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**Second report on the content, forms and degrees of international responsibility (Part two of the draft articles), by Mr. Willem Riphagen, Special Rapporteur**

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**Introduction**

1. The present report is the second submitted by the Special Rapporteur for consideration by the International Law Commission on the topic of State responsibility (part 2 of the draft articles).
2. The Special Rapporteur submitted a preliminary report<sup>1</sup> on the topic during the course of the Commission's thirty-second session, in 1980.
3. The historical development of the consideration of the draft articles on the topic of State responsibility is

summarized in the preliminary report. Under the general plan adopted by the Commission, the origin of international responsibility forms the subject of part I of the draft, which is concerned with determining on what grounds and under what circumstances a State may be held to have committed an internationally wrongful act which, as such, is a source of international responsibility. With respect to part I, the Commission has completed its first reading by adopting provisionally the text of thirty-five draft articles.<sup>2</sup>

\* Incorporating A/CN.4/344/Corr. 1 and 2.

<sup>1</sup> See *Yearbook . . . 1980*, vol. II (Part One), p. 107, document A/CN.4/330.

<sup>2</sup> For the text of these draft articles, see *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

4. Part 2 of the draft, the subject of the present report, deals with the content, forms and degrees of international responsibility, that is to say, with determining the consequences that internationally wrongful acts of a State may have under international law, in different cases (reparative and punitive consequences of an internationally wrongful act, relationship between these two types of consequences, material forms which reparation and sanction may take). Once these two essential tasks are completed, the Commission may decide to add to the draft a part 3 concerning the "implementation" (*mise en*

*oeuvre*) of international responsibility and the settlement of disputes.

5. By its resolution 35/163 of 15 December 1980, the General Assembly, having considered the Commission's report on its thirty-second session, recommended, in paragraph 4(c), that the Commission should, at its thirty-third session:

continue its work on State responsibility with the aim of beginning the preparation of draft articles concerning part two of the draft on responsibility of States for internationally wrongful acts, bearing in mind the need for a second reading of the draft articles constituting part one of the draft.

## CHAPTER I

### Status of the work on the topic

#### A. The Special Rapporteur's first report

6. The preliminary report<sup>3</sup> submitted by the Special Rapporteur in 1980 in the course of the Commission's thirty-second session analysed in a general way the various possible new legal relationships (i.e. new rights and corresponding obligations) arising from an internationally wrongful act of a State as determined by part 1 of the draft articles on State responsibility.

7. Having noted at the outset a number of circumstances which are, in principle, irrelevant for the application of part 1<sup>4</sup> but relevant for part 2, the report set out three parameters for the possible new legal relationships arising from an internationally wrongful act of a State. The first parameter was the new obligations of the State whose act is internationally wrongful; the second, the new right of the "injured" State; and the third, the position of the third State in respect of the situation created by the internationally wrongful act.

8. In thus drawing up a catalogue of possible new legal relationships established by a State's wrongfulness, the

report discussed the duty to make "reparation" in its various forms (first parameter), the principle of non-recognition, *exceptio non adimpleti contractus*, and other "counter-measures" (second parameter); and the right, possibly even the duty, of "third" States to take a non-neutral position (third parameter).

9. The report then turned to the problem of "proportionality" between the wrongful act and the "response" thereto, and in this connection discussed limitations of allowable responses by virtue of the particular protection given by a rule of international law to the object of the response; by virtue of linkage, under a rule of international law, between the object of the breach and the object of the response; and by virtue of the existence of a form of international organization *lato sensu*.<sup>5</sup>

10. Finally, the first report addressed the question of loss of the right to invoke the new legal relationship established by the rules of international law as a consequence of a wrongful act, and suggested that this matter be dealt with, rather, within the framework of part 3 of the draft articles on State responsibility (the implementation of international responsibility).<sup>6</sup>

#### B. Comments in the Commission on the Special Rapporteur's first report

11. The discussion of the topic in the Commission<sup>7</sup> was of a preliminary character, calling for the need to draw up a concrete plan of work for the topic.

12. It was generally recognized that in drafting the articles of part 2 the Commission should proceed on the basis of the articles of part 1, which it had already provisionally adopted on first reading, although, of course, on second reading some revisions, rearrangements and mutual adaptations should not be excluded.

<sup>3</sup> See footnote 1 above.

<sup>4</sup> The report noted at the outset that a number of circumstances—such as the conventional or other origin of the obligation breached, the content of that obligation, and the seriousness of the actual breach of that obligation—may, however, have relevance for the determination of the new legal relationships in part 2. It also recalled that some draft articles in part 1—notably article 11, para. 2; article 12, para. 2; article 14, para. 2—may give rise to the question whether or not the content, forms and degrees of State responsibility are the same for this "contributory" conduct as for other internationally wrongful conduct, and that similar questions arise in respect of the cases of implication of a State in the internationally wrongful act of another State (arts. 27 and 28). Furthermore, the report recalled that the Commission, in drafting the articles of chapter V of part 1, entitled "Circumstances precluding wrongfulness", deliberately left open the possibility that an act of a State, committed under such circumstances, might nevertheless entail some new legal relationships similar to those entailed by an internationally wrongful act. The report recommended that such new legal relationships be dealt with in part 2 of the draft, rather than within the context of the topic "International liability for injurious consequences arising out of acts not prohibited by international law". (*Yearbook . . . 1980*, vol. II (Part Two), p. 62, para. 36).

<sup>5</sup> *Ibid.*, para. 38.

<sup>6</sup> *Ibid.*, para. 39.

<sup>7</sup> *Ibid.*, pp. 62–63, paras. 40–47.

13. It was also noted that, while liability for injurious consequences arising out of acts not prohibited by international law might include the obligation of a State to give compensation, any possible degree of "overlap" with the treatment, in part 2 of the articles on State responsibility, of the obligation of reparation resulting from a wrongful act, or even from an act the wrongfulness of which was precluded in the circumstances described in chapter V of part 1, would do no harm.

14. Some members of the Commission expressed doubts as to the advisability of dealing extensively with "countermeasures", international law being based not so much on the concept of sanction and punishment as on the concept of remedying wrongs that had been committed. Other members, however, considered the second and third parameters to be of the essence of part 2.

15. It was generally recognized that the principle of proportionality was at the basis of the whole topic of the content, forms and degrees of responsibility, though some members contested its character as a rule of international law or were inclined to regard it as being a primary, rather than a secondary rule.

16. Several members stressed the need to avoid the enunciation of primary rules within the context of part 2. There was the feeling, however, that some "categorization", according to their content, of the primary obligations with which an act of a State was not in conformity was inevitable when determining the new legal relationships arising from the breach of those obligations.

17. Some members underlined the necessity of looking carefully at the distinction made in the preliminary report between the "injured" State and a "third" State, particularly in view of modern developments in international law which assert the interdependence of States.

18. Various members advocated that the Commission adopt an empirical or inductive approach to the topic, as it had hitherto in dealing with State responsibility.

#### C. Comments in the Sixth Committee on the topic

19. In the course of the review of the Commission's 1980 report by the Sixth Committee of the General Assembly at its thirty-fifth session, several delegations made comments on this topic.<sup>8</sup>

20. Most of the delegations agreed with the approach adopted by the Special Rapporteur in connection with the three parameters he suggested for the discussion of the content, forms and degrees of international responsibility.

21. It was generally observed that the work on part 2 should proceed as quickly as possible, and in harmony with part 1, care being taken of the possible link between issues dealt with in both parts.

22. Thus, one representative, commenting on the three parameters, noted that account should be taken of the

distinction made in article 19 of part 1 between international delicts and international crimes and that the rule of proportionality should also apply in the same way as with respect to the "new" rights of the injured State which correspond in a large measure to the "new" obligations of the State bearing the responsibility. He also noted that other "independent rights" should also be mentioned, such as the right to terminate a treaty in accordance with article 60 of the 1969 Vienna Convention on the Law of Treaties<sup>9</sup> and the right to apply countermeasures, in conformity with article 30 in part 1 of the draft articles.

23. On the question whether the legal consequences of breaches of international obligations which do not constitute wrongful acts should be dealt with under the topic, there was the view that such consequences of situations that did not involve State responsibility should not be dealt with in part 2. It was observed, in this connection, that the view had been expressed in the Commission that the exclusion of wrongfulness did not exclude the possibility that different rules might operate in cases of breaches of international obligations and place upon the State obligations for total or partial compensation which were not connected with the commission of a wrongful act.

24. Another representative was of the view that part 2 of the draft articles on State responsibility should be concerned essentially with the consequences of a wrongful act and the rights afforded to the injured State. The position of third States affected by the internationally wrongful act was a secondary aspect; he therefore had some hesitation about the concept that new legal relationships inevitably arose in all cases where an internationally wrongful act had been committed, particularly in the case of material breach of a treaty obligation. Consequences might flow from that material breach. As article 60 of the Vienna Convention had made clear, the other party or parties might be entitled to terminate the treaty, to suspend its operation, to seek reparation or even, depending on the circumstances, to seek *restitutio in integrum*. In principle, it would be wise to eschew doctrinal questions in formulating part 2 of the draft and to concentrate on determining the rights of the injured State in the various contingencies contemplated. In a definition of those rights, the obligations of the State which had caused the injury would simultaneously be defined. He therefore hoped that the Special Rapporteur would bear in mind that the normal remedy in cases of breach of an international obligation was reparation and that the application of countermeasures or other forms of sanction was admitted only exceptionally—namely, in circumstances where the essential interests of the injured State could not be protected by reparation alone.

25. The view was also expressed that, in formulating a definition of the different forms of responsibility, two factors should be taken into account: first, the greater or lesser importance which the international community

<sup>8</sup> Those comments are summarized in "Topical summary, prepared by the Secretariat, of discussion of the report of the International Law Commission in the Sixth Committee during the thirty-fifth session of the General Assembly" (A/CN.4/L.326), paras. 145–154.

<sup>9</sup> Hereinafter called "Vienna Convention". For the text, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 287.

attached to the rules at the origin of the obligations violated, and, second, the greater or lesser gravity of the breach itself. In defining the degrees of international responsibility, it was necessary to determine the role to be played by the concepts of reparation and sanction. The Special Rapporteur had suggested a method whereby the international community could determine the response proportional to the breach of a particular obligation. Accordingly, the Committee would have to await the new report of the Special Rapporteur in order to decide whether the proposed plan of work was satisfactory.

26. A number of representatives observed the possible link between the issues treated under part 2 and part 1 of the topic of State responsibility and those examined under the topic of "international liability for injurious consequences arising out of acts not prohibited by international law". A question accordingly was raised as to whether draft article 35 (Reservation as to compensation for damage) in part 1 of the draft on State responsibility, belongs to that part, which deals with secondary rules, or to part 2, dealing with the content, forms and degrees of responsibility—or whether the question of compensation should appropriately be treated under the topic of international liability for injurious consequences arising out of acts not prohibited by international law.

27. A question was also raised with respect to the link between article 34 in part 1, on self-defence, and the issues to be covered under part 2. One representative observed that measures of self-defence did not constitute a violation of international law and that their function as a legal consequence of an armed attack, or as a measure intended to restore and ensure the implementation of the legal rules violated, had not been fully exhausted. The question of self-defence should therefore be dealt with in part 2 of the draft, in connection with other legal consequences that might result from an aggression; in that case, a distinction must be made between aggression and other international crimes. It would appear, he noted, that the comments of the previous Special Rapporteur, Mr. Ago (now Judge on the International Court of Justice) regarding defence against armed attack, and Article 51 of the Charter of the United Nations, gave a more precise description of self-defence in contemporary international law than the text proposed by the Commission, which involved a danger of misinterpretation.

28. In the second chapter of the present report, an attempt has been made to analyse the topic further on the basis, *inter alia*, of the comments in the Commission and the Sixth Committee of the General Assembly, as reflected above.

## CHAPTER II

### The first parameter: the new obligations of the State whose act is internationally wrongful

#### A. The relevance of the structural difference between internal and international law

29. By way of introducing this chapter, it may not be superfluous to recall the fundamental structural difference between any system of internal law, on the one hand, and international law on the other hand. International law is based upon the sovereign equality of States, and, as such, however progressively developed, can never reach a structure comparable to that of national, internal law. Surely, modern international law (particularly in its conventional form) has introduced other entities than States, as possessing interests protected by rules of international law, and even sometimes as "actors" on the international plane. At the same time, the emergence of concepts such as "the general principles of law" (as mentioned in Article 38 of the Statute of the International Court of Justice) and of *jus cogens* in various contexts, testifies a progressive development, tending, at least at first sight, towards "bodies of rules" similar to those we can find in internal law systems. However, those developments do not destroy the original basis of international law, and the new entities and concepts remain in a way something like a *corpus alienum*, requiring a mutual adaptation in respect of the principle of sovereign equality of States.

30. The fundamental structural difference between internal law and international law would seem particularly

relevant for the topic of State responsibility. Indeed, the (relatively) sharp distinction made within the framework of internal law between "norms" and "sanctions" cannot simply be transplanted to international law. Actually, this distinction is predicated upon another one, that between a central "authority" and its "subjects", which is conspicuously lacking in the international community of States.

31. In view of the above, it might be useful to remark at the outset that the distinction made by the Commission between "primary rules", "rules of State responsibility"—further divided into rules relating to "the origin of international responsibility (part 1) and rules relating to "the content, forms and degrees of international responsibility" (part 2)—and rules of "implementation of international or State responsibility" (part 3), though certainly justified from a methodological point of view, should not be carried so far as to dissimulate the essential unity of the structure of international law as a whole, determined by its functions in the international community of States. Indeed, the manner in which the "primary rules" are established and the different functions of those "primary rules" cannot but influence both the various contents of "State responsibility" and the modalities of its "implementation".

32. The same remark is, of course, valid in respect of the methodological distinctions made by the Special Rapporteur

teur in his preliminary report, as will be made clear further on in the present report.

33. A few random examples of the interrelationship between methodologically separated items may be given here in order to illustrate the above remarks.

34. As was mentioned in paragraph 8 above, a distinction was made in the preliminary report between three parameters of the "new legal relationships" that may be established by international law as a consequence of a State's wrongful act.<sup>10</sup> There is nothing against making such a methodological distinction, which, indeed, was generally accepted in the debates on the topic in the Sixth Committee of the General Assembly at its thirty-fifth session (see paras. 19 to 27 above). It should not, however, be forgotten that—as will be more fully explained below—a good deal of the legal phenomena under the so-called first parameter is based on considerations derived from a primary rule on "domestic jurisdiction". In the same way, some legal phenomena appertaining to the second and third parameters are based on considerations relating to the absence of a machinery of implementation. Indeed, no treatment of the law of State responsibility could be complete without answering the question: what are the legal consequences of a breach of the *new* legal obligations of the first parameter?

35. Also, to take an example from the Commission's report on its twenty-fifth session:

The term "sanction" is used here to describe a measure which, although not necessarily involving the use of force, is characterized—at least in part—by the fact that its purpose is to inflict punishment. That is not the same purpose as coercion to secure the fulfilment of the obligation, or the restoration of the right infringed, or reparation, or compensation.<sup>11</sup>

One may well wish to make such a distinction, which is a real one, but one must not forget that the idea of punishment in the sense of "eye for eye and tooth for tooth" is wholly alien to international law, and, contrariwise, that, again from the viewpoint of international law, there may be a general interest in providing for measures intended to discourage future breaches of the obligation involved (*ex ante*-aspect). In other words, the distinction between "reparation" and "punishment" is less clear-cut than one might think in reading the above-quoted words. There is a common denominator in the sense of the purpose to "secure the fulfilment of the obligation".

36. Throughout part 1 the term "obligation" is used, rather than "relationship", or "norm". On the other hand, in part 2 the Commission has referred to "(new) legal relationships". The preference for the term "obligation" in part 1 is explained in the Commission's above-mentioned report.<sup>12</sup> Again, these methodological considerations may be quite valid. But, again, one should not forget that this is not merely a matter of terminology. Indeed, in part 2, one should keep in mind the fact that an "obligation" under

international law is always (or almost always) a mirror reflection of a "right" of another State, and that the term "norm" somehow implies the idea of an obligation *erga omnes*. This, it is submitted, is clearly relevant for the determination of the content, forms and degrees of State responsibility, as well as for the implementation of international responsibility. In short, methodological distinctions, as expressed in the use of particular terms, should not lead to a dissimulation of the essential unity of the elaboration of "justice" in international law as a whole.

37. The essential unity of purpose in the various phases of the elaboration and implementation of rules of international law has still another aspect. It should make us wary of sweeping statements on State responsibility in general. Thus, to take but one example, almost all writers on the topic refer, with apparent approval, to a passage of the famous judgement of 13 September 1928 of the Permanent Court of International Justice in the case *Factory at Chorzów* (Merits), where the Court stated that "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed".<sup>13</sup>

38. Now, within the framework of the judgement as a whole, no fault should probably be taken with this formulation. Taken out of context, however, and transformed into a general principle of "integral reparation" for all cases of breach of any international obligation whatsoever,<sup>14</sup> the correctness of the statement becomes doubtful.

39. If, for instance, the international obligation breached by an act of a State is one "requiring it to adopt a particular course of conduct" (art. 20 of part 1 of the draft articles), such obligation is generally not meant to guarantee all the "consequences" of the performance of that obligation. Why then, one might well ask, should the breach create a new obligation "to wipe out all the consequences of the illegal act"? This criticism, of course, is meant, at this stage, only to indicate the danger of over-simplification. The matter of reparation will be discussed somewhat more extensively below.

40. Actually, the foregoing paragraph suggests a much more general problem relating to the relevance of international judicial decisions for our task of progressive development and codification of rules of international law. In drawing up rules, the Commission attempts to fulfil a double task: stating the rights and obligations of States, and providing guidance to international courts and tribunals for the performance of their task. On the other hand, the Commission is itself guided by the practice of States and the pronouncements of international courts and tribunals.

41. In this connection, it may be useful to recall that (at least on the international plane) the judge is always in a

<sup>10</sup> See *Yearbook ... 1980*, vol. II (Part One), p. 112, document A/CN.4/330, para. 28.

<sup>11</sup> *Yearbook ... 1973*, vol. II, pp. 174–175, document A/9010/Rev.1, chap. II, sect. B, para. (5) of the commentary to article 1.

<sup>12</sup> *Ibid.*, p. 184, para. (15) of the commentary to article 3.

<sup>13</sup> *P.C.I.J., Series A, No. 17*, p. 47.

<sup>14</sup> See, for example, B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London, Stevens, 1953), part III, pp. 163 *et seq.*

position different from that of the legislator, inasmuch as he is, as it were, *ad hoc* a central authority in respect of States as subjects within his jurisdiction.<sup>15</sup> As such he may possess powers or competences which allow him to go further in the determination of the rights and obligations of State parties to a dispute under his jurisdiction or, inversely, may lack the power to indicate the concrete contents of an existing right or obligation of those States.

42. Possible examples of the first of those situations are the powers given to the Tribunal in the *Trail Smelter* case<sup>16</sup> to determine the allowable amounts of future emission of fumes (*ex ante* aspect), and the power envisaged in article 290 of the draft convention on the law of the sea<sup>17</sup> to order not only interim measures to protect the rights of parties to the dispute, but also interim measures for the protection of the marine environment as such. A possible example of the second situation is given by the various decisions of mixed arbitral tribunals which considered themselves without power to award "punitive damages", leaving expressly aside whether or not there was any obligation to pay such damages.

43. Consequently, in assessing the suitability of the translation of a pronouncement of an international court or tribunal into a draft rule, the Commission should take into account the possibility that such pronouncement was a consequence of a special task entrusted to that court or tribunal, rather than an application of a general rule of international law. Again, the link between "primary rule", "State responsibility" and "implementation" is obvious.

#### B. Plan of work for elaboration of the draft

44. As is noted in chapter I above, in the course of the discussion on the preliminary report in the Commission—and also in the course of the discussions on the Commission's report in the Sixth Committee of the General Assembly at its thirty-fifth session—several members stressed the necessity of drawing up a plan of work for the elaboration of part 2 of the draft articles. Such a plan of work could draw inspiration from earlier pronouncements of the Commission. Indeed, as early as 1963, the Commission approved unanimously the report of the Sub-Committee on State responsibility, including

<sup>15</sup> One of the reasons why the Commission adopted, in part 1 of the draft articles on State responsibility, the term "obligation" rather than "rule" or "norm" was that an obligation "may very well have been created and imposed upon a subject . . . by a decision of a judicial or arbitral tribunal" (*Yearbook . . . 1973*, vol. II, p. 184, document A/9010/Rev.1, para. (15) of the commentary to article 3). This is no doubt true, but if part 2 is meant to cover also the legal consequences of a breach of an obligation imposed by an international judicial decision, one should take into account that such a breach generally has very particular legal consequences under international law.

The limited possibility of invoking the nullity of an international arbitral award (art. 35 of the Commission's Model Rules on Arbitral Procedure: *Yearbook . . . 1958*, vol. II, p. 86, document A/3859, chap. II, sect. II), Articles 12 to 15 of the Covenant of the League of Nations, and Article 94 of the Charter of the United Nations come to mind here.

<sup>16</sup> United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949, V.2), p. 1911.

<sup>17</sup> A/CONF.62/L.78 and Corr.3 and 8.

the proposed programme of work contained therein. The relevant part of that programme was at that time headed: "The *forms*\* of international responsibility". Again, in its 1969 report to the General Assembly, the Commission proposed a plan as regards part 2, there referred to as "the definition of the various *forms and degrees*\* of responsibility". Finally, in 1975, the Commission elaborated somewhat on what it then called a "definition of the *content, forms and degrees*\* of international responsibility".<sup>18</sup>

45. It is hardly surprising that the three earlier plans of work vary slightly in wording, emphasis and approach. However, the main points are the same, and indeed are also reflected in the preliminary report, be it that the latter sometimes uses a different terminology.

46. Furthermore, throughout its commentaries on the various draft articles of part 1, the Commission refers to topics to be dealt with in part 2.<sup>19</sup> These commentaries, though not strictly relevant to a plan of work, should be kept in mind during our work on part 2.

47. Perhaps the most striking difference between the earlier plans of work and the preliminary report is the emphasis the report puts on the "rule of proportionality". Again, this may only be a matter of terminology. Indeed, when the Commission, in 1969, stated that:

two factors in particular would guide it in arriving at the required definition: namely, the greater or lesser importance to the international community of the rules giving rise to the obligations violated, and the greater or lesser seriousness of the violation itself.<sup>20</sup>

The idea of proportionality would seem to be implied. The same goes for the Commission's statement in its 1975 report where it is said that:

It will first be necessary to establish in what cases a State which has committed an internationally wrongful act may be held to have incurred an obligation to make reparation, and in what cases such a State should be considered as becoming liable to a penalty.<sup>21</sup>

48. Be that as it may, the Special Rapporteur feels it useful to refer once again to the "rule of proportionality" and to try to correct some misunderstanding which his preliminary report—in particular, paragraphs 98 to 100 thereof—may have raised in this respect.

49. Following an inductive method, it is relatively easy to establish a "*scala* of responses" of international law to breaches of international law. Introducing at that stage a rule of proportionality may create the impression that, in international law, there would exist a perfect correlation between breach and response. Now that is obviously not the case in practice. Indeed, in view of the particular structure of international law (in contradistinction to the structure of a national legal system), this could not be the

<sup>18</sup> The relevant passages concerning the three above-mentioned plans of work of the Commission are reproduced in the Special Rapporteur's preliminary report, paras. 1–6 (*Yearbook . . . 1980*, vol. II (Part One), pp. 107–109, document A/CN.4/330).

<sup>19</sup> For the Commission's commentaries to articles in Part 1 of the draft, *ibid.*, p. 110, para. 8, and footnotes 15–20.

<sup>20</sup> *Yearbook . . . 1969*, vol. II, p. 233, document A/7610/Rev.1, para. 81.

<sup>21</sup> *Yearbook . . . 1975*, vol. II, p. 56, document A/10010/Rev.1, para. 43.

case. In other words, if we can establish the existence of rules of international law concerning a degree of correlation between breach and response, those rules are likely to be rather of a negative kind, excluding particular responses to particular breaches.<sup>22</sup> It is in this sense that paragraph 99 of the preliminary report should be understood. The formulation of such rules in part 2 of the draft articles need not be exhaustive, as indeed the draft articles in part 1 concerning "Circumstances precluding wrongfulness" are not meant to be exhaustive.<sup>23</sup> In this connection, it should be recalled that the preliminary report uses the term "response" (of international law to a breach) in a very general way, as indicating all possible new legal relationships arising out of an internationally wrongful act, including new legal obligations of the State which has committed such act—which State, incidentally, might perhaps from now on be called, for short, "the author State" (cf. art. 32, para. 1, in part 1 of the draft) in order to avoid any implication of *mens rea*.

50. In the same line of thought, a question arises relating to the plan of work. In the earlier plans the Commission seemed to envisage part 2 as dealing straight away with the definition of the "forms" (and "degrees" and "content") of international responsibility. The Special Rapporteur would like to submit to the Commission's scrutiny the advisability of starting the draft articles of part 2 with a number of general principles, not unlike those contained in chapter I of part 1.

### C. The relevant preliminary rules

51. What the Special Rapporteur has in mind are three rules of a preliminary kind, namely that (a) a breach of an international obligation does not, as such and in respect of the author State, affect that obligation; (b) the "primary rule" itself (particularly if stated in conventional form) may explicitly or implicitly determine legal consequences of its breach; (c) a breach of an international obligation does not, in itself, deprive the author State of its rights under international law. All three rules may seem self-evident (as indeed are articles 1, 2 and 4 of part 1), but a restatement at the outset of a formulation of possible responses to breaches and the limitations of such responses may nevertheless serve a useful purpose in a comprehensive codification of the rules of State responsibility.

52. The *first rule* has been recalled, *inter alia*, in the discussions of the Commission on the preliminary report; its restatement, in the opinion of the Special Rapporteur, may be useful for the following main reasons.

<sup>22</sup> Indeed the Commission encountered a question of "proportionality" earlier in discussing some of the "circumstances precluding wrongfulness"—which the Special Rapporteur would be tempted to call a "zero-parameter"—for example, in article 32 para. 2: "if the conduct in question was likely to create a comparable or greater peril", and article 33 subpara. 1(b): "[unless] the act did not seriously impair an essential interest of the State towards which the obligation existed".

<sup>23</sup> See *Yearbook . . . 1980*, vol. II (Part Two), p. 61, para. (29) of the commentary to article 34.

53. In a purely "voluntarist" approach to international law, a conduct of a State amounting to a breach of an international obligation of that State might be considered as a "repudiation" of that obligation, creating a new situation, which surely may give rise to (new) legal relationships under international law, but then to new relationships which, as it were, "start from scratch" and have no direct and necessary link with the old legal relationship as expressed in the primary rule which the State breached by such conduct.<sup>24</sup>

54. Contrariwise, in any "normative" approach to international law which recognizes rules of international law the existence of which is, in principle, independent from their "origin" in the express or tacit consent of States (and from a later withdrawal of that consent), the "old" relationship created by such rule necessarily "survives"—again, in principle—the breach of an obligation under that old relationship, and the legal consequences of such a breach are of necessity linked with and based upon that old relationship, not wholly unlike the link between norm and sanction under a national legal system. Now, leaving aside the doctrinal question to what extent present-day international law has developed from a "voluntarist" to a "normative" approach, we may conclude from earlier commentaries to several draft articles of part 1 that the Commission has rather a "normative" approach. A reaffirmation of that approach in a rule as suggested here might therefore not be amiss.

55. Such reaffirmation would also underline the specific character of a true legal obligation; indeed, it would be the counterpart of a statement made by the Commission in a different context. In its commentary to article 17, the Commission states:

For it to be actually decided that an act of a State which conflicts with a supposed international obligation of that State is not wrongful, it would be necessary to conclude, rather, that the obligation did not exist, or at least that it was not a legal obligation.<sup>25</sup>

56. Actually, in international practice we find various examples of "instruments", possibly even common oral statements which, though perhaps formulated in a way which does resemble a statement of rights and obli-

<sup>24</sup> H. Kelsen, in an article published in 1932 and quoted in the Commission's report on its twenty-eighth session, seemed to go even further, holding that "an 'obligation' to perform specific acts, by way of reparation for the damage or otherwise, can only derive from an agreement between the State committing the breach and the injured State" (*Yearbook . . . 1976*, vol. II (Part Two), p. 111, para. (38) of the commentary to article 19 and footnote 519).

One may compare this opinion with that of older writers on international law; thus Grotius, for example, stated:

"The fact must also be recognized that kings . . . have the right of demanding punishments not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard to any persons whatsoever." (*De Jure Belli ac Pacis, Libri Tres* [1646], book II, chap. XX, para. XL, in *The Classics of International Law*, trans. F.W. Kelsey (Oxford, Clarendon Press, 1925), p. 504.)

There might indeed exist an intellectual link between the absence of "first parameter" obligations and the stipulation of "third parameter" rights.

<sup>25</sup> *Yearbook . . . 1976*, vol. II (Part Two), p. 81, para. (7).

gations, are meant by their authors not to create an independent “rule”, but rather as a formulation of a conclusion as to what each of them intends to do, it being understood that non-performance by one of the authors simply invalidates the conclusion, earlier arrived at, itself, thereby at the same time releasing the other authors from performance of their part of the conclusion. Thus, no “true legal obligations” are created by such an instrument.

57. Finally, a preliminary first rule as envisaged above would seem to lay the foundation for a more specific rule which, in the opinion of the Special Rapporteur, should be incorporated in part 2. Indeed, the first obligation incumbent upon a State that has committed a breach of an international obligation, is to stop the breach (obviously this obligation is relevant only in cases of breaches “by an act of the State extending in time”; see the title of article 25 in part 1 of the draft). As will be explained later in the present report, this obligation may include conduct which some writers have characterized as *restitutio in integrum, stricto sensu*; i.e. as a new legal consequence arising from the breach. There seems to be no objection to this characterization, provided it is not used as a proof of a general obligation of *restitutio in integrum, stricto sensu* in all cases of a breach of an international obligation.

58. The *second preliminary rule*, envisaged above (para. 51, point (b)) is in conformity with a statement already made by the Commission in its commentary to article 17. There it is noted that:

Subject to the possible existence of peremptory norms of general international law concerning State responsibility, some States may at any time, in a treaty concluded between them, provide for a special régime of responsibility for the breach of obligations for which the treaty makes specific provision.<sup>26</sup>

59. First of all, it would seem useful to state this rule in the text of the draft articles itself. Secondly, the rule seems to be of a larger scope than that expressed in the foregoing quotation, in particular in respect of the limitation of possible responses to a breach. Thus, in its Judgment of 24 May 1980 in the case concerning *United States Diplomatic and Consular Staff in Teheran*,<sup>27</sup> the International Court of Justice refers to a possible breach of the international obligation of the sending State, to the effect that its diplomatic agents in the receiving State shall respect the laws and regulations of the receiving State and shall not interfere in the internal affairs of that State. This obligation is doubtless an obligation under general international law.<sup>28</sup> In the same Judgment, the Court held that a breach of this obligation cannot under any circumstances legitimately entail the response of a disregard of such privileges and immunities by the

receiving State. As the Court states in paragraph 86 of its Judgment:

The rules of diplomatic law, in short, constitute a *self-contained régime\** which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other hand, foresees their possible abuse by members of the mission and *specifies the means at the disposal\** of the receiving State to counter\* any such abuse.<sup>29</sup>

60. The *third preliminary rule* envisaged (para. 51, point (c)) is, as it were, a negative statement of the rule of proportionality, inasmuch as it states that a breach of an international obligation does not, in itself, deprive the author State of its rights under international law. At the same time, this proposed preliminary rule is the counterpart of the first preliminary rule stipulating the continuing force of the obligation breached. While the first preliminary rule, as remarked above (para. 57), lays the foundation for the more specific obligations of the author State, the third preliminary rule lays the foundation for a number of more specific limitations of the possible response to a breach. The author State does not, by the mere fact of committing any breach of any obligation, become an “outlaw”. Rather, the rules of international law determine the legal consequences of the breach, i.e. the possible responses, including the new obligations of the author State. These responses are not necessarily strictly proportional to the breach. They may involve legal consequences having a serious impact on the sovereignty of the author State, as, for example, in the case of a response against aggression committed by the author State. But the point is that even the most serious “international crime” (in the sense of art. 19 of part 1 of the draft) does not in itself—i.e. automatically—deprive the author State of its sovereignty as such.

61. It is submitted that a restatement of this third preliminary rule is particularly useful in view of the tendencies in modern international law to recognize and protect interests which are “extra-State” interests in the sense that their ultimate beneficiaries are entities which are not States, but individual human beings, peoples or even humanity as a whole. Since those entities are not normally—at least in general international law—given a status separate from but similar to that of a State, the rules of international law protecting their interests are still rules creating rights for and imposing obligations on States. Consequently, such rights and obligations must generally “survive” a breach of an international obligation by a State to which those rights and obligations are given, so to speak, “in trust”, for the benefit of these extra-State entities.

62. In this connection it would seem relevant to refer to two considerations of the International Court of Justice in its Advisory Opinion of 21 June 1971 in the Namibia case.<sup>30</sup> Discussing the right of termination of a treaty on

<sup>26</sup> *Ibid.*, p. 80, para. (5).

<sup>27</sup> *I.C.J. Reports 1980*, p. 3.

<sup>28</sup> It is codified in art. 41, para. 1, of the 1961 Vienna Convention on Diplomatic Relations in the form of a duty “of all persons enjoying such privileges and immunities”. (United Nations, *Treaty Series*, vol. 500, p. 120.) It is to be noted that the Court, in para. 1 of its dictum in the above-mentioned case, expressly refers to “long-established rules of general international law” (*I.C.J. Reports 1980*, p. 44).

<sup>29</sup> *Ibid.*, p. 40.

<sup>30</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16.

account of breach, the Court expressly notes as an exception to this right "provisions relating to the protection of the human person contained in treaties of a humanitarian character (as indicated in Art. 60, para. 5, of the Vienna Convention)".<sup>31</sup> Even more generally, the Court held that: "In general, the non-recognition of South Africa's administration of the territory should not result in depriving the people of Namibia of any advantages derived from international co-operation".<sup>32</sup>

63. Obviously the third preliminary rule does refer to rights of the author State existing at the moment of the breach by it of an international obligation. The rule, as suggested, does not address the question whether conduct of a State which in itself is a breach of an international obligation of that State may nevertheless create a situation entailing certain rights for that State, for example, as an occupying Power.<sup>33</sup>

64. While in the foregoing paragraphs the relevance of the third preliminary rule was illustrated with respect to responses of the second and third parameters, it should be noted that the rule may also be relevant for the responses of the first parameter, i.e. the new obligations of the author State. Indeed, as will be discussed below, the requirement of *restitutio in integrum stricto sensu* may well run contrary to a right of the author State to preserve its "domestic jurisdiction". This does not mean that a new obligation to proceed to *restitutio in integrum stricto sensu* may never be entailed by the commitment of a breach of an international obligation, but only that such a new obligation is not necessarily always entailed by any breach of any international obligation.

65. It should perhaps also be noted here that if the third preliminary rule is to be incorporated in the draft articles, it should be made clear that the "rights" of the author State referred to in this rule are not to be equated with a mere "faculty". Obviously, any "new legal relationship" created by the breach of an international obligation involves, as does the original primary obligation, a limitation of the sovereignty of the author State, taken in the sense of its complete freedom of action. "Sovereignty" in this primitive, unlimited, sense, is clearly not a "right" of the State under international law.<sup>34</sup>

<sup>31</sup> *Ibid.*, p. 47, para. 96.

<sup>32</sup> *Ibid.*, p. 56, para. 125; see also para. 127.

<sup>33</sup> Nor, of course, does the rule address the question of the obligations resulting from such a factual situation for the author State. Compare the—perhaps, taken out of the context, somewhat sweeping—statement of the Court in its Advisory Opinion relating to Namibia—to the effect that: "Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability\* for acts affecting other States." (*Ibid.*, p. 54, para. 118.)

<sup>34</sup> Compare also the famous statement of the Arbitral Tribunal in the *Trail Smelter* case: "... under the principle of international law ... no State has the right\* to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another ...". (United Nations, *Reports of International Arbitral Awards*, vol. III (*op. cit.*), p. 1965.)

#### D. Possible contents of the new obligations arising from breach of international obligation

66. Returning now to the plans of work envisaged by the Commission in its earlier reports, we note that in its report on its twenty-seventh session the Commission stated:

It will *first\** be necessary to establish in what cases a State which has committed an internationally wrongful act may be held to have incurred an obligation to make reparation, and in what cases such a State should be considered as becoming liable to a penalty.<sup>35</sup>

67. The Special Rapporteur, however, rather continues to feel—as stated in his preliminary report—that it would be more appropriate to start with a description of the various possible contents of the new obligations of the author State arising from its breach of an international obligation. The main reason for advocating such a course of action is, in his opinion, the lack of clarity as to what exactly constitutes a "reparation" and what exactly constitutes a "penalty".

##### I. THE THREE STEPS ASSOCIATED WITH THE FIRST PARAMETER

68. As already remarked above, the first duty of the author State is to stop the breach of its international obligation. It does not seem relevant whether one considers this duty as a consequence of the continuing "validity" or "force" of the primary obligation or as a duty which arises as a consequence of the breach. Actually these are, so to speak, the two sides of one and the same coin.

69. Next in the *scala* of obligations of the author State would seem to come the obligation to make "reparation", which in principle is a substitute for the performance of the primary obligation. Logically, the final step would seem to be a restoration of the situation which the primary obligation sought to ensure—in other words, the *restitutio in integrum, stricto sensu*, including, in principle, "retro-active" measures.

70. Now, obviously, the three steps described above are dependent upon the factual possibilities existing after the breach has occurred. Indeed—as remarked in paragraph 29 of the preliminary report—there always is an element of impossibility, and, therefore, the need to fall back on a substitute performance in pecuniary or other terms.

71. On the other hand, it is clear that the three steps impose an increasing burden on the author State, and the question therefore arises whether rules of international law make distinctions as to the new obligations of the author State according to the nature of the obligation breached. Thus, one could imagine, for example, that rules of international law made a distinction according to the nature of the right of the injured State affected by the breach.<sup>36</sup>

<sup>35</sup> *Yearbook ... 1975*, vol. II, p. 56, document A/10010/Rev.1, chap. II, para. 43.

<sup>36</sup> In paragraph (9) of its commentary to article 3 of part 1 of the draft, the Commission stated: "It should be noted that in international law the idea of breach of an obligation can be regarded as the *exact equivalent\** of the idea of the infringement of the subjective rights of others." (*Yearbook ... 1973*, vol. II, p. 182, document A/9010/Rev.1, chap. II, sect. B.)

72. It might then be thought that a distinction—well known in other rules of international law—would be made between the infringement of a right “directly” belonging to a foreign State and the infringement of a right belonging to a foreign State “through” its nationals, to the effect that, while in both cases there would exist an obligation of the author State to stop the breach, a *restitutio in integrum, stricto sensu* would be required only in the former case, as in the latter case reparation would be sufficient.<sup>37</sup>

73. It would not seem, however, that such a “qualitative” distinction (in fact such a rule of “proportionality” between breach and response) is clearly reflected in international judicial decisions and the practice of States. This is no doubt due to (a) the graduality of the distinction between stopping the breach, reparation and *restitutio in integrum, stricto sensu*, in particular in view of the factual possibilities in a given situation; and (b) the impact of other “quantitative” factors in the given situation, such as the attitude of the author State in respect of the breach and the seriousness of the result of the breach from the point of view of the injured State.

74. As to the first point, it should be noted that the term “reparation” is often used in a sense covering all the three possible consequences, and not only as reparation in pecuniary terms (i.e. as a substitute performance). The term is even often used as covering “satisfaction” given to the injured State in the form of a solemn declaration, penal or disciplinary measures taken against the physical person which is the actual author of the act of the State, “punitive damages” and other forms of “penalty”.<sup>38</sup>

75. But even if that distinction is made, and consequently the term “reparation” within that context is limited to compensation in pecuniary terms by way of substitute for the performance of the original primary obligation,<sup>39</sup> the distinction remains a gradual one. Indeed, were one, within the context of part 2, to follow the terminology adopted—within the different context of determination of the *tempus delicti commissi*—in articles 24, 25 and 26 of part 1 of the draft, then the notion of

stopping the breach could only be relevant as regards breaches other than those committed “by an act of the State not extending in time”.

76. But—quite apart from other doubts as to the contents of these articles, which are not relevant in the present stage of the Commission’s work—the present Special Rapporteur is inclined to feel that the obligation of the author State to stop the breach should include such measures as take away, *ex nunc*, the factual effects of the wrongful act of the State which, in the terms of article 24, in part 1 of the draft, otherwise would “continue subsequently”. Indeed, in the numerous cases in which the liberation of persons, the restitution of ships, documents, monies, etc. was proceeded to by the author State on the instigation (protest, etc.) of the injured State, or was ordered by an international judicial body, it would seem that stopping the breach was involved, rather than reparation or *restitutio in integrum, stricto sensu*.<sup>40</sup>

77. It is not always clear whether the physical measures of restitution taken in those cases always included a formal annulment of the legal decisions (under the national law of the author State) taken by the author State. In any case, there are also various examples of such annulment, at least by administrative action.<sup>41</sup>

78. Obviously, if the object of the wrongful act is no longer there, its liberation or restitution is physically impossible and there is no other way but to look for a substitute performance, or “reparation” in the narrow sense. Furthermore, the injury during the time-span in which the breach has not been stopped has to be compensated in some other way. But even if those two things have been done in addition to the liberation and restitution measures which are physically possible, one has still not arrived at the *Chorzów Factory* case standard that “reparation” must “wipe out all the consequences of the

<sup>37</sup> Such a distinction would correspond, *inter alia*, to the one made in respect of the applicability of the rule concerning exhaustion of local remedies. In a different context—relating to what we have called the third parameter—the International Court of Justice, in its Judgment of 5 February 1970 in the case concerning the *Barcelona Traction, Light and Power Company Limited*, also seems to treat “obligations the performance of which is the subject of diplomatic protection” on a different footing from other international obligations. (*I.C.J. Reports 1970*, p. 32, para. 35).

<sup>38</sup> Again, there is not even uniformity of views and terminology as regards the characterization of such measures as compensation for “moral” damage (cf. H. Lauterpacht: “La réparation morale contient un élément distinct de châtement”, *Recueil des cours de l’Académie de droit international de la Haye, 1937-IV* (Paris, Sirey, 1938), p. 355), or the cancellation on the ground of “*injustice patente*” of certain pecuniary obligations of a private person under a final judgement of a national court (*Martini* case (United Nations, *Reports of International Arbitral Awards*, vol. II (Sales No. 1949.V.1), p. 1002)). Obviously, under such a wide definition of the term “reparation”, the distinction made in paras. 68–69 above disappears.

<sup>39</sup> Or, in the terms of draft article 22 of part I of the draft, as an “equivalent result” or an “equivalent treatment” or conduct.

<sup>40</sup> These cases are referred to in the Arbitral Award of 19 January 1977 in the case *Texaco Overseas Petroleum Company/California Asiatic Oil Company v. Government of the Libyan Arab Republic* (hereinafter called *Topco-Calasiatic* case), and are discussed by M. B. Alvarez de Eulate in his article “La *restitutio in integrum* en la práctica y en la jurisprudencia internacionales”, *Temis* (Revista de ciencia y técnica jurídicas de la Facultad de Derecho de la Universidad de Zaragoza), Nos. 29–32 (1971–1972), p. 11.

<sup>41</sup> See Alvarez de Eulate, *loc cit.*, pp. 27 *et seq.* The situation of national decisions contrary to international law is often expressly provided for in treaties for the pacific settlement of international disputes. Compare *Systematic Survey of Treaties for the Pacific Settlement of International Disputes, 1928–1948* (United Nations publication, Sales No. 1949.V.3), pp. 291 *et seq.*, and articles 1 and 2 of the “Additional Protocol to the Convention relative to the creation of an International Prize Court” (*The Reports to the Hague Conferences of 1899 and 1907*, ed. J. B. Scott (Oxford, University Press, 1920), p. 809). It would seem significant that in those treaties the legal impossibility of annulment by administrative action under the national law of the author State is taken into account and equitable satisfaction in some other form is then provided for. Indeed, it may be doubted whether, in the absence of special provisions to that effect, an international judicial body is empowered itself to annul, or even order the formal annulment, of a legal decision taken by a national authority under its applicable law, at least without leaving to the State concerned the alternative of another form of satisfaction, as indeed arbitral awards often do.

illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed".<sup>42</sup> Indeed, as the Judgment just quoted admits, the question of "impossibility" arises here, so to speak from the other end of the *scala*, and a substitute for *restitutio in integrum, stricto sensu*, i.e. "payment of a sum corresponding to the value which a *restitutio in kind* would bear",<sup>43</sup> has to be found.

79. Strict application of the *Chorzów Factory* standard then seems to pose the following double question: what is considered to be "impossible", and what is the financial substitute for the "impossible"?

80. On both scores there are considerable doctrinal difficulties to overcome. Indeed, if it is true that under article 4 of part 1 of the draft—in the words of the Commission's commentary:

the fact that some particular conduct conforms to the provisions of internal law, or even is expressly prescribed by those provisions, in no way precludes its being characterized as internationally wrongful if it constitutes a breach of an obligation established by international law,<sup>44</sup> would then the same not be valid for the new obligation "to wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed"?<sup>45</sup>

81. On the other hand, articles 31 and 33 of part 1 of the draft can clearly not be invoked in respect of this new obligation, since "the State in question" has certainly contributed to the occurrence of the situation of material impossibility or of the state of necessity, respectively.

82. Nevertheless, it is an established fact that, very often, *restitutio in integrum, stricto sensu*, according to the *Chorzów Factory* standard, is not even claimed, let alone awarded, and it even seems doubtful—though in practice this is difficult to prove—that the financial substitute for the "impossible" is always fully claimed or awarded.

83. On the other hand—and with references to the second point mentioned above (para. 75)—the quantitative factors of the attitude of the author State in respect of the breach and the seriousness of the result of the breach from the point of view of the injured State cannot but influence the opinion of the international judicial body dealing with the case. Surely no such body would be inclined to treat a case in which, in the course of the normal exercise of its jurisdiction, a State incidentally commits a breach of an international obligation altogether on the same footing as a deliberate breach of the same obligation committed for no other purpose than to harm another State. Nor would it be inclined to ignore the difference in importance, for the injured State, of a breach of the same obligation towards it, committed in an isolated case, and a breach which forms part of a systematic policy directed against its personal or territorial elements.<sup>46</sup>

<sup>42</sup> *P.C.I.J., Series A, No. 17*, p. 47

<sup>43</sup> *Ibid.*

<sup>44</sup> *Yearbook . . . 1973*, vol. II, p. 185, document A/9010/Rev.1, chap. II, para. (5) of the commentary to article 4.

<sup>45</sup> See footnote 42 above.

<sup>46</sup> Cf. also para. 36 of the preliminary report (*Yearbook . . . 1980*, vol. II (Part One), p. 114, document A/CN.4/330).

Furthermore, it would seem that, whether the breach is one of an obligation of conduct, of result or of preventing (or promoting) the occurrence of a given event, the question whether the wrongful act occurred within or outside the jurisdiction of the author State must influence the determination of the content of its new obligations arising from the breach.

84. The plan of work referred to above (para. 66) is predicated upon a distinction between "reparation" and "penalty". As noted in paragraph 74 above (see also paras. 37–39), it is not quite clear where the dividing line between the two lies, in particular in respect of the first parameter, the new obligation of the author State. Indeed, if one starts from the *Chorzów Factory* standard, one could well ask the question what more could be claimed from the author State than "to wipe out *all*\* the consequences of the illegal act", including pecuniary compensation of consequences which it is materially impossible to wipe out. Surely the answer to this question could be that, since the author State has "contributed to the occurrence of the situation of material impossibility", something more than the compensation just referred to may be required. In this line of thought it is understandable that controversy exists between learned writers, for example, as to whether pecuniary compensation for moral damage has or has not a punitive character. Actually, in all cases where, somehow or other, a pecuniary compensation is awarded as a counterpart of an irreparable loss, the obvious incomparability between the receipt of a sum of money and the loss suffered invites an analogy with a "penalty". Nevertheless, in many national legal systems such pecuniary compensation is awarded under the title of damages, rather than under any other title.

85. In any case, in the relationship between States, and even when a direct loss of the injured State is involved (such as destruction, in whole or in part, of the embassy premises of the sending State or murder of or physical injury to its diplomatic representatives), the payment of a sum of money by the author State may not wholly make good what has been done to the injured State by the wrongful act. Some other satisfaction for the injured State may be required, and indeed is often given in the practice of States, such as apologies and even declarations of "guarantee" that the author State will take care that similar wrongful acts will not occur in the future. To the extent that the question arises before an international judiciary body, the statement by that body itself to the effect that the author State has committed a wrongful act may constitute a "satisfaction" for the injured State.<sup>47</sup>

86. The Special Rapporteur is inclined to consider such measures of "satisfaction" as examples of the *ex ante* aspect of the new legal relationship, involving the "credibility" of the primary rule itself, and not as a penalty to which the author State is made liable.<sup>48</sup>

<sup>47</sup> Cf. the *Corfu Channel case (Merits)*, Judgment, *I.C.J. Reports 1949*, p. 4.

<sup>48</sup> See the preliminary report, paras. 30–31 (*Yearbook . . . 1980*, vol. II (Part One), p. 113, document A/CN.4/330). This does not, of

(Continued on next page.)

87. Indeed—since we are still dealing with the first parameter only—the whole idea of the author State, by the fact of its having committed a wrongful act, being obliged to inflict a penalty on itself, does seem alien to the whole structure of international law.<sup>49</sup>

88. The foregoing analysis does not exclude an obligation of the author State to take punitive measures in application of its internal law, and this within the framework of its obligation to stop the breach. This is particularly apparent if the international obligation breached is an obligation “concerning the treatment to be accorded to aliens”. It may well be that the alien concerned, in the course of exhausting the effective local remedies available to him, succeeds in getting himself a satisfaction, for example, in the form of penal or disciplinary action being taken against the actual person responsible for the injury caused to that alien.<sup>50</sup>

89. Obviously the next question which arises in such a case is whether the internal law of the author State does or does not fall short of an international standard existing in this respect. One may even question an international obligation of the author State to give effect to its internal legal system if its rules are particularly favourable—possibly for reasons of “risk allocation”—to the victim of a particular conduct, in a way going beyond what is generally provided for in national legal systems. In other words, the international standard may put a “maximum” as well as a “minimum”. A particular form of international standard is the obligation, imposed by a (conventional) rule of international law, to punish physical persons who have committed certain crimes known as “crimes de droit international”.<sup>51</sup> It is interesting to note that the international standard referred to here is often accompanied by deviations from the normal rules relating to the limits of national jurisdiction. In a sense, this may be regarded as a particular legal consequence attached to that “international standard”, i.e. a non-recognition of an otherwise recognized exclusive jurisdiction of the State of which the perpetrator of the crime is an organ.

90. But this is clearly a matter of primary rules and thus beyond the scope of our present inquiry.<sup>52</sup>

91. What is, however, in principle not beyond the scope of our inquiry is the legal consequence of a situation in which internal law is not applied or falls short of such international standard—in other words, the precise content of the reparation due by the author State to the injured State on the international plane. It is submitted that the reparation in such a case should be the equivalent, in pecuniary terms, of the application of internal law—or, as the case may be, of the international standard—to the direct victim of the wrongful act, national of the injured State.

92. Obviously, such a solution implies an acceptance of an “impossibility” for the author State to stop the breach, an impossibility which is not a “material” one, but one which results from the content of the internal legal system (including the remedies and their application by the competent national authorities) of that State.<sup>53</sup>

93. This is the doctrinal difficulty, referred to above (para. 80). Strictly speaking, the sovereignty of the author State, comprising its internal legislative power to change, even with retroactive effect and even for a particular case, its internal legal system, seems to exclude the acceptance, on the international plane, of such “impossibility”.<sup>54</sup>

94. Nevertheless, this is exactly what the provisions of treaties on the pacific settlement of disputes do.<sup>55</sup> If “administrative action” cannot bring about the desired result, “compensation”, “reparation” or another form of “equitable satisfaction” shall take its place. Indeed, in the relationship between the States involved, a “satisfaction” (in the sense of para. 85 above) may well be an equitable substitute, in addition to pecuniary compensation.<sup>56</sup>

95. Furthermore, even if one excludes *a priori* from the first parameter—as the Special Rapporteur is inclined to do—a new obligation of the author State to inflict a “penalty” on itself, the question remains in which cases a “satisfaction” (in the sense of para. 85 above) can be claimed.

96. Here again (see para. 72 above) it is submitted that, while in the first instance a distinction may be made

(Footnote 48 continued.)

course, imply that there could never be an element of vengeance in a “satisfaction” claimed by an injured State.

<sup>49</sup> As is, at least in the opinion of the Special Rapporteur, the idea of vengeance (see para. 35 above). On the other hand, an expression of regret for the occurrence of the event and declaration that repetition will be avoided are no more than a tribute to the primary rule and may well be paid by the author State *sua sponte*.

<sup>50</sup> Thus, to take an example from a national legal system familiar to the Special Rapporteur, the Dutch code of penal procedure gives a right to the “interested” person victim of a criminal act to claim before a court that prosecution be instituted against the alleged perpetrator of the criminal act; the court, in taking its decision, must take into account a possible “public interest” in not proceeding to a penal prosecution (see arts. 12 *et seq.*: *Wetboek van Strafvordering*, 9th ed. (Zwollen, Tjeenk Willink, 1977)).

<sup>51</sup> Cf. *Yearbook* ... 1976, vol. II (Part Two), pp. 102–104, paras. (16)–(21) of the commentary to article 19.

<sup>52</sup> Compare article 22 in part 1 of the draft, which does not define either the “equivalent result” or “treatment”, or the “effectiveness” of the local remedies.

In this connection, it is interesting to note that even within the framework of the particular rules governing the member States of the European Communities—which rules have “direct effect” within the national legal systems of those member States—the jurisprudence of the European Court of Justice leaves the determination of some of the legal consequences of a breach of those rules by national administrative authorities of such member States to the national legal system of that State and to its courts, subject, of course, to the rule of non-discriminatory treatment. In a certain sense this amounts to making the precise content of an international obligation dependent on internal law, but such reference is often unavoidable and, indeed, in conformity with the structure of international law.

<sup>53</sup> The same goes for the impossibility of *restitutio in integrum*, *stricto sensu* in cases concerning the treatment of aliens.

<sup>54</sup> Under article 6 of part 1 of the draft the author State is responsible for the conduct (including, under article 3, the omission) of its “constituent, legislative [and] judicial or other power”.

<sup>55</sup> See footnote 41 above.

<sup>56</sup> Again the “adaptation” of the application of international rules to the application of national rules, is—like the reverse situation—rather typical for the structure of international law.

between cases of direct injury to the other State and cases in which the other State is injured "through" its national (qualitative difference), the other circumstances of the case (the quantitative differences mentioned in para. 83, including the question whether the breach is or is not a flagrant violation of the primary rule) may blur this distinction insofar as the determination of the content of the reparation due by the author State is concerned.<sup>57</sup>

97. While normally satisfaction is due only in cases of direct injury, the quantitative circumstances of the case may justify an obligation to give satisfaction also in other cases, and vice versa.

98. It is perhaps useful to note, in connection with the adaptation of national law to international rules, that while under the constitutional rules of a given country the executive organs cannot take action without a mandate of the judiciary organs, the same internal legal system may not provide for a request to that effect from the executive organs, made not strictly on its own behalf but in order to ensure the fulfilment of the international obligations of the State towards a foreign State. Thus, many national legal systems do not provide for an official intervention of an executive organ in a procedure before a national court where the jurisdictional immunity of a foreign State is involved.<sup>58</sup>

<sup>57</sup> The distinction between direct injury and injury suffered through a national is in itself not always easy to apply. Leaving aside the cases of wrongful conduct "against the territorial integrity or political independence of another State" (cf. also the Definition of Aggression (General Assembly resolution 3314 (XXIX) of 14 December 1974, annex) and, in particular, the second part of article 2 thereof), a "direct" injury to a foreign State may result from a violation of the rule of general international law prohibiting the use of the territory of another State for the purpose of exercising a governmental activity, and perhaps the wrongful interference with navigation of ships or aircraft under the flag of a foreign State (cf. the question of the possible non-applicability of the local remedies rule in the latter case, as discussed *inter alia* in the Arbitral Award of 9 December 1978 in the case concerning the *Air Services Agreement of 27 March 1946 (United States v. France)* (United Nations, *Reports of International Arbitral Awards*, vol. XVIII (Sales No. E/F.80.V.7), p. 417)). For comment on the case, see, for example, L.F. Damrosch, "Retaliation or arbitration—or both? The 1978 United States–France aviation dispute", in *American Journal of International Law* (Washington, D.C.), vol. 74, No. 4 (October 1980), pp. 785–807. Cf. also the "prompt release of vessels" under article 292 of the draft convention on the law of the sea (A/CONF.62/L.78 and Corr. 3 and 8). In both cases, as in the case of violation of diplomatic immunities, the limits of national jurisdiction under the general rules of international law are at stake.

<sup>58</sup> It may be recalled here that, under the second preliminary rule suggested above (para. 51(b)), a treaty may explicitly or implicitly vary the legal consequences of a breach, e.g., by excluding some of the normal legal consequences to be provided for in part 2 of the draft articles. Thus, it is generally held that in the relationship between the member States of the European Communities, reprisals of one member State against another (or by a member State against the Communities as such, and, except as expressly provided for in the constituent treaty, even vice versa) are implicitly excluded. This, of course, concerns the second parameter. But even as regards the first parameter, the new obligations of a member State will—also in view of the direct effect of

## 2. SUMMARY OF THE ANALYSIS OF THE STEPS ASSOCIATED WITH THE FIRST PARAMETER

99. Summing up the above analysis, it is submitted that, in respect of the first parameter (the new obligations of a State which has acted not in conformity with what was required of it by an international obligation):

- (a) One may distinguish between:
  - (i) an obligation to stop the breach;
  - (ii) an obligation to pay to the injured State a sum of money corresponding to the value of the loss suffered and not repaired;
  - (iii) an obligation to re-establish the situation which would have existed if the breach had not been committed; and
  - (iv) an obligation to give satisfaction in the form of formal apologies for the breach, a formal reconfirmation of the obligation breached, or a declaration to the effect that measures will be taken in order to prevent similar breaches in the future;

(b) While the obligation mentioned under (a)(i) arises in any case of a breach and includes the obligation to effect a release of persons and a return of objects held by the State as a result of the breach, as well as the application of remedies existing under the internal law of the State, and while the obligation mentioned under (a)(ii) also arises in any case and may comprise the payment of a sum of money corresponding to the value of the fulfilment of the obligation mentioned under (a)(iii), the question whether the latter obligation has arisen has to be answered in the light of:

- (i) the character of the primary injury ("direct" injury to another State, or injury "through" its nationals); and
- (ii) the "quantitative" factors of intention to harm in the conduct on the part of the author State, and seriousness of the result of the breach on the part of the injured State.

In appropriate cases, the obligation mentioned under (a)(iv) may be a substitute for the obligation mentioned under (a)(iii).

100. The above summing up deals with "international delicts" in the sense of paragraph 4 of article 19 of part 1 of the draft. In the opinion of the Special Rapporteur, the possible responses to an "international crime" require a special and separate treatment.<sup>59</sup> Surely, in the case of an international crime, the author State is also obliged to stop the breach. But apart from that, there does not, within the

community law (being the constituent treaties plus the binding rules established by the community organs)—in principle not include any obligation of compensation or satisfaction to be given to another member State or to the Community as such (see, among the more recent literature on this matter, A. Bleckmann, "Zwangsmittel im Gemeinsamen Markt?", *Recht der Internationalen Wirtschaft* (Heidelberg), vol. 24, No. 2 (February 1978), p. 91). Similar variations may explicitly or implicitly result from other multilateral or regional treaty regimes.

<sup>59</sup> Indeed, such a separate treatment is implied by the Commission's commentary to article 19 (*Yearbook . . . 1976*, vol. II (Part Two), pp. 96 *et seq.*).

framework of the first parameter, seem to be room for the distinctions made in the summing-up. As a matter of fact, paragraph 3 of article 19 already embodies the quantitative factors mentioned in paragraph 99, under (b)(ii) above. Furthermore, if a breach "is recognized as a crime" by the international community as a whole, it may be assumed that such recognition particularly relates to what this international community and its members consider to be an adequate response on their part to such a breach.<sup>60</sup>

101. Finally, in the field of international crimes the emphasis would seem to lie on the "implementation" of State responsibility, in particular on the existence and powers of the competent international organization(s).<sup>61</sup>

102. In this connection, attention may be drawn to a matter which might perhaps be considered as being of a terminological kind. In paragraph (1) of the commentary to article 19 of part 1 of the draft, the Commission states:

Article 19 is concerned with the question of the possible bearing of the *subject-matter of the international obligation*\* breached . . . on the régime of responsibility applicable to that act [i.e., the act of the State committing such a breach] if its wrongfulness should be established.<sup>62</sup>

In paragraph (10) of the same commentary, the Commission refers to an International Court of Justice opinion as drawing "a fundamental distinction between international obligations *and hence*\* between the acts committed in breach of them".<sup>63</sup>

103. On the other hand, after noting in paragraph (12) of the commentary to article 19:

the possibility that internationally wrongful acts in that category ["exceptionally important obligations, breaches of which could have very serious consequences for the international community as a whole"] can occur in this field [the field of obligations relating to the treatment of foreigners] as well<sup>64</sup>

the Commission states, in paragraph (66) of the same commentary:

. . . the conclusion that an international crime has been committed depends in every case on two requirements being met: (a) the *obligation*\* . . . must be "of essential importance" for the pursuit of the fundamental aim characterizing the sphere in question; and (b) the *breach*\* of that obligation must be a "serious" breach.<sup>65</sup>

Indeed, in paragraph 3 of article 19, the seriousness of the breach is incorporated in the description of some "international crimes".

104. It would seem to the Special Rapporteur that it is of some importance to recognize that, in determining the

content, forms and degrees of State responsibility, it is rather the character of the (concrete) breach and its factual circumstances (the "quantitative" aspects referred to above) than the (abstract, qualitative) subject-matter of the primary obligation which has to be taken into account, although, of course, it cannot be denied that the latter and the former are interrelated.

### 3. ANALYSIS IN LIGHT OF JUDICIAL AND ARBITRAL DECISIONS, STATE PRACTICE AND DOCTRINE

105. Turning now to the decisions of international courts and arbitral tribunals, the practice of States and the teachings of the most highly qualified publicists of the various nations, it would seem that references, in earlier commentaries of the Commission,<sup>66</sup> notably the very extensive commentary to article 19, cover most of the available material, and no useful purpose would be served by repeating them in the present report. Some annotations may, however, be made in order to compare this material with the analysis attempted in the present report.

106. In respect of international courts and arbitral tribunals, it must be recalled (see para. 41 above) that their decisions are of necessity taken within a special framework, the framework of their particular mandate and powers. Furthermore, such decisions are usually taken a long time after the (alleged) breach, and more often than not deal with the determination of the existence of such a breach and its legal consequences at the same time. Finally, they are not always explicit on the way in which the amount of damages awarded is assessed. Anyway, far the greater number of those decisions deal with cases involving primary rules concerning the treatment to be accorded to aliens. In short, for the purposes of drafting articles dealing with the content, forms and degrees of international responsibility in general and independent of the existence of a machinery for implementation, they are of limited value.

107. Thus, it is hardly surprising that most of those decisions concentrated on the obligation of the author State to make "reparation" in pecuniary terms, i.e. to pay damages. Surely, in determining the amount of damages, indirect consideration is given to what the author State should have done in the first place. This consideration is indeed indirect, inasmuch as it is given within the context of another obligation, to wit, the obligation to pay a sum of money to the injured State. It would seem clear that, in the relationship between States, the amount of the sum of money to be paid is usually of relatively minor importance; it does not normally affect either State's domestic jurisdiction nor to any appreciable extent the conduct of its internal or external affairs. Under the *Chorzów Factory* standard (see para. 37 above), this consideration is directly linked to the obligation under the primary rule. The reparation "must wipe out all the consequences of the

<sup>60</sup> Such response may include a "penalty" inflicted upon the author State.

<sup>61</sup> Cf. also the Definition of Aggression (see footnote 57 above), and paragraphs (20) to (26) of the Commission's commentary to article 19, notably, in para. (22), the statement that "in formulating the 'primary' obligation . . . under international law, the United Nations Charter combines the formulation with an explicit indication of the consequences attendant upon any breach" (*Yearbook . . . 1976*, vol. II (Part Two), pp. 103-106).

<sup>62</sup> *Ibid.*, p. 96.

<sup>63</sup> *Ibid.*, p. 99.

<sup>64</sup> *Ibid.*, p. 100.

<sup>65</sup> *Ibid.*, p. 120. The distinction between "obligation" and "breach" also plays a role in distinguishing between the two notions of *jus cogens* and "international crime" (see, for example, para. (62) of the commentary to art. 19 (*ibid.*, pp. 119-120)).

<sup>66</sup> In particular, those referred to in the preliminary report, para. 8 and footnotes 15 to 20 (*Yearbook . . . 1980*, vol. II (Part One), pp. 109-110, document A/CN.4/330).

illegal act" and, as such, should correspond to the *status quo sine delicto*.<sup>67</sup>

108. The obligation "to wipe out all the consequences of the illegal act" is, as it were, mitigated by the notion of "proximate" or "effective" causality.<sup>68</sup> Indeed, in the factual chain of events connecting a particular conduct to a particular result, there may be "extraneous links" which cannot but influence the decision as to the amount of damages (if any) to be paid.<sup>69</sup>

109. Such extraneous links are, on the one hand, the element of "hazard", and, on the other hand, the element of "intentions" of the author State. While the former element tends to limit the extent of consequences taken into account in determining the amount of damages to be paid, the latter element tends to increase this extent, and thereby, the amount of damages.<sup>70</sup>

110. It should be noted here that the question by which conduct which result should, or should not, be caused, is obviously a matter of the content—express or implied—of the primary rule. Accordingly, such primary rule may embody the element of "intention"—or even the element of "hazard"—in determining the obligations and the rights of the States bound by that primary rule. Thus, the primary obligation may cover only intentional acts of the State, or, on the other hand, may create an "absolute liability" of that State.

111. Furthermore, the primary rule may, so to speak, extend the chain of events and take into account (again, even by implication) the actual capacity of the obliged State (or States)—and even the State the right of which is involved—to prevent (or to create) the situation which the primary rule wishes to avoid (or to attain).<sup>71</sup>

112. Much of the jurisprudential (and doctrinal) discussion on what is often called "the principle of fault" and "the principle of integral reparation" would thus seem to turn on the interpretation and application of the primary

<sup>67</sup> This is, of course, *ex tunc* and is to be distinguished from the obligation to stop the breach, the latter corresponding to what the author State should do after the breach has occurred (*ex nunc*, and possibly, *ex ante*). See the preliminary report, para. 31 (*ibid.*, p. 113).

<sup>68</sup> See Cheng, *op. cit.*, chap. 10, where the author mentions the ruling in the case *H.G. Venable (Opinions of Commissioners, under the Convention concluded September 8, 1923, between the United States and Mexico, February 4, 1926 to July 23, 1927)* (Washington D.C., 1927) and chaps. 8 and 9 on the principle of integral reparation and the principle of fault.

<sup>69</sup> In a sense, one might also consider both the act of a third State and the injury suffered by a third State as extraneous elements in a factual chain of events. This is, however, a matter to be dealt with separately.

<sup>70</sup> Obviously, "hazard" and "intentions" meet in the objective criterion of what is a "normal" or "reasonably foreseeable" chain of events.

<sup>71</sup> The primary rule may also be laid down *ex post facto* in the *compromis* which is the basis of a judicial decision; a notable example of this is given by the Treaty between Great Britain and the United States of America signed at Washington on 8 May 1871, on which the Award of 14 September 1872 in the "*Alabama*" claims arbitration was founded (see J. Gillis Wetter, *The International Arbitral Process: Public and Private* (Dobbs Ferry, N.Y., Oceana, 1979), vol. 1, p. 44. See also the (controversial) question whether or not the *compromis* excluded any damages for "indirect losses" (*ibid.*, pp. 60 *et seq.*).

rule, rather than on any supposed general rule relating to the content of State responsibility, irrespective of the content of the primary rule. This point is particularly illustrated by the Judgment of the International Court of Justice in the *Corfu Channel* case and the dissenting opinions appended to it.<sup>72</sup>

113. If judicial decisions concentrate on reparation in pecuniary terms, the obligation to stop the breach does not, of course, as such find specific mention or consideration; it is, as it were, submerged in the determination of the amount of damages to be paid.

114. There are however also judicial decisions which order measures other than the paying of a sum of money. In this connection, reference should be made to: (a) final decisions which order a *restitutio*, and (b) decisions ordering interim measures of protection of the kind mentioned in article 41 of the Statute of the International Court of Justice. It should be recalled that in both cases considerations relating to the specific function and powers of the Court may be involved.

115. It is interesting to note that, while in the practice of States there are many cases in which, as a consequence of protests of the injured States, the author State liberated the persons and returned the objects it held as a consequence of a wrongful act, there are relatively few cases in which such liberation or return was ordered as a final decision by an international court or tribunal.<sup>73</sup>

116. As remarked above (para. 57), it does not, in practice, matter much whether a final judicial decision ordering the return of certain objects, the liberation of certain persons or the annulment of certain acts, does so as (part of) a reparation or as a consequence of the obligation to stop the breach. The point is rather whether or not, *independently of the existence of a machinery for implementation*, there exists an obligation of the author State to effect a *restitutio in integrum stricto sensu (ex tunc)*. The establishment of such an obligation may be relevant for the other parameters of the legal consequences of the breach, such as the right of the injured State to apply "counter-measures". It is, however, not in the latter context that the question is normally looked at in judicial decisions. Nevertheless, such decisions may throw light on the existence or non-existence of the obligation and its scope.

117. Little information can be gathered from the numerous cases in which the international judicial body, in a final judgement, orders the return of a sum of money acquired by the author State through an internationally wrongful act. Such return obviously amounts to the same

<sup>72</sup> See above, footnote 47. Actually, to the extent that the element of "hazard", breaking the chain between conduct and result, takes the form of "*force majeure* and fortuitous event" (art. 31 of the draft articles), there may be a "circumstance precluding wrongfulness" in the sense of part 1 of the draft, which deals with the origin of State responsibility rather than the content of State responsibility.

<sup>73</sup> Many examples taken from the practice of States and judicial decisions are mentioned in the study of Alvarez de Eulate referred to above (see above, footnote 40).

as (part—i.e. apart from interest—of) a reparation in pecuniary terms.<sup>74</sup>

118. Furthermore, the cases in which the Franco/Italian Conciliation Commission set up under the Treaty of Peace with Italy of 10 February 1947<sup>75</sup> ordered the refund of sums collected for certain taxes<sup>76</sup> are also rather irrelevant for the present issue, since the refund was expressly provided for, as a primary obligation of Italy, under article 78, para. 6, of the Treaty. Moreover, not only was the Conciliation Commission made competent, under article 83, para. 2, of the Treaty, to deal with any dispute relating to the interpretation and application of articles 75 and 78 and annexes XIV to XVII of the Treaty, but it was also stipulated that the Commission “shall perform the functions attributed to it by those provisions”.<sup>77</sup> The same is true of the cases in which the Conciliation Commission ordered “the restitution of property” removed by force or duress from the territory of “any of the United Nations” (art. 75, para. 2)<sup>78</sup> or the re-establishment of property, rights and interests in Italy (art. 78).<sup>79</sup>

119. One might possibly consider the obligation imposed on Italy by articles 75 and 78 of the Peace Treaty not so much as a primary obligation as an example of a particular conventional determination of the legal consequences of internationally wrongful acts, but this construction does not change the conclusion that the decisions taken by the Conciliation Commission are irrelevant for the present issue. It is to be noted that article 78, subparagraph 4(a) of that Treaty reads as follows:

The Italian Government shall be responsible for the restoration to complete good order of the *property*\* returned to United Nations nationals under paragraph 1 of this Article. In cases where *property*\* cannot be returned or where, as a result of the war, a United Nations national has suffered a loss by reason of injury or damage to *property*\* in Italy, *he shall receive*\* from the Italian Government *compensation in lire*\* to the extent of *two-thirds*\* of the sum necessary, at the date of payment, to purchase similar property or to make good the loss suffered. . . .<sup>80</sup>

120. More interesting for the present purpose are the final judicial decisions which order something else than the payment of a sum of money. One of the more recent decisions—the Arbitral Award of 19 January 1977 in the *Topco-Calasiatic* case—was already referred to in the preliminary report.<sup>81</sup> In this case the Sole Arbitrator, Mr.

René-Jean Dupuy, devoted a large part of the Award on the Merits to the question whether, “having disregarded its obligations, the Libyan Government should be held to *restitutio in integrum* or *restitutio in pristinum*”<sup>82</sup> and, somewhat implicitly, ordered such *restitutio*.<sup>83</sup>

121. The learned Sole Arbitrator, on the basis of “international case law and practice” as well as of “writings of scholars in international law” arrives at the conclusion that “*restitutio in integrum* is, . . . under the principles of international law, the normal sanction for non-performance of contractual obligations and that it is inapplicable only to the extent that restoration of the *status quo ante* is impossible”.<sup>84</sup> Again, in the Award, it was held “the solution in principle which is constituted by *restitutio in integrum* should be discarded when there is absolute impossibility of envisaging specific performance, or\* when an irreversible situation has been created”.<sup>85</sup>

122. It is interesting to note that the Sole Arbitrator cites in support of his opinion a statement by an eminent member of our Commission, Mr. Reuter, to the effect that *restitutio in integrum* is, in principle, “the most perfect performance possible of the original obligation”.<sup>86</sup> Indeed, if one looks at the primary rule and takes into account that the original obligation does not lapse as a consequence of its breach, the conclusion would seem inescapable. The primacy of the rule of international law would, it seems, admit no other solution. What justification could be found for the substitution of an obligation to pay a sum of money, for the original obligation?

123. In strict logic, such justification could only be found in another, second, rule of international law, which specifically allows a State (in this case, the author State) the discretion itself to determine the consequences of a given situation (in this case, the situation which has arisen after a breach of an international obligation has occurred). If such a rule exists, it could come into conflict with the rule of international law mentioned before, and it would be up to a third rule of international law to determine whether the former or the latter rule prevails in a given situation. What could be those “second” and “third” rules?

124. As to second rule, the most likely candidate is the rule stipulating the domestic jurisdiction of States. Surely this rule does not exclude nor override a primary obligation of the State under another rule of international

<sup>74</sup> This is particularly clear in cases where not even all the money received as taxes is returned, as, for example, in the case of the *Palmarejo and Mexican Gold Fields* (United Kingdom v. Mexico). United Nations, *Reports of International Arbitral Awards*, vol. V (Sales No. 1952.V.3.), pp. 298 *et seq.* See also the decisions in the cases *Jethro Mitchell*, *The Macedonian, King and Gracie*, *Turnbull, Orinoco Company*, *Compagnie générale des asphaltes de France*, cited by Alvarez de Eulate (*loc. cit.*, pp. 23–24).

<sup>75</sup> United Nations, *Treaty Series*, vol. 49, p. 3.

<sup>76</sup> The case *Società anonima Michelin italiana* (United Nations, *Reports of International Arbitral Awards*, vol. XIII (Sales No. 64.V.3), p. 612); and *Wollemborg* case (*ibid.*, vol. XIV (Sales No. 65.V.4), p. 283).

<sup>77</sup> United Nations, *Treaty Series*, vol. 49, p. 168.

<sup>78</sup> *Ibid.*, p. 157.

<sup>79</sup> *Ibid.*, pp. 160–163.

<sup>80</sup> *Ibid.*, p. 161.

<sup>81</sup> See footnote 40 above and *Yearbook . . . 1980*, vol. II (Part One), p. 112, footnote 27.

<sup>82</sup> *International Legal Materials* (Washington, D.C.), vol. XVII, No. 1 (January 1978), sect. III, p. 31, para. 92.

<sup>83</sup> One might doubt the final character of this Award inasmuch as the dictum of the Award, after granting to the Libyan Government “a time period of five months . . . in order that it may bring to the notice of the Arbitral Tribunal the measures taken by it with a view to complying with and implementing the present arbitral award”, immediately adds the decision “that, if the present award were not to be implemented within the time period fixed, the matter of further proceedings is reserved . . .” (*Ibid.*, p. 37). Furthermore the dispute is one between private companies and a State, and as such, is not directly relevant to our enquiry. However, the Sole Arbitrator founded his decision also on “the principles of international law with respect to *restitutio in integrum*” (*ibid.*, p. 32).

<sup>84</sup> *Ibid.*, p. 36, para. 109.

<sup>85</sup> *Ibid.*, para. 112.

<sup>86</sup> *Ibid.*, p. 35, para. 102.

law. But it may override (depending on the third rule of international law) an obligation of *restitutio in integrum, stricto sensu* in case a breach of the primary obligation has occurred.<sup>87</sup>

125. Obviously such a second rule cannot provide a justification for not proceeding to a *restitutio in integrum, stricto sensu*, if the situation created by the breach lies beyond the domestic jurisdiction of the author State. Thus it is clear that if, for example, a State *wrongfully* occupies part of the territory of another State, not only should the occupation be ended, but also objects taken away from the occupied zone should be returned.<sup>88</sup> The same goes for other "direct" injuries to another State, such as the breach of the inviolability of the premises of the diplomatic mission of that State.

126. It is therefore not surprising to find international judicial decisions declaring void measures taken by the author State as regards a territory under the sovereignty of another State, as in the case of the *Legal Status of the South-Eastern Territory of Greenland* (1933).<sup>89</sup>

127. The situation would be different if the international judicial body were to order the annulment of a decision taken by a national authority of the author State under its internal law. The *Martini* case is sometimes cited as a case in point, in which the Arbitral Tribunal held (in respect of a judgement of the "Cour fédérale et de cassation" of Venezuela of 4 December 1905) that:

... the parts of the judgement of 4 December 1905, which are tainted by patent injustice, impose on the firm of Martini certain obligations to pay. Although such payment has never been made ..., the obligations exist in law. These obligations must be annulled, by way of reparation.

<sup>87</sup> In this connection, a parallel may be drawn with an internal rule of an international organization. In case the United Nations Administrative Tribunal determines that the Secretary-General of the United Nations has acted not in conformity with his obligations by terminating a contract of service of a staff member under the statute of the Tribunal:

"If the Tribunal finds that the application is well-founded, it shall order the rescinding of the decision contested or the *specific performance*\* of the obligation invoked. At the same time the Tribunal shall fix the amount of *compensation*\* to be paid to the applicant for the injury sustained should the Secretary-General ... decide, *in the interest of the United Nations*,\* that the applicant shall be compensated without further action being taken in his case". (*Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, *I.C.J. Reports 1954*, p. 52.)

It is interesting to note that in the original version of the same statute the second sentence read in part:

"... if, in exceptional circumstances, such rescinding or specific performance is, in the opinion of the Secretary-General, *impossible or inadvisable*\*, the Tribunal shall ... order the payment to the applicant of compensation for the injury sustained". (*Ibid.*)

<sup>88</sup> Cf. the Judgment of 15 June 1962 of the I.C.J. in the case concerning the *Temple of Préah Vihear*, Merits, *I.C.J. Reports 1962*, p. 37.

<sup>89</sup> *P.C.I.J., Series A/B, No. 53*, p. 22. See also the Award of 30 June 1865 in the case concerning fishery rights around the Aves Islands. The Award declares those islands to be under the sovereignty of Venezuela, but orders Venezuela to recognize the Dutch fishing rights or pay an indemnity for the loss of those fishing rights (see J. B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (Washington, D.C.: U.S. Government Printing Office, 1898), vol. V, p. 5037).

In pronouncing their annulment, the Arbitral Tribunal emphasizes that an illegal act has been committed and applies the principle that the consequences of the illegal act must be wiped out.<sup>90</sup>

However, in the *dictum* of this Award we find a somewhat different formula:

[the Tribunal] decides that, by reason of the attitude adopted by the "Cour fédérale et de cassation" towards the firm of Martini and Co. in the said case, *the Government of Venezuela is required to recognize, by way of reparation, the annulment of the obligations to pay\** imposed on the firm of Martini and Co., as set out under 2(a)-(d) above.<sup>91</sup>

128. In actual fact, therefore, since the obligations of Martini, imposed by part of the judgement of the Venezuelan Court, were obligations to pay a sum of money to the Venezuelan Government, the case is comparable to those cited above in which a sum of money wrongfully received by the author State was ordered to be refunded.<sup>92</sup>

129. Even in the *Topco-Calasiatic* case the Sole Arbitrator held that *restitutio in integrum* "should be discarded ... when an irreversible situation has been created".<sup>93</sup> It is to be noted that the Sole Arbitrator was of the opinion—thoroughly motivated in the Award—that the legal relationship between the private companies and Libya was governed by the rules of international law. Though the Award does not contain any indication in this direction, one might perhaps consider that a consequence of such opinion would be that the rights acquired by the companies under the contracts with Libya could somehow be assimilated to sovereign rights of a State beyond the domestic jurisdiction of another State. Obviously, what is "irreversible" *in law*, as distinguished from material impossibility (in fact), is difficult to determine.<sup>94</sup>

<sup>90</sup> United Nations, *Reports of International Arbitral Awards*, vol. II (*op. cit.*), p. 1002.

<sup>91</sup> *Ibid.*

<sup>92</sup> No more relevant for the present issue are the cases of the *Bužau-Nehoiși Railway* (United Nations, *Reports of International Arbitral Awards*, vol. III (*op. cit.*), pp. 1827 *et seq.*, and of the *Société Radio-Orient* (*ibid.*, pp. 1871 *et seq.*).

In the first of these cases, the Arbitral Tribunal did indeed order the return by the Romanian Government of a specific number of shares in the railway company to the Berliner Handels-Gesellschaft (not to the claimant Government), but it did so *under a treaty provision* not unlike the one laid down in article 75 of the Treaty of Peace with Italy (see para. 118 above).

In the second case, the dictum of the Arbitral Award reads, *inter alia*, as follows:

"[The Tribunal] orders the cancellation, six weeks after the date of this award, of the instruction whereby, on 16 April 1935, the Egyptian Telegraph Administration forbade Egyptian telegraph offices to accept telegrams for dispatch over the routes of the "Radio-Orient" company ...". (*ibid.*, p. 1881).

This is clearly a case of an order to stop the breach of an international obligation through a discretionary administrative act of the author State itself. In this case the author State has invoked "its sovereign right to maintain law and order in its territory": this plea was rejected by the Tribunal on the ground that "the sovereign rights of each State are restricted by the commitments it has undertaken towards other States, in this case by the Madrid Convention and the Telegraph Regulations" (*ibid.*, p. 1880). Again, the question turned rather on the interpretation of the primary obligation.

<sup>93</sup> See footnote 85 above.

<sup>94</sup> Alvarez de Eulate uses the term "*imposibilidad jurídica*" as a reason for not ordering *restitutio in integrum* (*loc. cit.*, pp. 17-18). Article 9 of the Draft Convention on the responsibility of States for

130. Indeed, the use of such vague terms seems rather to point to a certain discretion to be left to the international judicial body in deciding on the measures to be taken by the author State as a consequence of the breach of an international obligation. Actually there is some analogy with the power of an international tribunal to order "interim measures of protection".

131. As is well known, the power to order (or "indicate") provisional measures of protection is not generally given to all international judicial bodies, and, if it is given, is seldom used by such bodies. Judicial practice in this respect cannot be regarded as in any way conclusive as regards the existence or non-existence of new obligations of an author State in case of breach of an international obligation. Indeed, the very existence of a breach—both in terms of fact and in terms of law—as well as the competence of the court and the fulfilment of other "preliminary" conditions are often in dispute between the parties at the moment the question of interim measures of protection turns up. While, therefore, an international judicial body must of necessity have a wide measure of discretion in deciding whether or not to order interim measures of protection, the reasoning underlying its decision on the issue might give some indication of its opinion as regards the legal consequences of the alleged breach of an international obligation.<sup>95</sup>

132. In essence, interim measures of protection are directed against (a) a continuation of the (alleged) breach (possibly in the form of similar infringements of the same right) and/or (b) a frustration of the obligation to conform to a final decision of the court (concerning the "response" to the breach from the side of the defendant State). Accordingly, one might perhaps expect that in deciding on the exercise or non-exercise of the power to indicate interim measures of protection, the court would take into account the prospects of its final judgement obliging the defendant State to something *more* than a reparation in pecuniary terms.<sup>96</sup>

(Footnote 94 continued.)

injuries caused in their territory to the person or property of aliens, prepared by the Deutsche Gesellschaft für Völkerrecht (German International Law Association) in 1930, while stating, even within the limited scope of the draft, from an obligation of the author State to *restitutio in integrum stricto sensu*, and even while stating, in paragraph 2, that

"Difficulties in effecting such re-establishment, and in particular the necessity of expropriating and compensating third-party assignees, do not preclude the right to demand such re-establishment", provides, in paragraph 3, that:

"Re-establishment may not be demanded if such demand is unreasonable, and in particular if the difficulties of re-establishment are disproportionate to the advantages for the injured person".

(See *Yearbook* . . . 1969, vol. II, p. 150, document A/CN.4/217 and Add.1, annex VIII).

<sup>95</sup> Cf. United Nations, the Gilbert Amado Memorial lecture *The International Court of Justice and the Indication of Provisional Measures of Protection*, delivered by Judge T.O. Elias of the International Court of Justice on 7 June 1978. See also the Court's order of 15 December 1979 in the case concerning *United States Diplomatic and Consular Staff in Teheran*, Provisional Measures, *I.C.J. Reports 1979*, p. 7.

<sup>96</sup> Cf. the separate opinion of Judge Jiménez de Aréchaga in the I.C.J.'s Order of 11 September 1976 in the *Aegean Sea Continental Shelf* case:

"... the essential justification for the impatience of a tribunal in granting relief before it has reached a final decision on its competence

133. To a certain extent, the emphasis placed by the International Court of Justice on the threat of "*irreparable*\* prejudice being caused to rights which are the subject of dispute in judicial proceedings" as a condition for indicating interim measures of protection does go in this direction.<sup>97</sup>

134. However, all depends on what is considered to be an "irreparable" prejudice. In the *Aegean Sea Continental Shelf* case, the Court, in its Order of 11 September 1976, held that:

... the alleged breach by Turkey of the exclusivity of the right claimed by Greece to *acquire information*\* concerning the natural resources of areas of continental shelf, if it were established, is one that might be *capable of reparation by appropriate means*\*; and whereas it follows that the Court is unable to find in that alleged breach of Greece's rights such a risk of irreparable prejudice to rights in issue before the Court as might require the exercise of its power under Article 41 of the Statute to indicate interim measures for their preservation.<sup>98</sup>

On the other hand, Judge Elias, in his separate opinion in this case, seems inclined to take into account "the fact that the injury by itself might be sufficient to cause *irreparable harm to the national susceptibilities of the offended State*"<sup>99</sup>.

135. Obviously, information, once acquired, cannot be given back, and "harm to national susceptibilities" is almost always irreparable. In any case, the practice relating to interim measures of protection does not seem to indicate any hard and fast correlations between the nature of the breach (such as, for example, the distinction between "direct" injury and injury "through nationals") and the content of the new legal obligations of the author State.

136. Some special questions may arise in respect of international obligations relating to the respect for human rights. Here again, a treaty in this field may not only

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and on the merits is that the action of one party '*pendente lite*' causes or threatens a damage to the rights of the other, of such a nature that it would not be possible fully to restore those rights, or remedy the infringement thereof, simply by a judgment in its favour." (*I.C.J. Reports 1976*, pp. 15–16).

<sup>97</sup> See, *inter alia*, the aforementioned Order of 11 September 1976 (footnote 96 above), paras. 32–33; and the Order of 15 December 1979 in the case concerning *United States Diplomatic and Consular Staff in Teheran*, paras. 36 and 42 (*I.C.J. Reports 1979*, pp. 19–20).

In a way, this notion of "irreparable prejudice" as a condition for ordering interim measures of protection can be linked with the notion of "irreversible situation" as excluding *restitutio in integrum stricto sensu*; in a similar way, the justification of indicating interim measure of protection in order to prevent a frustration of the obligation to conform to the final judgement may be compared with the obligation under article 18 of the Vienna Convention not to defeat the object and purpose of a treaty, signed but not yet ratified.

<sup>98</sup> *Aegean Sea Continental Shelf*, Interim Protection, *I.C.J. Reports 1976*, p. 11, para. 33.

<sup>99</sup> *Ibid.*, p. 30. In his opinion (p. 28), Judge Elias also criticizes the *obiter dictum* in the case *Legal Status of the South-Eastern Territory of Greenland (P.C.I.J., Series A/B, No. 48, p. 268)* to the effect that even action calculated to change the legal status of the territory would not in fact have irreparable consequences for which no legal remedy would be available, and considers that this *obiter dictum* "must be regarded as limited to the peculiar circumstances of that case".

In his Memorial Lecture (see footnote 95 above), Judge Elias rejects the "emphasis on aggravation of the situation as essentially limited to the possibility of destruction or disappearance of the subject-matter of the dispute . . ." (*Op. cit.*, p. 13).

provide for an international tribunal to judge the fulfilment of the treaty obligations in individual cases, but also give such tribunal special powers to determine the legal consequences of a breach.<sup>100</sup>

137. Both the (few) judicial decisions which, as a final judgement, order a *restitutio* and the (equally few) judicial decisions ordering interim measures of protection seem to confirm, or at least not to contradict, the statements made in paragraph 99 above. In essence, the breach of an international obligation is considered as creating a new

<sup>100</sup> The European Convention on Human Rights is a case in point. It establishes a European Court of Human Rights and, in its article 50, provides that:

"If the court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party". (United Nations, *Treaty Series*, vol. 213, p. 248.)

The particular character of this provision is underlined by the jurisprudence of the European Court of Human Rights. Under the Convention, the injured individual has no direct access to the Court, but only to the European Commission on Human Rights, which in its turn may refer a case to the European Court. The Commission, under article 26 of the Convention, may only deal with a matter after all domestic remedies have been exhausted. The European Court has consistently held that this rule applies only to the original petition addressed by an individual to the Commission under article 25 of the Convention, and not to a claim for compensation made by him after the Court has held that in his case there has been a violation of a right guaranteed by the Convention. Let it be noted that the Court has done so, *inter alia*, on the ground that:

"... if the victim, after exhausting in vain the domestic remedies before complaining at Strasbourg of a violation of his rights, were obliged to do so a second time before being able to obtain from the Court just satisfaction, the total length of the procedure instituted by the Convention would scarcely be in keeping with the idea of the effective protection of Human Rights. Such a requirement would lead to a situation incompatible with the aim and object of the Convention". (European Court of Human Rights. *De Wilde, Ooms and Versyp cases* ("Yagrancy" cases), *Judgment of 10 March 1972* (article 50), *Series A*, vol. 14, p. 9, para. 16).

Furthermore, as to the merits, the Court held:

"No doubt, the treaties from which the text of Article 50 was borrowed had more particularly in view cases where the nature of the injury would make it possible to wipe out entirely the consequences of a violation but where the internal law of the State involved precludes this being done. Nevertheless, the provisions of Article 50 which recognize the Court's competence to grant to the injured party a just satisfaction also cover the case where the impossibility of *restitutio in integrum* follows from the very nature of the injury; indeed, common sense suggests that this must be so *a fortiori*. The Court sees no reason why, in the latter case just as in the former, it should not have the right to award to the injured persons the just satisfaction that they had not obtained from the Government of the respondent State". (*Ibid.*, pp. 9-10, para. 20).

On the other hand, the Court underlines the necessity of a link of causality between the breach and the situation which gave rise to the claim for compensation (see *De Wilde, Ooms and Versyp cases* (quoted above)) and takes account of the "satisfaction" already received by the Court's decision itself (see European Court of Human Rights, *Neumeister case, Judgment of 7 May 1974* (article 50), *Series A*, No. 17). From the cases cited, and others, it would appear that, apart from compensation for legal costs, the Court awards compensation for moral damage to the extent that such damage is a direct consequence of the breach. The effective protection of the individual human being seems to be the paramount consideration of the Court, rather than the relationship between States under the general rules of international law.

situation, to be dealt with by rules of international law *separate* from the primary rule which stipulates the obligation breached (unless, of course, that primary rule at the same time determines the legal consequences of its breach). Consequently, an obligation of *restitutio in integrum stricto sensu*—"the most perfect performance possible of the original obligation" (see para. 122 above)—is not necessarily a legal consequence of the breach. Whether or not such an obligation arises as an "automatic" legal consequence of the breach, depends on (a) the character of the right infringed, and (b) the character of the conduct infringing the right.

138. As regards (a), the distinction between (i) rights belonging to the injured State as such; (ii) rights belonging to the injured State through its nationals; and (iii) the intermediate category of rights belonging to the injured State through the ships or aircraft flying its flag.<sup>101</sup> may be relevant. As regards (b), the distinction between (i) intentional harm inflicted on the injured State; (ii) conduct in the normal exercise of national jurisdiction, incidentally infringing an international obligation; and (iii) the intermediate category of application of national rules and procedures falling short of international standards, may be relevant.<sup>102</sup>

139. One might compare—and contrast—such circumstances, aggravating international responsibility, with the circumstances precluding wrongfulness (see also para. 49 above). In any case, the distinctions under (a) and (b) are not more than guidelines relating to the "proportionality" between the breach and the response, insofar as this response relates to the new obligations of the author State. The gradual differences between direct and indirect injury, and between intentional and incidental conduct, do not seem to admit a more stringent "third" rule of international law (in the sense of para. 123 above).

140. We have already noted above (*inter alia*, para. 99(b)) that the obligation to stop the breach may include the obligation to liberate persons and to return objects, if those persons have been deprived of their liberty by an internationally wrongful act of the State or the objects have been acquired by such an act. Very often rules of national law provide for other remedies as well, including the payment of indemnities, the "reparation" of moral damages or even a claim for punishment of, or disciplinary measures taken against, the physical person responsible for the wrongful act.

141. These are remedies under national law for wrongs, thus qualified by national law. Even without accepting in any way the doctrine of "direct effect" of rules of international law within a national legal system,<sup>103</sup> one may recognize that on the international plane, the

<sup>101</sup> The exclusive right of a State, in relation to its territory, to use it in order to conduct governmental activities therein, may also belong to this intermediate category.

<sup>102</sup> An international obligation of the State to provide effective local remedies against a violation of rules of international law is a specific case in point; compare, *inter alia*, article 232, last sentence, of the draft convention on the law of the sea (A/CONF.62/L.78 and Corr.3 and 8).

<sup>103</sup> This being a matter of internal constitutional law.

obligation to stop the breach of an international obligation includes the obligation to treat, within the framework of the national legal system of the author State, wrongful acts under international law in the same way as “corresponding” wrongful acts under national law. The fulfilment of such an obligation may then amount to a result equivalent to “reparation” and even “satisfaction” on the international plane.

142. In the case of international obligations “concerning the treatment to be accorded to aliens” (art. 22 of part 1 of the draft articles), this result may even be allowed to be achieved by subsequent conduct of the State, to the effect that there is not even a breach if such equivalent result is thereby reached.

143. However, even if the international obligation breached is one corresponding to a direct right of another State (and art. 21, para. 2, therefore does not apply), application *proprio motu*, by the author State, of measures available to that State under its internal law may come near to an “equivalent” of the fulfilment of the original “primary” obligation, and as such may be considered as a further step in the obligation to stop the breach. This seems to be the case, in particular, if the primary obligation concerns a right of the “intermediate” category mentioned above (para. 138). Indeed, such primary obligations may, just like obligations “concerning the treatment to be accorded to aliens”, allow an “equivalent result” to be reached—in other words may stipulate a “substitute performance”. Actually, the distinction between (primary) rules determining the legal consequences of their “breach”, and (separate) rules defining the legal consequences of a breach of an international obligation, becomes less and less definite.<sup>104</sup>

144. One might call this obligation to apply local remedies an obligation to stop the breach *lato sensu*, as contrasted with the obligation to stop the breach *stricto sensu*, i.e. to stop the continuing effects of the breach, such

as release of persons and objects wrongfully held by an act of the author State.

145. With these three gradations of the obligation of the author State to live up to its primary obligation—i.e. obligation to stop the breach *stricto sensu*, obligation to stop the breach *lato sensu*, and obligation to effect a *restitutio in integrum stricto sensu*—correspond three gradations of reparation on the international plane, that is, in the State-to-State relation. Two of those gradations are in pecuniary terms and relate to the quantum of damages; the third is “satisfaction” in other terms (apologies, guarantees).<sup>105</sup> All three are substitutes for the non-performance of the original primary obligation. As such (see paras. 123 and 138 above) they need a justification in fact or in law in order to be considered a sufficient response to the (new) situation created by the breach.<sup>106</sup>

146. Under the *Chorzów Factory* standard there would seem to be only *one* reparation in pecuniary terms: the one the quantum of which corresponds to a *restitutio in integrum stricto sensu* (which under the circumstances is materially impossible), namely, “payment of a sum corresponding to the value which a *restitutio* in kind would bear (see para. 78 above). However, as explained in paragraphs 106 to 111 above, the Special Rapporteur is inclined to feel that the quantum of damages may be differently assessed in a way that does not go so far as the *Chorzów Factory* standard (“to wipe out *all*\* the consequences of the illegal act”) does. Indeed, the quantum of damages would seem to be inextricably related to the characteristics of the primary rule.<sup>107</sup>

147. On the other hand, satisfaction in other than pecuniary terms (or “reparation *ex ante*”) corresponds in a way with *restitutio in integrum stricto sensu*, inasmuch

<sup>105</sup> One could call these three gradations of reparation “reparation *ex nunc*”, “reparation *ex tunc*” and “reparation *ex ante*”.

<sup>106</sup> The approach of considering the breach of an international obligation as creating a new situation, to which other rules of international law provided the response is, it would seem, typical for the structure of international law. Compare—in the field of the third parameter—art. 60, subpara. 2(c), of the Vienna Convention (see footnote 9 above) for the situation in which “a material breach of its provisions by one party *radically changes*\* the position of every party with respect to the further *performance*\* of its obligations under the treaty”. Compare also the approach in the Vienna Convention on Succession of States in respect of Treaties, of treating State succession as a *fact* having an impact on treaty obligations, sometimes equated with a fundamental change of circumstances. (*Official Records of the United Nations Conference on Succession of States in Respect of Treaties*, vol. III, *Documents of the Conference* (United Nations publication, Sales No. E.79.V.10), p. 185.)

<sup>107</sup> Cf. also paras. 81 and 82 of the preliminary report (*Yearbook . . . 1980*, vol. II (Part One), p. 124, document A/CN.4/330). Such reparation “*ex nunc*” would also seem the appropriate “compensation” in the cases of “circumstances precluding wrongfulness” mentioned in article 35 of part 1 of the draft articles. Actually, there seems to be a gradual transition from (a) primary rules of international law determining the legal consequences of certain acts without qualifying such acts as wrongful to (b) rules of international law determining both an international obligation and the legal consequences of its breach; and to (c) separate rules of international law determining the legal consequences of a breach of an international obligation imposed by other rules of international law.

<sup>104</sup> In this connection, it is interesting to note the very elaborate rules laid down in the draft convention on the law of the sea (A/CONF.62/L.78 and Corr.3 and 8) concerning the powers (and their exercise) of port States and coastal States as regards ships flying a foreign flag, notably arts. 223–233 concerning “safeguards” (and the corresponding dispute settlement provision of art. 292, which is also applicable to arrest of foreign fishing vessels under art. 73). Most of these rules are indeed primary rules (though art. 232 relates to “liability” and art. 292 to “implementation”) and are clearly an integral part of the total regulation of this specific subject matter, based on a *combination* of the (domestic) jurisdictions of port State and coastal State on the one hand, and flag State on the other. This combination is, *inter alia*, effected through rules comparable to those which, according to paragraph 137 above, are generally relevant for the determination of the legal consequences of a breach of international obligations. Thus we find, in the first sentence of art. 232, an international responsibility for measures which “were unlawful or *exceeded those reasonably required in the light of available information*”; see also art. 227, in particular the prohibition of discrimination *in fact*; in art. 230, international standards of treatment; in art. 232, second sentence, an obligation to provide for local remedies. On the other hand, the practical effect of art. 292—and of arts. 226 and 73—comes close to creating a kind of “immunity” of foreign vessels and their crews, subject to the posting of a bond or other financial security, as the power given to the competent international judicial body in that article comes close to the power to order interim measures of protection.

as both tend to create a situation that is new in respect of the situation created by the breach.<sup>108</sup> As such, satisfaction may be a convenient substitute to other legal consequences which are considered “impossible” in fact or in law, including cases where there is no (material) damage to repair.<sup>109</sup>

148. The Commission noted, in its report on the work of its twenty-eighth session:

In point of fact, international wrongs assume a multitude of forms and the consequences they should entail in terms of international responsibility are certainly not reducible to one or two uniform provisions . . . the idea that they [international wrongful acts other than international crimes] always entail a single obligation, that of making reparation for the damage caused, and that all they involve is the determination of the amount of such reparation, is simply the expression of a view which has not been adequately thought out.<sup>110</sup>

149. Throughout his preliminary report, and in particular in paragraph 100,<sup>111</sup> the Special Rapporteur indicated his tentative view that it would not be possible to lay down in a limited number of draft articles a hard and fast, quasi-automatic correlation between breaches and responses thereto. The analysis in the present report seems to confirm that tentative view.

150. It is only natural that, in the case of a breach of an international obligation, the new legal relationships created by this situation tend, on the one hand, towards a belated fulfilment of the original obligation, and on the other hand, and cumulatively, towards imposing substitute obligations. In the foregoing paragraphs these two tendencies have been analysed, insofar as the first parameter (the “new” obligations of the author State) is concerned. Obviously, these new obligations may, in fact, not be fulfilled, and then the question arises what the legal consequences of such a situation are. Partly, this is a matter of the second and third parameters (and a matter of “implementation”). But even within the first parameter it seems clear that, for example, a non-fulfilment of the obligation to stop the breach *stricto sensu* aggravates the responsibility of the author State for the original breach, and so forth.

151. On the other hand, the situation created by the breach and the determination of the legal consequences of this situation, may well involve other (primary) rules of international law, even within the framework of the first parameter. Thus, what we have called “stopping the

breach *lato sensu*”, i.e. the application of remedies compatible with the internal law of the author State, may raise the question whether these remedies are or are not falling short of international standards relating to the exercise of national jurisdiction. Furthermore, an obligation of the author State to effect a *restitutio in integrum stricto sensu* may be incompatible with its right of domestic jurisdiction.

152. The relevance of these other primary rules of international law is dependent on the character of the breach, in other words, on the right infringed. Thus, in principle the other rules just mentioned are irrelevant in the case of an infringement of a direct right of another State.

153. On the other hand, even in the case of infringement of an international right which another State has in the person of his nationals, the situation may involve still other primary rules of international law. Thus, the intention of the author State may have been to harm the other State as such, or it may have infringed such “intermediate” rights of another State as its jurisdiction over ships flying its flag. All these circumstances cannot but have an impact on the degree and content of the international responsibility of the author State, including the quantum of the required reparation in pecuniary terms and, possibly, the required giving of “satisfaction” and its content.

154. The dividing line between the requirement of belated performance and the requirement of substitute performance is obviously determined in the first place by the material possibility (the possibility in fact) of the belated performance. As already noted in paragraph 29 of the preliminary report,<sup>112</sup> there is, in a sense, always an element of material impossibility, since the breach is a fact which cannot itself be “wiped out”.

155. But it would seem that, apart from material impossibility (in a sense comparable to the situation dealt with in article 31 in part 1 of the draft), other cases of what might be called “legal impossibility” cannot be ruled out *a priori* as irrelevant for the determination of the content of the new obligation of the author State—at least not in relation with “lesser” breaches (see below, para. 156).

156. Thus, there may a legal impossibility, under the national legal system of the author State, to arrive at a belated performance of the original obligation. While this circumstance can certainly not justify the breach, it may nevertheless effect a shift from a new obligation of belated performance to a new obligation of reparation (substitute performance). Relevant in this respect are, on the one hand, the character of the right of the other State that was infringed by the breach and, on the other hand, the character of the conduct constituting the breach, including the possibly “substandard” state of the national legal system, both as regards the procedure and as regards the

<sup>108</sup> *Restitutio in integrum stricto sensu* re-establishes the situation existing before the breach: satisfaction adds something to the performance of the original obligation.

<sup>109</sup> Or in cases where it cannot be established that, without the breach, the factual situation would have been different: compare the Judgment of the European Court of Human Rights in the *De Wilde, Ooms and Versyp* cases cited above (footnote 100), where an obligation to provide for the possibility of appeal was held to have been violated, but it was also held that the existence of an appeal procedure would not in all probability have resulted in a different situation of the persons concerned.

<sup>110</sup> *Yearbook . . . 1976*, vol. II (Part Two), p. 117, para. (53) of the commentary to art. 19.

<sup>111</sup> *Yearbook . . . 1980*, vol. II (Part One), p. 129, document A/CN.4/330.

<sup>112</sup> *Ibid.*, pp. 112–113.

content of the “remedies” provided by it (see paras. 138 and 151 above).<sup>113</sup>

157. Furthermore, there may be a legal impossibility under a rule of international law. Thus, as we have noted before, a new obligation to perform a *restitutio in integrum stricto sensu* may be incompatible with the right of domestic jurisdiction of the author State. Again, the rule of domestic jurisdiction can certainly not be invoked to justify the breach, but it may nevertheless effect a shift from a new obligation of belated performance to a new obligation of substitute performance through reparation. Here again, the character of the right infringed and the character of the conduct constituting the breach are relevant.<sup>114</sup>

158. All that has been stated above is no more than an attempt of “approximation”<sup>115</sup> to a (third) rule of proportionality linking the actual response to the actual breach, as far as the first parameter is concerned. Indeed, it should be recalled that at present only the first parameter is involved, i.e. the new obligations of the author State, and that this parameter is only one stage in the (gradual) transition from a primary rule of international law, determining the legal consequences of certain facts in respect of the relationship between States, towards the second and third parameters, and towards the “implementation” of State liability and responsibility.<sup>116</sup>

159. Even within the framework of the first parameter alone, it would seem inevitable, in the approximation of proportionality, to categorize actual breaches of international obligation along the lines indicated above (paras. 137–138). Obviously, in practice it will not always be easy to fit into such categorization the manifold primary rules of international law actually infringed and the various circumstances under which the actual breach has been committed.

160. Furthermore, there is the possible impact (which the Special Rapporteur would like to reserve for treatment in a later report) on the new obligations of the author State of the (mere) contribution of the author State, of the injured State, or of a third State, to a situation not in conformity with the situation required by a rule of international law.<sup>117</sup>

<sup>113</sup> In a certain sense, one might compare this situation with the one dealt with in article 32 of part 1 of the draft, inasmuch as in both cases there is a material possibility of performance of the international obligation and in both cases there are considerations outside the field of State-to-State relations that affect those relations.

<sup>114</sup> This may correspond to a certain extent, with the “exceptions” to an obligation of *restitutio in integrum stricto sensu*, on the ground of “irreversibility” of the situation or otherwise (see para. 124 above). In a sense, a comparison can be made with article 33 of part 1 of the draft, dealing with the “state of necessity”.

<sup>115</sup> See the preliminary report, para. 99 (*Yearbook . . . 1980*, vol. II (Part One), p. 129, document A/CN.4/330).

<sup>116</sup> In connection with “implementation”, it should be noted that the specific legal consequences of the non-performance of a binding judicial determination of responsibility for an internationally wrongful act require special treatment.

<sup>117</sup> It would seem preferable to treat these “abnormal” situations separately in view of their even closer relationship with primary rules.

161. Three types of situations are involved:

(a) The situations referred to in articles 11, 12, 14 and 15 of part 1 of the draft: the contribution of the author State;<sup>118</sup>

(b) The situations referred to in article 29 of part 1 (see also the reference in art. 35 to art. 29) and (other) cases of “contributory negligence” of the injured State;

(c) The situations referred to in articles 27 and 28 of part 1: the contribution of a third State.

162. In connection with these types of situation, reference should also be made to (a) the case in which a “state of necessity” under article 33 was “contributed” to by the injured State; and (b) the cases referred to in paragraph 101 of the preliminary report.<sup>119</sup>

163. All this requires a flexible formulation of any draft articles to be inserted in part 2.

### E. Draft articles

164. On the basis of the foregoing, the following draft articles are submitted:

#### *The content, forms and degrees of international responsibility (part 2 of the draft articles)*

#### CHAPTER I

#### GENERAL PRINCIPLES

##### *Article 1*

**A breach of an international obligation by a State does not, as such and for that State, affect [the force of] that obligation.**

*Reference.* See paragraphs 50–57 of the present report. See also article 16 (as well as article 18) of part 1 of the draft articles on State responsibility.

##### *Article 2*

**A rule of international law, whether of customary, conventional or other origin, imposing an obligation on a State, may explicitly or implicitly determine also the legal consequences of the breach of such obligation.**

*Reference.* See paragraphs 50, 51, 58 and 59 of the present report. See also article 17 of part 1 of the draft articles on State responsibility.

##### *Article 3*

**A breach of an international obligation by a State does not, in itself, deprive that State of its rights under international law.**

*Reference.* See paragraphs 50, 51 and 60–65 of the present report.

<sup>118</sup> See the preliminary report, paras. 20–26 (*ibid.*, pp. 111–112).

<sup>119</sup> *Ibid.*, p. 127.

## CHAPTER II

OBLIGATIONS OF THE STATE WHICH HAS  
COMMITTED AN INTERNATIONALLY  
WRONGFUL ACT*Article 4*

Without prejudice to the provisions of article 5,

1. A State which has committed an internationally wrongful act shall:

(a) discontinue the act, release and return the persons and objects held through such act, and prevent continuing effects of such act; and

(b) subject to article 22 of part 1 of the present articles, apply such remedies as are provided for in, or admitted under, its internal law; and

(c) re-establish the situation as it existed before the breach.

2. To the extent that it is materially impossible for the State to act in conformity with the provisions of paragraph 1 of the present article, it shall pay a sum of money to the injured State, corresponding to the value which a fulfilment of those obligations would bear.

3. In the case mentioned in paragraph 2 of the present article, the State shall, in addition, provide satisfaction to the injured State in the form of an apology and of appropriate guarantees against repetition of the breach.

*Article 5*

1. If the internationally wrongful act is a breach of an international obligation concerning the treatment to be

accorded by a State [within its jurisdiction] to aliens, whether natural or juridical persons, the State which has committed the breach has the option either to fulfil the obligation mentioned in article 4, paragraph 1, under (c), or to act in accordance with article 4, paragraph 2.

2. However, if, in the case mentioned in paragraph 1 of the present article,

(a) the wrongful act was committed with the intent to cause direct damage to the injured State, or

(b) the remedies, referred to in article 4, paragraph 1, under (b), are not in conformity with an international obligation of the State to provide effective remedies, and the State concerned exercises the option to act in conformity with article 4, paragraph 2, paragraph 3 of that article shall apply.

*Reference.* See paragraphs 99, 137, 145 and 150–157 of the present report. *Article 4*, paragraph 1, refers to the obligations tending towards a belated performance of the original primary obligation: stop the breach *stricto sensu* subpara. 1(a)); stop the breach *lato sensu* (subpara. 1(b)), and *restitutio in integrum, stricto sensu* (subpara. 1(c)). *Article 4*, paragraphs 2 and 3, refers to the obligations tending towards a substitute performance (reparation *ex nunc*, reparation *ex tunc*, reparation *ex ante*); it uses the terminology of the *Chorzów Factory* standard. *Article 5* singles out a particular type of primary obligations as entailing a lesser obligation of the author State.<sup>120</sup>

<sup>120</sup> To a certain extent, this attempt at categorization of primary international obligations is comparable to the three categories of Gräfrath and Steiniger, cited in *Yearbook . . . 1976*, vol. II (Part Two), p. 115, footnote 546.