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

Topic:
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STATE RESPONSIBILITY

[Agenda item 2]

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I. Introduction

1. In order to expedite the study of the topic, the Special Rapporteur herewith submits 16 draft articles, based on his previous reports¹ and on the discussions relating thereto at previous sessions of the International Law Commission and of the Sixth Committee of the General Assembly.

2. At a later stage the Special Rapporteur will submit the commentaries to these draft articles. This course of action is dictated by the following considerations. First, parts of the appropriate commentaries are already contained in previous reports; secondly, the final commentary depends on the final drafting of the articles and the observations made in the Drafting Committee and the Commission itself in the course of the adoption of the draft articles.

3. Obviously, apart from remarks concerning the content and drafting of the articles submitted in the present report,

the Commission may wish to elaborate in greater detail some or all of these texts and may consider it useful to treat in part 2 of the draft subtopics not addressed in these draft articles (such as the quantum of damages or the so-called nationality of claims).

4. The draft articles submitted in this report are meant to replace all earlier articles proposed by the Special Rapporteur.

5. On further reflection, the Special Rapporteur has come to the conclusion that the matter dealt with in draft article 4 as submitted in his third report (*jus cogens*),² which the Commission discussed and referred to the Drafting Committee but on which the Committee did not make a proposal to the Commission, could very well be dealt with within the framework of the articles on reciprocity and reprisals (see articles 8 and 9 as submitted below).

6. Moreover, since the majority of the Commission apparently is of the opinion that aggression and self-defence are matters falling within the scope of the topic of State

* Incorporating document A/CN.4/380/Corr.1.

¹ See (a) second report: *Yearbook* . . . 1981, vol. II (Part One), p. 79, document A/CN.4/344;

(b) third report: *Yearbook* . . . 1982, vol. II (Part One), p. 22, document A/CN.4/354 and Add.1 and 2;

(c) fourth report: *Yearbook* . . . 1983, vol. II (Part One), p. 3, document A/CN.4/366 and Add.1.

² Document A/CN.4/354 and Add.1 and 2 (see footnote 1 (b) above), para. 148.

responsibility, the Special Rapporteur wishes to withdraw his proposal, made in the third report, to insert a general article on "proportionality" (article 2).³ Here again, the matter would seem to be more properly dealt with within the framework of the article on reprisals (see article 9, paragraph 2, as submitted below).

7. There has been some discussion at previous sessions of the Commission on the order in which the various sub-topics should be treated. The draft articles now presented deal with the legal consequences of international crimes and, in particular, with the legal consequences of aggression at the very end, just before the saving clause (see articles 14 and 15). Obviously this is not because of any lesser importance of those wrongful acts. On the contrary, if one arranges the articles on the legal consequences of internationally wrongful acts in increasing order of gravity, and if one recognizes that such legal consequences are cumulative in the sense that the legal consequences of international crimes are added to the legal consequences of internationally wrongful acts in general, such an order seems to be indicated. However, this is a mere matter of drafting and another order may well be envisaged.

8. In view of the above, the Special Rapporteur will, at the present stage, limit himself to the following commentaries:

Article 1: text and commentary provisionally adopted by the Commission at its thirty-fifth session.⁴

Article 2: idem; the reference between square brackets to article 4 is now replaced by a reference to new article 12 (see paragraph 5 above) and the reference to article 5 is replaced by a reference to new article 4 (see the commentary to article 4 below).

Article 3: idem.

Article 4: idem; previously adopted as article 5 (see paragraph 5 above).

Article 5: new; compare paragraphs 112 *et seq.* and paragraphs 122-123 of the fourth report.⁵

³ *Ibid.*, para. 146.

⁴ *Yearbook . . . 1983*, vol. II (Part Two), p. 42.

⁵ See footnote 1 (c) above.

Article 6: compare article 4 as submitted in the second report.⁶

Article 7: compare article 5 as submitted in the second report.⁷

Article 8: compare paragraphs 95 *et seq.* of the fourth report.⁸

Article 9, paragraph 1: idem.

Article 9, paragraph 2: compare article 2 as submitted in the third report⁹ (see also paragraph 6 above).

Article 10: compare paragraphs 102 *et seq.* of the fourth report.¹⁰

Article 11: compare paragraphs 84 *et seq.* and paragraph 124 of the fourth report.¹¹

Article 12: compare article 4 and commentary, as submitted in the third report;¹² see also paragraph 59 of the second report.¹³

Article 13: compare paragraphs 109 and 130 of the fourth report.¹⁴

Article 14, paragraph 1: idem; see also article 6 and commentary, as submitted in the third report.¹⁵

Article 15: idem (see also paragraphs 6 and 7 above).

Article 16: compare paragraphs 126 and 127 of the fourth report;¹⁶ see also article 12, subparagraph (a), as submitted below.

⁶ Document A/CN.4/344 (see footnote 1 (a) above), para. 164.

⁷ *Ibid.*

⁸ See footnote 1 (c) above.

⁹ Document A/CN.4/354 and Add.1 and 2 (see footnote 1 (b) above), para. 146.

¹⁰ See footnote 1 (c) above.

¹¹ *Ibid.*

¹² Document A/CN.4/354 and Add.1 and 2 (see footnote 1 (b) above), para. 148.

¹³ See footnote 1 (a) above.

¹⁴ See footnote 1 (c) above.

¹⁵ Document A/CN.4/354 and Add.1 and 2 (see footnote 1 (b) above), para. 150.

¹⁶ See footnote 1 (c) above.

II. Draft articles

Article 1

The international responsibility of a State which, pursuant to the provisions of part 1, arises from an internationally wrongful act committed by that State entails legal consequences as set out in the present part.

Article 2

Without prejudice to the provisions of articles 4 and 12, the provisions of this part govern the legal consequences of any internationally wrongful act of a State, except where

and to the extent that those legal consequences have been determined by other rules of international law relating specifically to the internationally wrongful act in question.

Article 3

Without prejudice to the provisions of articles 4 and 12, the rules of customary international law shall continue to govern the legal consequences of an internationally wrongful act of a State not set out in the provisions of the present part.

Article 4

The legal consequences of an internationally wrongful act of a State set out in the provisions of the present part are subject, as appropriate, to the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security.

Article 5

For the purposes of the present articles, "injured State" means:

(a) if the internationally wrongful act constitutes an infringement of a right appertaining to a State by virtue of a customary rule of international law or of a right arising from a treaty provision for a third State, the State whose right has been infringed;

(b) if the internationally wrongful act constitutes a breach of an obligation imposed by a judgment or other binding dispute-settlement decision of an international court or tribunal, the other State party or States parties to the dispute;

(c) if the internationally wrongful act constitutes a breach of an obligation imposed by a bilateral treaty, the other State party to the treaty;

(d) if the internationally wrongful act constitutes a breach of an obligation imposed by a multilateral treaty, a State party to that treaty, if it is established that:

- (i) the obligation was stipulated in its favour; or
- (ii) the breach of the obligation by one State party necessarily affects the exercise of the rights or the performance of the obligations of all other States parties; or
- (iii) the obligation was stipulated for the protection of collective interests of the States parties; or
- (iv) the obligation was stipulated for the protection of individual persons, irrespective of their nationality;

(e) if the internationally wrongful act constitutes an international crime, all other States.

Article 6

1. The injured State may require the State which has committed an internationally wrongful act to:

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

(b) apply such remedies as are provided for in its internal law; and

(c) subject to article 7, re-establish the situation as it existed before the act; and

(d) provide appropriate guarantees against repetition of the act.

2. To the extent that it is materially impossible to act in conformity with paragraph 1 (c), the injured State may require the State which has committed the internationally wrongful act to pay to it a sum of money corresponding to

the value which a re-establishment of the situation as it existed before the breach would bear.

Article 7

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, and the State which has committed the internationally wrongful act does not re-establish the situation as it existed before the breach, the injured State may require that State to pay to it a sum of money corresponding to the value which a re-establishment of the situation as it existed before the breach would bear.

Article 8

Subject to articles 11 to 13, the injured State is entitled, by way of reciprocity, to suspend the performance of its obligations towards the State which has committed an internationally wrongful act, if such obligations correspond to, or are directly connected with, the obligation breached.

Article 9

1. Subject to articles 10 to 13, the injured State is entitled, by way of reprisal, to suspend the performance of its other obligations towards the State which has committed the internationally wrongful act.

2. The exercise of this right by the injured State shall not, in its effects, be manifestly disproportional to the seriousness of the internationally wrongful act committed.

Article 10

1. No measure in application of article 9 may be taken by the injured State until it has exhausted the international procedures for peaceful settlement of the dispute available to it in order to ensure the performance of the obligations mentioned in article 6.

2. Paragraph 1 does not apply to:

(a) interim measures of protection taken by the injured State within its jurisdiction, until a competent international court or tribunal, under the applicable international procedure for peaceful settlement of the dispute, has decided on the admissibility of such interim measures of protection;

(b) measures taken by the injured State if the State alleged to have committed the internationally wrongful act fails to comply with an interim measure of protection ordered by such international court or tribunal.

Article 11

1. The injured State is not entitled to suspend the performance of its obligations towards the State which has committed the internationally wrongful act to the extent

that such obligations are stipulated in a multilateral treaty to which both States are parties and it is established that:

(a) the failure to perform such obligations by one State party necessarily affects the exercise of the rights or the performance of obligations of all other States parties to the treaty; or

(b) such obligations are stipulated for the protection of collective interests of the States parties to the multilateral treaty; or

(c) such obligations are stipulated for the protection of individual persons irrespective of their nationality.

2. The injured State is not entitled to suspend the performance of its obligations towards the State which has committed the internationally wrongful act if the multilateral treaty imposing the obligations provides for a procedure of collective decisions for the purpose of enforcement of the obligations imposed by it, unless and until such collective decision, including the suspension of obligations towards the State which has committed the internationally wrongful act, has been taken; in such case, paragraph 1 (a) and (b) do not apply to the extent that such decision so determines.

Article 12

Articles 8 and 9 do not apply to the suspension of obligations:

(a) of the receiving State regarding the immunities to be accorded to diplomatic and consular missions and staff;

(b) of any State by virtue of a peremptory norm of general international law.

Article 13

If the internationally wrongful act committed constitutes a manifest violation of obligations arising from a multilateral treaty, which destroys the object and purpose of that treaty as a whole, article 10 and article 11, paragraph 1 (a) and (b) and paragraph 2, do not apply.

Article 14

1. An international crime entails all the legal consequences of an internationally wrongful act and, in addition,

such rights and obligations as are determined by the applicable rules accepted by the international community as a whole.

2. An international crime committed by a State entails an obligation for every other State:

(a) not to recognize as legal the situation created by such crime; and

(b) not to render aid or assistance to the State which has committed such crime in maintaining the situation created by such crime; and

(c) to join other States in affording mutual assistance in carrying out the obligations under subparagraphs (a) and (b).

3. Unless otherwise provided for by an applicable rule of general international law, the exercise of the rights arising under paragraph 1 of the present article and the performance of the obligations arising under paragraphs 1 and 2 of the present article are subject, *mutatis mutandis*, to the procedures embodied in the United Nations Charter with respect to the maintenance of international peace and security.

4. Subject to Article 103 of the United Nations Charter, in the event of conflict between the obligations of a State under paragraphs 1, 2 and 3 of the present article and its rights and obligations under any other rule of international law, the obligations under the present article shall prevail.

Article 15

An act of aggression entails all the legal consequences of an international crime and, in addition, such rights and obligations as are provided for in or by virtue of the United Nations Charter.

Article 16

The provisions of the present articles shall not prejudice any question that may arise in regard to:

(a) the invalidity, termination and suspension of the operation of treaties;

(b) the rights of membership of an international organization;

(c) belligerent reprisals.