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Preliminary report on the content, forms and degrees of international responsibility (Part 2 of the draft articles on State responsibility), by Mr. Willem Riphagen, Special Rapporteur

Topic:
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**Preliminary report on the content, forms and degrees
of international responsibility (Part 2 of the
draft articles on State responsibility)**

by Mr. Willem Riphagen, Special Rapporteur

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ABBREVIATIONS

| | |
|---------------------------|---|
| I.C.J. | International Court of Justice |
| <i>I.C.J. Reports</i> | <i>I.C.J., Reports of Judgments, Advisory Opinions and Orders</i> |
| ICAO | International Civil Aviation Organization |
| P.C.I.J. | Permanent Court of International Justice |
| <i>P.C.I.J., Series A</i> | <i>P.C.I.J., Collection of Judgments (through 1930)</i> |

EXPLANATORY NOTE: ITALICS IN QUOTATIONS

An asterisk inserted in a quotation indicates that, in the passage immediately preceding the asterisk, the italics have been supplied by the Special Rapporteur.

1. When, in response to relevant recommendations of the General Assembly, the International Law Commission in the early 1960s decided to study *ex novo* the topic of State responsibility, it included at the very outset the content, forms and degrees of State responsibility among the questions to be considered under the topic.¹ Thus, reference to the contents, forms and degrees of State responsibility are found in memoranda submitted by members of the Sub-Committee on State Responsibility set up by the Commission in 1962, as well as in the records of the

proceedings of that Sub-Committee.² More significant are the conclusions reached in this respect by the Sub-Committee itself when it decided unanimously to recommend to the Commission a series of "indications on the main points to be considered as to the general aspects of the international responsibility of the State" which "may serve as a guide to the work".³ After outlining a preliminary point (Definition of the concept of the international responsibility of the State) and a first point (Origin of international responsibility), the indications recommended by the Sub-Committee to the Commission are as follows:

Second point: The forms of international responsibility

(1) *The duty to make reparation*, and the right to apply sanctions to a State committing a wrongful act, as consequences of responsibility. Question of the penalty in international law. Relationship between consequences giving rise to reparation and those giving rise to punitive action. Possible distinction between international wrongful acts involving merely a duty to make

* Incorporating documents A/CN.4/330/Corr.1 and 3.

¹ Actually, the first Special Rapporteur for the topic, Mr. F. V. Garcia Amador, already dealt in the reports he submitted to the Commission between 1956 and 1961 with questions having a bearing on the content, forms and degrees of State responsibility. He reviewed, for example, the duty of the State to make reparation for injury caused in its territory to the person or property of aliens. See *Yearbook... 1956*, vol. II, p. 173, document A/CN.4/96; *Yearbook... 1957*, vol. II, p. 104, document A/CN.4/106; *Yearbook... 1958*, vol. II, p. 47, document A/CN.4/111; *Yearbook... 1959*, vol. II, p. 1, document A/CN.4/119; *Yearbook... 1960*, vol. II, p. 41, document A/CN.4/125; and *Yearbook... 1961*, vol. II, p. 1, document A/CN.4/134 and Add.1.

² See *Yearbook... 1963*, vol. II, pp. 228 *et seq.*, document A/5509, annex I, appendix I.

³ Para. 6 of the report by Mr. Roberto Ago, Chairman of the Sub-Committee on State Responsibility, to the Commission (*ibid.*, pp. 228).

reparation and those involving the application of sanctions. Possible basis for such a distinction.

(2) *Reparation*. Its forms. *Restitutio in integrum* and reparation by equivalent or compensation. Extent of reparation. Reparation of indirect damage. Satisfaction and its forms.

(3) *Sanction*. Individual sanctions provided for in general international law. Reprisals and their possible role as a sanction for an international wrongful act. Collective sanctions.⁴

2. At its fifteenth session, in 1963, the Commission approved unanimously the report of the Sub-Committee on State Responsibility, including the proposed programme of work contained therein.⁵ During the discussion, it was pointed out that the questions listed were intended solely to serve as an aide-mémoire for the Special Rapporteur when he came to study the substance of particular aspects of the definition of the general rules governing the international responsibility of States, and that the Special Rapporteur would not be obliged to pursue one solution in preference to another in that respect. It was also pointed out that the approval of the programme of work proposed by the Sub-Committee was without prejudice to the position of the members of the Commission on the substance of the questions set out in that programme.⁶ By its resolution 1902 (XVIII) of 18 November 1963, the General Assembly recommended that the Commission:

Continue its work on State responsibility, taking into account the views expressed at the eighteenth session of the General Assembly and the report of the Sub-Committee on State responsibility and giving due consideration to the purposes and principles enshrined in the Charter of the United Nations.

3. At its nineteenth session, in 1967, the Commission, in its new composition, confirmed the instructions given to the Special Rapporteur in 1963.⁷ The note submitted at that session by Mr. Roberto Ago, Special Rapporteur, reproduced the indications on the main points to be considered under the topic recommended by the Sub-Committee on State Responsibility,⁸ and approved by the Commission, including those quoted under the second point (The forms of international responsibility).⁹ They were likewise reproduced in the first report by Mr Ago as Special Rapporteur, submitted to the Commission in 1969.¹⁰

4. Following consideration at its twenty-first session of that first report, the Commission reported in 1969 to the General Assembly, *inter alia*, as follows:

⁴ *Ibid.*

⁵ *Ibid.*, p. 224, document A/5509, para. 55.

⁶ *Ibid.*, para. 54.

⁷ *Yearbook... 1967*, vol. II, p. 368, document A/6709/Rev. 1, para. 42.

⁸ See para. 1 above.

⁹ *Yearbook... 1967*, vol. II, p. 326, document A/CN.4/196, para. 2.

¹⁰ *Yearbook... 1969*, vol. II, p. 139, document A/CN.4/217 and Add.1, para. 91.

... The Special Rapporteur, in summing up the debate, gave an account of the views of members of the Commission and announced his future plan of work. There was general agreement on the main lines of the programme to be undertaken on the subject during the next sessions.

Thus the Commission was in general agreement in recognizing that the codification of the topic of the international responsibility of States should not start with a definition of the contents of those rules of international law which laid obligations upon States in one or other sector of inter-State relations. The starting point should be the imputability to a State of the violation of one of the obligations arising from those rules, irrespective of their origin, nature and object. The aim, then, will be to establish, in an initial part of the proposed draft articles, the conditions under which an act which is internationally illicit and which, as such, generates an international responsibility can be imputed to a State. This first stage of the study will include the definition of the objective and subjective conditions for such imputation; the determination of the different possible characteristics of the act or omission imputed, and of its possible consequences; and an indication of the circumstances which, in exceptional cases, may prevent the imputation. The Special Rapporteur was asked to submit a report on the topic, containing a first set of draft articles, at the Commission's twenty-second session.

*Once this first essential task has been accomplished, the Commission proposes to proceed to the second stage, which concerns determination of the consequences of imputing to a State an internationally illicit act and, consequently, the definition of the various forms and degrees of responsibility.** To that end, the Commission was in general agreement in recognizing 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. A definition of the degrees of international responsibility will include determination of the respective roles of reparation and sanction and, particularly in connexion with the latter, separate consideration of the cases in which responsibility is reflected only in the establishment of a legal relationship between the defaulting State and the injured State and the cases in which, on the contrary, a particularly serious offence might also give rise to the establishment of a legal relationship between the guilty State and a group of States, or eventually between that State and the entire international community.

At a third stage it will be possible to take up certain problems concerning what has been termed the "implementation" of responsibility, and questions concerning the settlement of disputes which might be caused by a specific violation of the rules relating to international responsibility."¹¹

5. The conclusions reached by the Commission in 1969 were, on the whole, favourably received by the Sixth Committee of the General Assembly. The plan for the study of the topic, the successive stages in the execution of the plan and the criteria to be applied to the different parts of the draft, as laid down by the Commission, received general approval. In resolution 2501 (XXIV) of 12 November 1969, the General Assembly recommended that the Commission should continue its work on State responsibility, taking into account paragraph 4(c) of General Assembly resolution 2400 (XXIII) of 11 December 1968 in which the Assembly recommended, *inter alia*, that the Commission make every effort to begin substantive work on State responsibility as from its next session.

¹¹ *Ibid.*, p. 233, document A/7610/Rev.1, paras 79-82.

6. Since then, and with reference to the general structure of the draft, the Commission has consistently reiterated, in its annual report to the General Assembly, that: (a) *the origin of international responsibility* forms the subject of part 1 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; (b) part 2 will deal with *the content, forms and degrees of international responsibility*, that is to say, with determination of the consequences that an internationally wrongful act 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); (c) once these two essential tasks are completed, the Commission may perhaps decide to add to the draft a part 3 concerning *the "implementation" ("mise en œuvre") of international responsibility and the settlement of disputes*.¹² In its report on the work of its twenty-seventh session (1975), the Commission, in the paragraphs devoted to the structure of the draft, even developed some of the points which in its opinion should be addressed under the part of the draft devoted to *the content, forms and degrees of international responsibility*, as follows:

43. In the second phase of the study plan, the aim will be to determine what consequences an internationally wrongful act of a State may have under international law in different hypothetical cases, in order to arrive at a definition of the content, forms and degrees of international responsibility and to incorporate appropriate provisions in the draft articles. 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. The establishment of a distinction between internationally wrongful acts giving rise only to an obligation to make reparation and internationally wrongful acts incurring a penalty; the possible basis for such a distinction; and the relationship between the reparative and the punitive consequences of an internationally wrongful act, are some of the questions of principle which will have to be settled before the other matters covered by the second phase of the study plan can be taken up. In this context it will also be necessary to consider a possible distinction between cases where legal relationships arising out of the internationally wrongful act are established solely between the State which has committed the act and the State directly injured by it, and cases where such relationships are also established with other States or even with the international community as a whole. The next step will be to study the more specific issues arising in connexion with reparation and penalties as consequences of the internationally wrongful act of a State under international law. This will entail going into questions relating to modes of reparation (*restitutio in*

integrum, reparation by equivalent or compensation, satisfaction), the extent of reparation, the criteria for fixing reparation, the different types of penalties (individual and collective) and the various material forms (reprisals, etc.) they can take, with due regard, in particular, to pertinent developments resulting from the adoption of the Charter of the United Nations and the establishment of the United Nations system in practice.¹³

7. In the course of the consideration by the Sixth Committee of the report annually submitted by the Commission to the General Assembly, representatives of Member States have referred frequently with approval to the structure of the draft articles on State responsibility under preparation, including its division in parts, and to the content, forms and degrees of State responsibility as the subject-matter of part 2 of the draft. The General Assembly itself has recognized expressly, in its resolutions on the report of the Commission, that the draft articles on State responsibility will comprise more than one part. Thus, for example, General Assembly resolution 32/151 of 19 December 1977 recommended that the Commission should continue on a high priority basis its work on State responsibility,

"with the aim of completing *at least the first reading of the set of draft articles constituting part 1 of the draft** on responsibility of States for internationally wrongful acts, within the present term of office of the members of the International Law Commission".

A similar recommendation is contained in General Assembly resolution 33/139 (sect. I) of 19 December 1978. Still more significant in this respect is the relevant recommendation contained in resolution 34/141 adopted by the General Assembly on 17 December 1979. Paragraph 4(b) of that resolution reads as follows:

4. *Recommends* that the International Law Commission should:

...

(b) Continue its work on State responsibility with the aim of completing, at its thirty-second session, the first reading of the set of draft articles constituting part one of the draft on responsibility of States for internationally wrongful acts, taking into account the written comments of Governments and views expressed on the topic in debates in the General Assembly, and proceed to the study of the further part or parts of the draft with a view to making as much progress as possible in the elaboration of draft articles within the present term of office of the members of the Commission.*

8. In accordance with the plan approved for the study of the topic and the priorities given to its successive stages of execution, Mr. Ago, as Special Rapporteur, began in 1970 to submit a series of reports on *the origin of international responsibility*.¹⁴

¹³ *Yearbook... 1975*, vol. II, p. 56, document A/10010/Rev.1, para. 43.

¹⁴ See *Yearbook... 1970*, vol. II, p. 177, document A/CN.4/233; *Yearbook... 1971*, vol. II (Part One), p. 199, document A/CN.4/246 and Add.1-3; *Yearbook... 1972*, vol. II, p. 71, document A/CN.4/264 and Add.1; *Yearbook... 1976*, vol. II (Part One), p. 3, document A/CN.4/291 and Add.1 and 2; *Yearbook... 1977*, vol. II (Part One), p. 3, document A/CN.4/302 and Add.1-3; *Yearbook... 1978*, vol. II (Part One), p. 31, document A/CN.4/307 and Add.1 and 2; *Yearbook... 1979*, vol. II (Part One), p. 3, document A/CN.4/318 and Add.1-4; and p. 13 above, document A/CN.4/318/Add.5-7.

¹² See *Yearbook... 1973*, vol. II, p. 170, document A/9010/Rev.1, para. 43; *Yearbook... 1974*, vol. II (Part One), p. 274, document A/9610/Rev.1, para. 114; *Yearbook... 1975*, vol. II, p. 56, document A/10010/Rev.1, para. 41; *Yearbook... 1976*, vol. II (Part Two), p. 71, document A/31/10, para. 71; *Yearbook... 1977*, vol. II (Part Two), pp. 7-8, document A/32/10, para. 24; *Yearbook... 1978*, vol. II (Part Two), p. 76, document A/33/10, para. 86; *Yearbook... 1979*, vol. II (Part Two), p. 89, document A/34/10, para. 66.

namely, on the various questions falling under the first phase of the study of the topic. It is on the basis of these reports that the Commission considered and adopted, or is in the process of adopting, the various articles and commentaries relating thereto, constituting part 1 of the draft on State responsibility under preparation. Engaged in the elaboration of the provisions of part 1, the Commission has not yet had the opportunity to undertake the study of the various questions falling under part 2 (*Content, forms and degrees of international responsibility*). However, on the occasion of the consideration and formulation of provisions of part 1, members of the Commission have frequently made incidental references to aspects of questions falling under or having a bearing on part 2 of the draft. Moreover, the Commission's commentaries to various draft articles of part 1 contain developments of particular importance for the study of part 2 or reserve expressly certain questions for consideration in the context of part 2. See, in particular, the commentaries of the Commission to articles 1, 2, 3,¹⁵ 11,¹⁶ 17, 19,¹⁷ 21, 22,¹⁸ 24, 25, 27,¹⁹ 28, 29, 30, 31 and 32,²⁰ as well as the commentaries to chapters III²¹ and V²² of part 1.

9. Articles 1 to 32 of part 1 of the draft have already been adopted by the Commission in first reading, and it is the Commission's intention to complete the first reading of that part at its current session by concluding its study of the circumstances precluding wrongfulness considered in the eighth report of the former special rapporteur, Mr. Ago, which are still outstanding, namely "state of necessity" and "self-defence". Then, as stated in its 1979 report to the General Assembly, the Commission will be in a position to continue its study of the subject and to take up Part 2 of the draft, dealing with the content, forms and degrees of international responsibility. In order to continue its consideration of the subject—and in view of Mr. Ago's election as Judge of the International Court of Justice—the Commission, at its 1979 session,

¹⁵ For the commentaries to arts. 1 to 6, see *Yearbook... 1973*, vol. II, pp. 173 *et seq.*, document A/9010/Rev.1, chap. II, sect. B.

¹⁶ For the commentaries to arts. 10 to 15, see *Yearbook... 1975*, vol. II, pp. 61 *et seq.*, document A/10010/Rev.1, chap. II, sect. B.2.

¹⁷ For the commentaries to arts. 16 to 19, see *Yearbook... 1976*, vol. II (Part Two), pp. 78 *et seq.*, document A/31/10, chap. III, sect. B.2.

¹⁸ For the commentaries to arts. 20 to 22, see *Yearbook... 1977*, vol. II (Part Two), pp. 12 *et seq.*, document A/32/10, chap. II, sect. B.2.

¹⁹ For the commentaries to arts. 23 to 27, see *Yearbook... 1978*, vol. II (Part Two), pp. 81 *et seq.*, document A/33/10, chap. III, sect. B.2.

²⁰ For the commentaries to arts. 28 to 32, see *Yearbook... 1979*, vol. II (Part Two), pp. 94 *et seq.*, document A/34/10, chap. III, sect. B.2.

²¹ See *Yearbook... 1976*, vol. II (Part Two), pp. 75–78, document A/31/10, chap. III, sect. B.2.

²² See *Yearbook... 1979*, vol. II (Part Two), pp. 106–109, document A/34/10, chap. III, sect. B.2.

appointed the author of the present report Special Rapporteur for the topic of State responsibility.²³

10. By submitting, at this stage, the present preliminary report on the content, forms and degrees of international responsibility, the newly appointed Special Rapporteur intends to facilitate a general review by the Commission of a series of questions of principle having, or which may have, a bearing on the elaboration of the provisions to be included in part 2 of the draft. Any guidance or preliminary conclusion of the Commission on such questions will greatly help the work that the Special Rapporteur is supposed to do in the future in connection with the elaboration of those provisions.

11. Under *article 1* of the draft articles on State responsibility as provisionally adopted by the Commission,²⁴

Every internationally wrongful act of a State entails the international responsibility of that State.

An "internationally wrongful act" of a State, according to *articles 3 and 16*, is conduct of that State which is not in conformity with what is required of it by an international *obligation*. Part 2 of the draft articles will have to define the meaning of "international responsibility—in other words, the legal consequences under international law of the internationally wrongful act of a State. While it is possible to talk about an "obligation" of a State under international law without necessarily mentioning another entity towards which such obligation exists (indeed, of the 32 draft articles provisionally adopted up until now only two, *articles 29 and 30*, use the term "obligation of [a] State towards [another] state"), the word "responsibility" would seem to imply another entity towards which a State is responsible. Actually, as stated by the then Special Rapporteur, Mr. Ago, in his third report on State responsibility, the term "international responsibility" has been used to mean:

all the forms of new legal relationship which may be established in international law by a State's wrongful act—irrespective of whether they are limited to a relationship between the State which commits the wrongful act and the State directly injured, or extend to other subjects* of international law as well, and irrespective of whether they are centred on the guilty State's obligation to restore the rights of the injured State and to repair the damage caused, or whether they also involve the faculty of the injured State itself, or of other subjects,* of imposing on the guilty State a sanction permitted by international law.*²⁵

It follows, incidentally, from the above quotation that, while part 1 avoids the term "injured State" and even attaches international responsibility to a breach of an international obligation irrespective of the existence of any injury to interests protected by primary rules of

²³ *Ibid.*, p. 90, document A/34/10, paras. 71–73.

²⁴ For the text of all the draft articles adopted so far by the Commission: *ibid.*, pp. 91 *et seq.*, document A/34/10, chap. III, section. B.1.

²⁵ *Yearbook... 1971*, vol. II (Part One), p. 211, document A/CN.4/246 and Add.1–3, para. 43.

international law, part 2 cannot but take into account such injury, and the subject or subjects of international law to which the interests affected are, so to speak, allocated by international law for the purpose of responsibility.

12. At the same time, while it may be true that for the purposes of part 1, and as stated in *article 17*, paragraph 2,

The origin of the international obligation (i.e., see para. 1, "customary, conventional or other") breached by a State does not affect the international responsibility arising from the internationally wrongful act of that State.

Part 2, in determining the new legal relationships established by a State's wrongful act, cannot ignore the origin—in particular the conventional origin—of the international obligation breached. Furthermore, of course, the Commission, in provisionally adopting *article 19* of its draft articles, was fully aware that "the subject-matter of the obligations breached"—in other words, the content of the primary rule of international law involved—may influence the legal consequences of such a breach, to be determined in part 2. Indeed, the same article, by introducing the quantitative element of the seriousness of the breach in its definition of international crime clearly points to the obvious relevance of the quantitative element, not for part 1 but for part 2 of the draft articles.

13. While, therefore, part 1 could leave aside a number of distinctions as irrelevant for the purposes of determining under what circumstances the "international responsibility of a State" arises, part 2, in defining the *meaning* of international responsibility, will somehow have to reflect these distinctions.

14. It may also be useful to recall at the outset some other questions which are raised by the drafting of several articles of part 1 and which the Commission deliberately left open to be dealt with elsewhere, possibly in part 2 of the draft articles. Thus, *articles 27 and 28*, stipulating—in the case of *article 27*, by implication—the international responsibility of a State other than the one which committed an internationally wrongful act, raise the question of the relationship between this responsibility and the responsibility, if any, of the latter State, incurred in connection with one and the same wrongful act.

15. Again, *article 29*, in precluding the wrongfulness of a specified act of a State in relation to another State which has validly given its consent to the commission of that specified act, deliberately leaves open the question of international responsibility entailed towards a *third* State. Whereas paragraph 2 of this article nullifies paragraph 1 "if the obligation arises out of a peremptory norm of general international law", if the article does not purport to deal with the possible impact of the consent given on the responsibility towards a third State in cases where there is no breach of an obligation arising out of a peremptory norm.

16. *Articles 31 and 32*—and possibly the articles, still to be drafted, dealing with "state of necessity" and "self-defence"—while precluding the wrongfulness of an act of a State under certain circumstances, do not purport to exclude any and every form of a "new legal relationship" which may be established in international law as a legal consequence of such act. Here again part 2 of the draft articles may be the appropriate place to spell out such legal consequences.

17. Finally, *article 30*, in referring to counter-measures as measures "legitimate under international law" against another State "in consequence of an internationally wrongful act of that other State", clearly presupposes at least some indication in part 2 of what are those measures "legitimate under international law".

18. It would seem that in all the cases dealt with in chapter V under the heading of "Circumstances precluding wrongfulness" there is room for defining the legal consequences of the acts which, *in abstracto*—that is, leaving aside the peculiar circumstances of the concrete situation—still constitute "breaches of an international obligation". At its thirty-first session, the Commission deliberately did not take a decision on the question whether those legal consequences should be dealt with in part 2 of the draft articles on State responsibility or in the context of the Commission's consideration of another topic, namely, the topic "International liability for injurious consequences arising out of acts not prohibited by international law".

19. The present Special Rapporteur is inclined to favour the first of these alternatives. Chapter V deals with cases in which, in view of special circumstances, an otherwise wrongful act is "justified" to the effect that some or all of the legal consequences attached to a wrongful act disappear. Contrariwise, the other topic deals with cases in which, in view of special circumstances, an *in abstracto* perfectly legal act entails some legal consequences otherwise attached to wrongful acts. Obviously the two types of cases tend to "meet" somewhere, possibly in considerations of risk-allocation; but the fundamental differences in international law between *a priori* wrongful and *a priori* legitimate acts of a State would seem to militate in favour of avoiding misunderstanding by separate treatment of the two types of cases.

20. More or less in connection with the foregoing, another question arises. It is recalled that in the situations dealt with in *article 31* (*Force majeure* and fortuitous event) and *article 32* (*Distress*), full responsibility is restored, *inter alia*, "if the State in question has *contributed*" to the occurrence of the situation" (of "material impossibility" or of "extreme distress", as the case may be). One might be tempted to draw an analogy with the cases dealt with in chapter II. There, of course, a different question, that of attribution of conduct to a State, is addressed. Nevertheless, there is a similarity between the two

questions respectively treated in articles 31 and 32, on the one hand, and in chapter II on the other. Indeed, articles 11, 12 and 14, in stipulating that the conduct of persons or groups of persons, or organs, mentioned in those articles, is *not* attributed to the State, add the proviso that this non-contribution “is without prejudice to the attribution to the (a) State of any *other** conduct which is *related to**” the non-attributed conduct and “which is to be considered as an act of the (that) State by virtue of articles 5 to 10”. It would seem that this proviso deals with the case in which conduct directly attributable to the State under articles 5 to 10 *contributes* to a situation not in conformity with what is required by a primary rule of international law. Here again, this contribution seems to restore full responsibility, or at least some degree of responsibility, towards an injured subject of international law.

21. *Article 15* of the draft articles goes even further and—whether in situations where a succession of governments or a succession of States is involved—imposes responsibility for acts of “an insurrectional movement” on the State to which, rather than to any other State, the insurrectional movement, so to speak, “belongs”. One could almost consider this as a case of contribution *a posteriori*.

22. In any case, it would seem clear that the proviso in *articles 11, 12 and 14* also covers cases where the contribution of the State’s “agents” consists of a failure to take appropriate action, legislative or otherwise, to prevent or put an end to conduct of persons or groups of persons not acting on its behalf.

23. As a follow-up of this construction, one might perhaps argue that there is room in part 2 of the draft articles for consideration of some degree of responsibility of a State as a result of conduct not of its “agents” (i.e. the organs, persons and groups of persons mentioned in articles 5 to 10), but of other persons who “belong” to that State rather than to any other State, either by virtue of being its nationals or because they are operating in, or from the territory of that State.

24. The Special Rapporteur would, however, advise against the Commission’s pursuing this train of thought within the context of the topic of State responsibility (as contrasted with the topic of “international liability for injurious consequences of acts not prohibited by international law”). Indeed, were one to envisage even some degree of responsibility of the State by virtue of conduct of its nationals or conduct within its territory, one would in fact invite “extraterritorial” legislation and/or a control by the State over what happens within its territory, effective to a degree of being incompatible with its obligation to respect fundamental freedoms of the individual human being.

25. Rightly, the present draft articles simply refer to a possible responsibility of the State for acts of its agents “related to” conduct not attributable to the State—thereby, it seems, requiring a positive contri-

bution of those agents to the course of events and permitting, in case of responsibility for failure to act, that account be taken not only of the obvious limitations of the factual power of any State, but also of the legal limits of its jurisdiction and its duty to respect human rights.

26. On the other hand, it would seem that the Commission should address itself, within the context of the discussion of part 2 of the draft articles, to the question of the content, form and degree of State responsibility for “contributory” conduct, and this both in relation to articles 11, 12 and 14 and to articles 27 and 28.

27. The primary object of part 2 of the draft articles on State responsibility is to determine the legal consequences of the breach of an international obligation entailing the responsibility of a State. As indicated above,²⁶ those legal consequences may vary according to the subject-matter of the international obligation breached, the seriousness of the breach under the circumstances of the case, and other factors as well. More generally, the legal consequences of an internationally wrongful act having essentially the nature of a reaction (response) directed at the restoration of an equilibrium broken by that wrongful act, a “rule of proportionality” would seem to govern in principle all such legal consequences. Before attempting to analyse further this notion of “proportionality”, it would seem useful to draw up, first, a systematic catalogue of possible legal consequences of internationally wrongful acts.

28. Once more it is recalled that the term “international responsibility” has been used to mean all the forms of new legal relationships that may be established by international law by a State’s wrongful act. In drawing up a systematic catalogue of these new legal relationships, three parameters appear: The first is the content of the new obligations of *the guilty State*; the second, the new “rights” of *the injured State*; the third, the position of *third States* in respect of the situation created by the internationally wrongful act.

29. Turning now to the *first-mentioned parameter*—the new obligations of the guilty State—the obvious primary purpose of the “response” is to re-establish the situation which would have prevailed if no breach of the international obligation had occurred—in other words, the *restitutio in integrum*.²⁷ In essence, a full *restitutio in integrum* is, in fact, always impossible;

²⁶ See para. 12.

²⁷ Among the more recent cases and literature, see for example the Award on the Merits in Dispute between Texaco Overseas Petroleum Company/California Asiatic Oil Company and the Government of the Libyan Arab Republic: American Society of International Law, *International Legal Materials* (Washington, D.C.), vol. XVII, No. 1 (January 1978), p. 1; and M. B. Alvarez de Eulate, “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 (Zaragoza), Nos. 29–32 (1971–1972), p. 11.

what has happened has happened, and no power on earth can undo it. One has to differentiate in view of the time-element involved (as, indeed, a time-element has been introduced in *articles 18, 24, 25 and 26*).

30. From this point of view, there are three possible aspects of the content of the new legal relationship(s): (a) what could be called the *ex nunc*-aspect, which concerns the present; (b) what could be called the *ex tunc*-aspect, which concerns the past; and (c) what could be called the *ex ante*-aspect, which concerns the future. (Here again, no sharp distinctions between the three aspects can be made.) Accordingly, the *ex nunc*-aspect typically envisages the re-establishment of a "right" which has been taken away by the wrongful act.

31. The *ex tunc*-aspect typically envisages the payment of damages as a reparation for the injurious consequences caused by the wrongful act, whereas the *ex ante*-aspect points to a confirmation of the obligation breached, possibly in the form of a guarantee against future breaches of the same obligation. One might say that while the *ex nunc*-aspect is centred on the position of the injured State, the *ex tunc*-aspect looks at the factual consequences of the conduct of the guilty State and the *ex ante*-aspect concerns, rather, the credibility of the primary rule itself. However that may be, the three aspects, as already indicated, are not more than facets of the same object: an attempt to conform what is to what ought to be, or, in the words of the often-quoted judgement of 13 September 1928 of the Permanent Court of International Justice in the *Factory at Chorzów* case (Merits), an attempt "to wipe out all the consequences of the illegal act".²⁸ Indeed, if we look at the *ex tunc*-aspect of the payments of damages as applied in various international judgements and arbitral awards, we often see it encompass the *ex nunc*-aspect (particularly if the re-establishment of the "right" taken away is considered impossible), and even the *ex ante*-aspect, by way of the according of "punitive" damages. Actually, the time-element reappears even if, ostensibly, only the actual damage caused by the conduct of the guilty State is taken into account; thus the awarding of damages for *lucrum cessans*.

32. The concept of *restitutio in integrum* as a new obligation of a State clearly presupposes a "right" of another State or States (the injured State or States) affected by the internationally wrongful act of the first-mentioned State. The draft articles of part I make several distinctions in respect of the content of the (primary) obligations of a State. Thus, *articles 20, 21 and 23* distinguish between obligations of "conduct", obligations of "result" and obligations "to prevent a given event"; *articles 18, 24, 25 and 26* distinguish breaches of an international obligation by "an act of the State not extending in time", an act "having a continuing character", "a composite act" and "a

complex act"; finally, *article 19* distinguishes the "international obligation... essential for the protection of fundamental interests of the international community", and *article 22* mentions "an international obligation concerning the treatment to be accorded to aliens".

33. All these distinctions necessarily refer implicitly to the content of the right of another State or States which is "protected" by the obligation of the first-mentioned State (or States). As such, those distinctions concerning the content of the primary obligation might well be relevant as well for the content of the new obligation arising for a State from its wrongful act. It would, indeed, seem logical *a priori* that there should be a correlation between the parameters of the legal consequences of a breach of an obligation and the parameters of the primary rule (obligation-right).

34. In so far as the first parameter of both is concerned, there should obviously be a quantitative proportionality between the breach and the legal consequences: the more serious the breach, the more complete the new obligation of *restitutio in integrum* (*lato sensu*, i.e., in its three aspects mentioned above). But the question arises whether the "quality" of the primary rule (obligation-right) necessarily influences the content of the new relationship, arising out of the breach of that primary rule—or is such quality only relevant within the context of the second and third parameters? Indeed, whatever the quality of the primary rule breached, there should be a *restitutio in integrum*. However, the quality of the primary rule may certainly be relevant to the allowable response of the injured State or States and to the position of third States in respect of the response; yet even within the context of the first parameter of the legal consequences, there might be a qualitative correlation. Thus it would seem that, in general, the giving of "guarantees" against future breaches (the *ex ante*-aspect) is reserved for cases of violation, through the use of external force or similar means, of fundamental rights of another State, whereas a mere reparation *ex tunc* is required in cases where, within the framework of the exercise of internal jurisdiction of a State, an obligation "concerning the treatment to be accorded to aliens" (art. 22) has been breached.

35. It would not seem, however, that any hard and fast rules can be laid down in this matter. In particular, there seems to be a "grey zone" of cases (both as regards the means applied by the guilty State and as regards the particular nature of the right of the injured State affected thereby) in which primary rules of international law may require a more complete *restitutio in integrum*—including "guarantees"—to be realized as a legal consequence of the wrongful act. In this connection, one might think of situations where an interdependence of States (which in itself creates a greater vulnerability of the situation for acts of one State causing injury to another State) has found expression in a special protection given to such

²⁸ P.C.I.J., Series A, No. 17, p. 47.

situations by a primary rule of international law; such special protection might also then be reflected in the content of the new legal relationship created by a breach of that primary rule. Thus perhaps the interdependence of States, created by their sharing an indivisible "environment", will tend towards the recognition of a duty—in case of wrongful trans-frontier pollution—to give guarantees against a repetition of such event. In a way, the well-known *Trail smelter* arbitration constitutes an illustration of this theme, inasmuch as the Arbitral Tribunal determined the allowable limits of *future* emissions.²⁹ But, of course, this determination was expressly envisaged by the particular *compromis* between the parties to the dispute.

36. It should, furthermore, be recognized that what appears at first sight to be a merely quantitative difference between one particular wrongful act and another may, in actual fact, be a qualitative difference. Thus, for example, and with reference to *article 19* of the draft articles, the seriousness of the breach of an obligation determines the qualitative difference between an international delict and an international crime. Also it would seem clear that what is, in the first instance, a "simple" violation by a State of its obligation not to use the territory of another State for the performance of *acta jure imperii*, may, when followed by similar acts in a deliberate pattern of conduct, constitute a violation of the territorial integrity of that other State. Similar instances of "continuing", "composite" and even "complex" acts changing the quality of the act in connection with the quality of the rights of other States affected thereby can be easily imagined. Often, if not always, the test of this change of quantity into quality may lie in whether the breach of an international obligation is incidental to an otherwise legitimate act or, contrariwise, such breach is the object and purpose of the act itself.

37. Before turning to the second parameter of the legal consequences of an internationally wrongful act of a State—i.e., the new rights of the injured State—the question of the distinction between "injured State" and "third State" should be analysed somewhat further. The possible content of the new obligation of the guilty State has been discussed above. In the first instance, this new obligation is an obligation towards the injured State or States. It is here that the origin of the primary obligation breached by a State is normally relevant. In particular, the conventional origin of the primary obligation normally entails a responsibility towards the other parties to that convention only. In other words, the parties to the new legal relationship are the same States, and only those States, that were parties to the convention stipulating the primary obligation. Moreover, it seems clear that a *restitutio in integrum*—in whichever of its three aspects—pre-

supposes an "injured" State or States. Normally, if the primary obligation is stipulated in a bilateral treaty the other State party to that treaty is the only State which may claim such *restitutio in integrum*. This would seem to be counterpart of the general rule laid down in article 34 of the Vienna Convention on the Law of Treaties.³⁰ Questions may arise, however, as regards (a) a possible responsibility towards an "injured" State which derives rights from a treaty under the relevant other rules of the Vienna Convention, and (b) a possible responsibility towards a State party to a multilateral treaty which is not directly injured by the breach of an obligation laid down in that treaty.

38. As to the first question, there does not seem to be any reason to treat the protection of the right acquired by the third State in a different way from that of the rights acquired by the parties to the treaty. Surely, under article 37 of the Vienna Convention, the right which has arisen for a third State may be revoked or modified by the parties to the treaty (if it is not "established that the right was intended not to be revocable or subject to modification without the consent of the third State"), but as long as the parties to the treaty have not taken such action, the right of the third State and the corresponding obligation of the States parties remain untouched. So do the legal consequences of a breach of that obligation. Of course, the same goes for a breach of the obligation which has arisen for the third State.

39. The second question is somewhat more complicated, since it involves a possible distinction between—in the terminology of article 60 of the Vienna Convention—"a party specially affected by the breach" of an obligation stipulated in a multilateral treaty, and any "other" party to that treaty. The legal consequence of a breach, dealt with in that article is of course different from the one discussed here; it has a different position in the *scala* of legal consequences, a position which will be discussed below. Here we are rather concerned with the question whether or not the breach by a State of an obligation under a multilateral treaty also entails a new legal relationship between that State and another State, party to that multilateral treaty, whose interests are not directly affected by that breach. Can the latter State (also) claim a *restitutio in integrum*?

40. Obviously that State can not claim damages *ex tunc*, since by definition there is no injury to its material interest. But a re-establishment *ex nunc* (to the direct benefit of the injured State!) and a guarantee *ex ante* against further breaches may well be in the (non-material) interest of that State, in particular in the case mentioned in article 60 of the Vienna Convention, i.e. "...if the treaty is of such a character

²⁹ United Nations, *Reports of International Arbitral Awards*, vol. III (United Nations publication, Sales No. 1949.V.2), pp. 1905–1982.

³⁰ For the text of the Convention, 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. Hereinafter called "Vienna Convention".

that 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". The Special Rapporteur is even inclined to go further and to accept that a multilateral treaty may be of such a character that even a breach by one party, which can not be considered a "material breach" for the purpose of article 60 of the Vienna Convention, may entitle another State party, whose material interests are not directly affected, to claim from the guilty State a re-establishment *ex nunc* and perhaps even a guarantee *ex ante*, even if the breach does not "radically change the position of every party".

41. One may, of course, consider this question as only rather related to the "implementation" of State responsibility, i.e. as a procedural matter. On the other hand, one might also consider the question as one rather related to the existence of a primary obligation. As is well known, the International Court of Justice, in its judgement of 18 July 1966 in the contentious cases of Ethiopia and Liberia *v.* the Union of South Africa,³¹ decided that Ethiopia and Liberia, although—as stated in its earlier judgement of 21 December 1962³²—having a *persona standi in judicio*, could not claim the performance by the Union of South Africa of its obligations under those articles of the Mandate which related to the implementation of the "sacred trust" (para. 33 of the judgement). Those articles, according to the Court, did not create a "separate self-contained right" of the individual Member States of the League of Nations (*ibid.*) but rather dealt with "matters that had their place in the political field". (It is to be noted that, in its advisory opinion of 21 June 1971,³³ the Court confirmed this distinction and there derived from it the conclusion that a "political organ of the United Nations" must be considered as empowered to take the necessary measures of response (para. 102 of the advisory opinion)). These judgements seem to be based on the opinion that the relevant articles of the Mandate did not create an obligation of South Africa towards the individual Member States of the League of Nations.

42. Whichever way one considers the second question (as one concerning the other "parties" to the new obligation of the guilty State to *restitutio in integrum*; as one concerning the "implementation" of State responsibility, i.e. a question of *persona standi in judicio*; or as one concerning the existence or non-existence of a primary obligation towards a particular State), it seems clear to the Special Rapporteur that there is a distinction to be made—for the purpose of

determining the legal consequences of a wrongful act—between a State directly affected by a particular breach of an international obligation (the "injured State") and other States, be they parties to the (multilateral) treaty creating the obligation or not. Within a *scala* of legal consequences, the new legal relationship created by the wrongful act of a State is primarily one between the guilty State and the State (or States) whose material interests are directly affected by that wrongful act.

43. Up till now we have only discussed the new obligation of the guilty State to *restitutio in integrum* in its three aspects: (a) re-establishment *ex nunc* of the "right" of the injured State (comparable to an obligation to fulfil, be it belatedly, the original primary obligation); (b) payment of damages *ex tunc* (comparable to "support" given to the original primary obligation); (c) giving "guarantees" *ex ante* (comparable to "counter measures" against the non-fulfilment of the original primary obligation). Furthermore, we have dealt with the question which other State or States may claim such *restitutio in integrum* from the guilty State.

44. Now we must turn to the *second parameter*: the question of (other) "responses" of the injured State to the wrongful act as a legal consequence of that wrongful act. It would seem useful to deal first with such other possible responses of both the injured State (second parameter) and other States (third parameter) before discussing the question of the relationship between the various "responses" (in particular the question whether or not such other responses are allowed only after it has become clear that the guilty State has not fulfilled its obligation to *restitutio in integrum*).

45. The first other response one might think of lies in the field of "non-recognition" of the situation created by the wrongful act. It is obviously possible that a primary rule of international law requires a State to recognize an existing factual situation created by another State as "legal", that is as entailing legal consequences. The question then may arise whether or not the fact that the situation is created by an internationally wrongful act of that State has an impact on this obligation. At first sight, it seems self-evident that at least the injured State is not any more obliged to recognize the situation created by another State as "legal" if that situation is created by a wrongful act of that other State. There may even be a duty, under international law, of the injured State or, for that matter, of third States, not to recognize the situation as legal—but this is a matter to be discussed within the context of the third parameter below. However, what exactly is the scope of this right of the injured State not to recognize the situation as legal? To answer this question one has to look at primary rules which create an obligation to "recognize".

46. In this connection, the first primary rules which come to mind are those concerning the limits, under

³¹ South West Africa, Second Phase, *Judgment: I.C.J. Reports 1966*, p. 6.

³² South West Africa, Preliminary Objections, *Judgment: I.C.J. Reports 1962*, p. 319.

³³ 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.

international law, of national jurisdiction, and, among those, in particular the rules relating to jurisdiction and other immunities of foreign States and their property. The question then is whether the courts of the injured State may ignore a jurisdictional immunity under international law of a foreign State in dealing with a situation created by that foreign State through an act in breach of its international obligation toward the injured State. The question is dealt with in various national court decisions, and even in national legislation concerning immunities of foreign States. By way of illustration, reference may be made to a judgement of the Netherlands Hoge Raad (Supreme Court) and to the United States legislation on N.V. immunity of foreign States. In the case of *the United States of America v. Bank voor Handel en Scheepvaart* (judgement of 17 October 1969), the United States Supreme Court held that it was empowered to test the conformity with rules of general international law of expropriation measures taken by the United States Government by virtue of its "Trading with Enemy Act" (typically an act *iure imperii*), and such even if the assets expropriated were situated within the territory of the United States and (before the expropriation) were not the property of Netherlands nationals or otherwise Netherlands interests. It should be noted that the implied waiver of immunity by the United States was not considered relevant by the Supreme Court. Furthermore, the Court found that the United States expropriation measures were not contrary to the rules of international law.³⁴

47. Under the United States legislation relating to foreign State immunities,

A foreign State shall not be immune from the jurisdiction of courts of the United States or of the States in any case... (3) in which rights in property taken *in violation of international law** are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign State; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign State and that agency or instrumentality is engaged in a commercial activity in the United States.³⁵

48. Obviously, the question of conformity or non-conformity with rules of international law of foreign legislative or administrative measures may also arise in cases where the foreign State, as such, is not a party in the dispute before the national court, and consequently its immunity (otherwise than via the "Act of State doctrine", a matter which the Commission does not wish to address within the context of the topic "Jurisdictional immunities of States and their property") is not in question. Under such circumstances, the matter of "recognition" of those measures is

usually dealt with by the application of the rules of conflict of laws, particularly of the exception to "recognition" of foreign laws contrary to the "*ordre publique*" of the forum. Whether or not, and if so, to what extent, general rules of public international law have anything to say on the admissible content of national rules of conflict of laws is a matter the Commission has as yet not considered a topic suitable for codification. It would seem therefore to the Special Rapporteur that this particular question of conflict of laws cannot be dealt with in the framework of part 2 of the draft articles on State responsibility. Furthermore, the possible impact of a wrongful act of a State on the scope of its jurisdictional immunity would seem to be more closely linked to, and could therefore better be addressed—if at all—within the framework of the topic entrusted to Mr. Sucharitkul as Special Rapporteur.

49. On the other hand, it may well be that questions of conflict of laws and the recognition due by a State to national rules and decisions of another State are embodied in a treaty between these States. Very often such treaties explicitly limit the duty of recognition by an "*ordre publique*" clause in that treaty. To the extent that this is not the case, one might perhaps consider such a clause to be implied in the treaty, at least for cases in which the other State does not act in conformity with the rules laid down in that treaty which relate to the limits of its jurisdiction. In any case, this situation rather falls within the scope of the *exceptio non adimpleti contractus* as a legal consequence of a wrongful act, to be discussed below.

50. In general, rules of (public) international law relating to (functional) limits of national jurisdiction are considered to be "self-executing", inasmuch as national courts may—and even should—apply such rules even if not "translated" into national legislation. Some national legislations generally refer to the "limits of jurisdiction recognized in international law". Furthermore, in some countries constitutional or other legislation refers to (conventional) rules of international law (even if not dealing with limits of national jurisdiction) as "self-executing", and even to be applied by national courts, the provisions of (prior, or even subsequently enacted) other municipal law notwithstanding.

51. It seems clear that in such cases the national courts of a State will feel inclined not to "recognize", i.e. not to apply, foreign rules or decisions established or taken not in conformity with (conventional) international obligations of that foreign State; in other words; in cases where the application of the foreign rule or decision would be incompatible with the application of the rule of international law binding on both States. Here again, the question may arise whether such "reaction" to a wrongful act of a foreign State is always permissible under (other) rules of international law. Sometimes this is clearly not the case. Thus, for instance, in the field of diplomatic

³⁴ See *Netherlands Yearbook of International Law, 1970*, vol. 1 (Leyden, Sijthoff, 1971), pp. 232–238.

³⁵ United States of America, *United States Statutes at Large, 1976* (Washington, D.C., U.S. Government Printing Office, 1978), vol. 90, part 2, pp. 2892–2893, Public Law 94–583, sect. 1605, sub-sect. 3(a).

immunities, no wrongful act whatsoever of a State could possibly justify a breach of the diplomatic immunities which that State enjoys in the territory of the injured State. This rule however, would seem to fall within the scope of the limitations which rules of international law on particular subject-matters (*inter alia*, protection of interests of the international community of States as a whole and protection of internationally recognized human rights) put to any type of “response” to an internationally wrongful act. These limitations will be discussed below.

52. Apart from such limitations, the non-recognition, in the exercise by a State of its national jurisdiction, of situations created by the internationally wrongful act of another State within its jurisdiction seems to be governed by the rules of international law specifically relating to “jurisdiction”. A general rule of international law to the effect that any internationally wrongful act of a State entitles the injured State to overstep the limits of its jurisdiction, does not, in the opinion of the Special Rapporteur, seem to exist. (This does not exclude that such response by the injured State may be lawful in case the guilty State, in its turn, has overstepped the limits of its jurisdiction.)

53. In a certain sense, the question of the “non-recognition” by a State of a situation created by another State is reflected on another level by the rules of international law relating to “intervention” by a State in the affairs of another State. Obviously, a “response” of a State to an internationally wrongful act of another State is not necessarily an “intervention” in the affairs of that other State, prohibited by the general rules of international law. Here again, if a particular type of means of “intervention” is prohibited by international law even as a response to an internationally wrongful act of a State against which the intervention is directed, this is so by virtue of a rule of international law of the type just referred to, i.e. a rule which makes the prohibition of intervention so to speak “resistant” against being breached by way of response to a wrongful act. Such special protection is, it would seem, not given to all interests which are safeguarded by the international law rule prohibiting intervention. In this connection, it is tempting to refer to another context of the “resistance” of a rule of international law against its breach under special circumstances. Reference is made here to the report of the former Special Rapporteur, Mr. Ago, on “state of necessity” as a circumstance precluding wrongfulness.³⁶ In paragraphs 55 and following of this report, Mr. Ago—in the opinion of the present Special Rapporteur, quite convincingly—demonstrates (see in particular paragraph 66) that the prohibition of “intervention” is not necessarily in all its aspects “immune” from being “lawfully” breached by virtue of the excuse of a “state of necessity”. It would seem that the same conclusion is equally valid as regards some breach of this prohibition committed as a counter-

measure—in the sense of article 30 of the draft articles—in respect of an internationally wrongful act.

54. In dealing with “non-recognition” as a response to an internationally wrongful act we have to take into account that this legal consequence is not so much directed against the wrongful conduct itself (*ex tunc*), nor even against its immediate result, the event that has taken place (*ex nunc*), but rather against the “follow-up” of that event (*ex ante*). Indeed, non-recognition is refusing to give an otherwise mandatory follow-up to the event that has taken place. (As such, it must be distinguished from another possible legal consequence of a wrongful act: the “substitution”, for the purposes of recognition, of the event that has taken place by a situation as it would have been if the conduct had been in conformity with the obligation of the guilty State. Of course, such substitution of a “fiction” for a “fact” presents some inherent difficulties, quite apart from it being in principle a stronger response than the mere non-recognition of the facts.) Obviously, the admissibility of such response must depend on the “quality” of the wrongful act. Thus, for instance, an act of aggression may have the immediate result that a territory not under the sovereignty of the aggressor State is occupied by it. Leaving aside the question whether, and if so, to what extent, such occupation entails any right of the occupying State as a belligerent State, it is common ground that the occupied territory does not, in law, become part of the territory of the occupying State. Consequently, its administration of the territory (at least to the extent not covered by its rights as a belligerent State) is certainly not something that other States are bound to recognize as legal. (See, under the first principle of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations:³⁷ “No territorial acquisition resulting from the threat or use of force shall be recognized as legal.”)

55. As is well known, the International Court of Justice, in its advisory opinion of 21 June 1971,³⁸ for the purposes of the legal consequence of non-recognition, as it were, assimilated the “continued presence” of South Africa in Namibia after the withdrawal of the Mandate by the General Assembly to a “territorial acquisition resulting from the threat or use of force” in the sense of the rule embodied in the General Assembly’s Declaration mentioned just above. (It is to be noted that the withdrawal of the Mandate was itself construed by the Court as a legal consequence of the wrongful acts of South Africa in violation of its obligations under the Mandate. We will come back to this aspect when discussing the relationship between the various legal consequences of wrongful acts, culminating in the “implementation” of

³⁷ General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

³⁸ For reference, see footnote 33 above.

³⁶ See p. 14 above, document A/CN.4/318/Add.5-7, sect. 5.

State responsibility.) In paragraphs 121 and following of its advisory opinion, the Court determines which “dealings with the Government of South Africa” are to be considered as implying “a recognition that South Africa’s presence in Namibia is legal”. Of course, there being no injured State (see para. 127: “the injured entity is a people...”), the Court deals here with a mandatory legal consequence in respect of *third States* (i.e. within the context of the third parameter). Obviously the right of the injured State not to recognize may well encompass more than the duty of a third State not to recognize. Nevertheless, the advisory opinion is relevant also in the context of the second parameter, inasmuch as it describes *a contrario* what non-recognition means. Whereas most of the “dealings with the Government of South Africa” prohibited by the obligation not to recognize the continued presence in Namibia as legal are, anyway, dealings that each State is otherwise free to enter or not to enter into (entering into treaty relations, sending diplomatic, consular or special missions, entering into economic and other forms of relationship) and as such are not relevant to the present context of the second parameter, the Court also mentions “dealings” to which a State might be otherwise obliged under a treaty with the guilty State. Actually, the duty to implement a treaty in respect of the whole territory of the other State party to the treaty and of all the territories for the international relations of which that other State party is responsible (see also the final sentence of para. 118 of the advisory opinion) does not apply in principle to a territory “acquired” or “held” by virtue of an internationally wrongful conduct.

56. It is interesting to note, however, that the Court, in paragraph 122, only refers to “existing bilateral treaties” and to “invoking active intergovernmental co-operation”. Furthermore, as regards multilateral treaties, the Court excludes from their non-application “certain general conventions such as those of a humanitarian character, the non-performance of which may adversely affect the *people** of Namibia”. As to the last-mentioned point, the Court also more generally states in paragraph 125 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;

and, in paragraph 127, that:

all States should bear in mind that the injured entity is a *people** which must look to the international community for assistance in its progress towards the goals for which the sacred trust was instituted.

57. All these “reservations” to the non-recognition could, in the opinion of the Special Rapporteur, be explained by the particular legal situation involved, where there was no State injured by the wrongful conduct, but the territory involved was one under international administration for the benefit of its population. This limitation of non-recognition (whether as a duty or as a right) therefore seems to fall rather in

the category, to be discussed below, of the protection of “extra-State” interests.

58. Apart from the right not to recognize as legal the situation created by the wrongful act of the guilty State, the injured State may have other rights as a legal consequence of that wrongful act. Under article 60 of the Vienna Convention, a material breach of a treaty by one of the parties entitles another party “to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part” (*exceptio non adimpleti contractus*). In its aforementioned advisory opinion of 21 June 1971, the International Court in paragraphs 94 and 95, generalizes this rule of international law into “the right to terminate a relationship in case of a deliberate and persistent violation of obligations which destroys the very object and purpose of that relationship”. One may have doubts as to the analogy between a “relationship” such as that which is envisaged in this case and a bilateral treaty relationship, in which normally there is a balance between the obligations of both parties. Indeed, whereas the invoking of the *exceptio non adimpleti contractus* can be seen as an application of the principle of reciprocity, there is nothing “reciprocal” in the relationship between the Mandatory and the League of Nations (or the United Nations). As a matter of fact, the Court, in paragraph 103 of the same advisory opinion, characterizes the United Nations as “the supervisory institution” and, at the end of paragraph 54, recalls one of its earlier statements, according to which the rights of the Mandatory in respect of the mandated territory are rather the *reverse of sovereignty over a territory*, inasmuch as they “have their foundation in the obligations of the Mandatory and . . . are, so to speak, mere tools given to enable it to fulfil its obligations.”

59. Be that as it may, one can draw the conclusion that, whether the rights and obligations under a legal relationship are “horizontally” or “vertically” connected by the “object and purpose” of the relationship as a whole, a response of non-fulfilment of obligations under the relationship is a valid legal consequence of the wrongful act of another State party to the relationship are “horizontally” or “vertically” connected by the “object and purpose” of the relationship as a whole, a response of non-fulfilment of obligations connection—such as that between States parties to a treaty—and a “vertical” connection—such as that between the supervisory part and the supervised party—still has important consequences. Indeed under articles 65 and 66(b) of the Vienna Convention and the annex to the Convention, a *compulsory* procedure for the settlement of disputes relating to termination or suspension of a treaty is provided for, also on the ground mentioned in article 60. On the other hand, according to the advisory opinion of the Court, no such procedure is apparently required in the case of the vertical relationship there envisaged.

60. At the same time, the Court expressly mentions, apparently with approval, that the General Assembly,

in withdrawing the Mandate, established as a ground therefore the breach by South Africa of obligations which as such are not directly contemplated, in the Mandate but rather in other instruments: the Charter of the United Nations and the Universal Declaration of Human Rights (para. 92 of the advisory opinion). This seems to point towards a not too restrictive conception of the “object and purpose” of a relationship, such relationship being possibly the result of a combination of different treaties between the same parties in related fields. (One might point out, in this connection, that perhaps the Mandate might be considered as a “treaty adopted within an international organization” in the sense of article 5 of the Vienna Convention.)

61. Indeed, apart from the applicability of the *exceptio non adimpleti contractus* in the strict sense, a breach of an international obligation may also entail legal consequences as regards the rights of the injured State to the non-fulfilment of obligations towards the guilty State other than those relating to the same “object and purpose” as the one underlying the obligation breached by the guilty State. As a matter of fact, one cannot *a priori* exclude counter-measures lying in a different field of activities than the one which is the “object and purpose” of the obligations breached by the guilty State, if only because of the absence of effective (as opposed to legal) reciprocity between the guilty and the injured State in a matter covered by a treaty under which an obligation is breached by the guilty State. However, the rule of proportionality of the response has a particular importance here (we will come back to this aspect below).

62. Passing now to the *third parameter*—the position of third States in respect of the wrongful act—the basic principle seems to be that a wrongful act does not create a new legal relationship between the guilty State and a State other than the injured State. Indeed, one might say that if the wrongful act of the guilty State A towards the injured State B created a new right of State C, the exercise of such right by State C would amount to an intervention in the external affairs of State A (and possibly, even of State B). There are, of course, exceptions to this basic principle of the “bilateral” character (guilty State/injured State) of the legal relationship created by an internationally wrongful act. Theoretically, one can distinguish three types of exceptions:

(a) There might be more than one “directly” injured State;

(b) The “primary” rule, the breach of which constitutes the wrongful act, is contained in a multilateral treaty;

(c) The wrongful act is a breach of an obligation protecting a fundamental interest which is not solely an interest of an individual State (compare the “international crime” mentioned in art. 19 of the draft articles).

(One might, of course, also consider these three types as types of “injury”, and hence as determining which are the “injured States”).

63. As regards the first type of exception, a distinction must be made between a wrongful act directly injuring two or more States separately, a wrongful act inflicting injury to an interest which two or more States have in common, and the case of inflicting injury on an interest which a State has “through” another State. It would seem that some such distinction underlies the judgement of 5 February 1970 of the International Court of Justice in the *Barcelona Traction* case,³⁹ in which the Court refused to recognize a *jus standi* of Belgium on the basis of nationals of that State allegedly holding 88 per cent of the shares in the company, incorporated under the laws of Canada. The Court distinguished this situation from the one in which there are “concurrent claims being made on behalf of persons having dual nationality...”, and from the situation where “...international law recognizes parallel rights of protection in the case of a person in the service of an international organization” (para. 98 of the judgement; see also paras. 53, 96 and 97). Be that as it may, the Judgement clearly recognizes the possibility of one and the same wrongful act directly inflicting injury on more than one State.

64. The second type of exception is addressed in articles 60 and 70 of the Vienna Convention within the context of the *exceptio non adimpleti contractus*. Article 60, paragraph 2, distinguishes between “a party specially affected by the breach” and “any party other than the defaulting State”. It is interesting to note that, while the former party may invoke the breach as a ground for suspending the operation of the treaty in the relations between itself and the defaulting State (“bilateral” character), the latter party individually has no such right. The response of suspending the operation of the treaty or even terminating it is reserved to “the other parties by unanimous agreement”. Furthermore, paragraph 2(c) of article 60 embodies a sort of *clausula rebus sic stantibus*, inasmuch as it takes into account the consequences of the breach as radically changing “the position of every party with respect to the further performance of its obligations under the treaty”. In that case, any party other than the defaulting State may suspend the operation of the treaty with respect to itself, and presumably also in its relations with the parties, other than the defaulting State. The situation here is somewhat similar to that envisaged in article 17, paragraph 2, *in fine*, of the Vienna Convention on Succession of States in Respect of Treaties.⁴⁰ Indeed, in both cases the “radical change” is linked with the character of the treaty itself. Actually, article 60 of the Vienna Convention only applies to a *material* breach of a treaty, i.e. (apart from the repudiation of the

³⁹ *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment: I.C.J. Reports 1970*, p. 3.

⁴⁰ *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. 190.

treaty) “the violation of a provision essential to the accomplishment of the object or purpose of the treaty”. It seems hard to imagine such a breach as not affecting every other party. Indeed, unless a multilateral treaty is nothing more than a “unification” of independent bilateral relationships (in which case one might even say that the multilateral treaty as such does not have an “object and purpose” of its own), a material breach by a party cannot but inflict injury on all the other parties. (Compare also the type of multilateral treaties, mentioned in art. 20, para. 2 of the Vienna Convention and in art. 17, para. 3 of the Vienna Convention on Succession of States in Respect of Treaties.) Nevertheless, the response can in the first instance only be a *collective* one. The individual action envisaged in article 60, paragraph 2(c) seems to be in the nature of a (provisional) withdrawal from the multilateral treaty as a consequence of a “radical change” in the factual situation, rather than in the nature of a response to a wrongful act. Both the reference to “the further performance of its obligations under the treaty” and the fact that the suspension of the operation of the treaty also affects the relations with parties other than the defaulting State seem to point in the direction of this construction. Surely the provision can only be applied if there has occurred a wrongful act, but it is not so much this wrongful act as the resulting situation—and, presumably, its maintenance or follow up, the “radical change”—which is the basis for withdrawal. In this connection, one might point to the inverse position in article 62, paragraph 2(b): a fundamental change of circumstances may not be invoked if it is the result of a breach, by the party invoking it, of an international obligation. (A similar provision is contained in art. 61, para. 2. Compare also proposed art. 33, para. 2, of the draft articles on State responsibility.)⁴¹ The character of the provision of article 60, paragraph 2(c) as not pertaining to the category of response to a wrongful act is furthermore underlined by the fact that only suspension of the operation of the treaty is allowed. Such suspension, under article 72, paragraph 1, has a limited effect, and even (para. 2) entails a duty “to refrain from acts tending to obstruct the resumption of the operation of the treaty” (a duty in some respects comparable to the one laid down in article 18 of the Vienna Convention).

65. For the reasons outlined above, it would seem that, within the context of the *exceptio non adimpleti contractus*, article 60 of the Vienna Convention does not treat all the parties to a multilateral treaty as “injured States” on the same footing (indeed, we have noted before that the *exceptio non adimpleti contractus*, as regards bilateral treaties, may be considered as the reflection of the principle of reciprocity of performances under the treaty; as such, the material breach by one party almost necessarily creates a “radical change” of the situation for the other

party). On the other hand, the Vienna Convention does recognize the existence of particular multilateral treaties in which the legal relations between each party and each other party are inextricably interwoven and constitute an indivisible whole. This is not far from saying that such particular multilateral treaties create a legal situation in which each obligation of a State party to the treaty is an obligation *erga omnes* (of course, within the framework of the community of States parties to the multilateral treaty). Seen in this light, the second type of exception is rather a prefiguration on a regional scale, of the third. (The term “regional” in this context should not be taken only in its “territorial” sense, but covers all groupings of States, whether on a territorial basis or on a “functional” or even on a purely “personal” basis, such as groupings for collective self-defence.)

66. Passing now to the third type of exception, we note that the existence of such an exception is prefigured by article 19 of the draft articles on State responsibility.⁴² Indeed, quite apart from the question of which response of the third State is allowed under the rules of international law, a “non-neutral position” of the third State in respect of the wrongful act seems to be implied in the qualification of the wrongful act as an “international crime”. The present preliminary report, in discussion of part 2 of the draft articles, is certainly not the place to review the wording of article 19. The question does, however, arise within the context of part 2 as to whether or not the—as yet not fully defined—category of “international crimes” constitutes the only category of internationally wrongful acts which entail a non-neutral position of *every* other State. Furthermore, it would seem to the Special Rapporteur that some further analysis of the relationship between the concept of “international crime” and the concept of “international *jus cogens*” is required in order to clarify the legal content of State responsibility. On the “regional” plane, for instance, one may note a certain similarity in the Vienna Convention between articles 41 and 58, on the one hand, and articles 53, 64 and 71, on the other hand. *Jus cogens*, or something like it, also plays a role in articles 18, paragraphs 2 and 29, paragraph 2 of the draft articles on State responsibility and in the proposed article 33, paragraph 3(a) of that draft. The persistency of certain primary legal relationships, “changing circumstances” notwithstanding, also underlies article 62, paragraph 2(a) of the Vienna Convention as well as articles 11 and 12 of the Vienna Convention on Succession of States in Respect of Treaties. Finally, as will be discussed below, the persistency of certain primary obligations for a State, their breach by another State notwithstanding, underlies, *inter alia*, article 60, paragraph 5 of the Vienna Convention. There seem to be, in other words, different types and consequences of *jus cogens*. For the moment, it seems sufficient to note

⁴¹ See p. 51 above, document A/CN.4/318/Add.5–7, para. 81.

⁴² See footnote 24 above.

that a “non-neutral position” of a third State, or even of every third State, is a “legal consequence” of a wrongful act that is not necessarily reserved for such wrongful acts as constitute international crimes.

67. On the other hand, looking at the list of possible international crimes in article 19, paragraph 3, it would seem *a priori* clear that the legal consequences of those crimes are not necessarily identical; indeed, the principle of proportionality would not allow such automaticity. Here again, reference may also be made to Mr. Ago’s proposal for article 33, which, in its paragraph 3, rightly singles out the prohibition of aggression as particularly immune against the excuse of state of necessity.

68. One of the more general questions which arise in the context of the third type of exception is whether or not the non-neutral position of the third State, and in particular its right to take a counter-measure, is dependent upon a collective decision taken in respect of the wrongful act of the guilty State. As we have seen, the real counter-measure of termination of a multilateral treaty as a consequence of a material breach of the treaty by one of the parties to it is reserved for a collective (even unanimous) decision of the other parties to the treaty.

69. The question is addressed, it would seem, in an advisory opinion of the International Court of Justice mentioned before.⁴³ The situation of the Court had to deal with in this opinion was a very special one, involving the status of a territory (Namibia) which was, and is, not part of the territory of a State. This basic fact may have decisively influenced the Court’s opinion on questions of a more general character which are at issue here. In any case, the Court primarily had to answer the question of the legal consequences for States of a Security Council resolution declaring the continued presence of South Africa in Namibia to be “illegal”. In other words, a collective decision had already been taken as regards the response to a wrongful act. The Court, therefore, did not have to answer the question of what the legal situation would have been if no Security Council resolution had been passed after the termination of the Mandate by the General Assembly of the United Nations.

70. On the other hand, it would seem significant that the Court in a way assimilated the Security Council resolution to a judgement which had the effect of “putting an end to an illegal situation” (para. 117 of the advisory opinion—an express reference to one of the Court’s own earlier judgements, in the *Haya de la Torre* case). In other words, one might perhaps construe the advisory opinion in such a way that the Security Council resolution was considered by the Court as nothing more than an official pronouncement (“judgement”) that South Africa had not fulfilled its obligations arising from the withdrawal of the

Mandate, and that, consequently, its continued presence was illegal. Thus construed, the question of the existence and content of “new legal relationships” between South Africa and other States would have been left open by the Security Council resolution. Starting from this construction, one might say that the Court had to indicate, and did indicate, what those “new legal relationships” were under the rules of general international law. In this perspective it should be noted, in the first place, that the Court declares in respect of the response (paragraph 120 of the opinion) that:

The precise determination of the acts permitted or allowed—what measures are available and practicable, which of them should be selected, what scope they should be given and by whom they should be applied—is a matter which lies within the competence of the appropriate political organs of the United Nations acting within their authority under the Charter.

In other words, a response by States to the wrongful act of South Africa requires a collective decision. Nevertheless, the Court also, as we have seen above, does itself indicate some types of response of individual States, but this is done by way of “interpretation” of the Security Council resolution—that is, as responses already indicated by a collective decision.

71. This, then, rather seems to confirm the statement that a collective decision is required before third States can take any action under a “new legal relationship”, created by a wrongful act, between the guilty State and third States. But this confirmation is still open to doubt since, apart from the fact that in the case of Namibia there is no “injured” State, the Court only deals with *mandatory* responses of States. Obviously, a duty of a third State not to act in conformity with its international obligations towards a guilty State cannot be easily assumed. At most one could require a State which is not an injured State to refrain from giving support *a posteriori* to the wrongful act, and this requirement might even prevail over obligations of the third State towards the guilty State. As a matter of fact, we have seen that most of the conduct considered by the Court as “inconsistent with the declaration of illegality and invalidity” made in the Security Council’s resolution, and consequently prohibited by that resolution, was conduct to which no State was obliged anyway (entering into new treaty relations etc.).⁴⁴ Furthermore, article 27 of the draft articles on State responsibility already qualifies:

Aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act carried out by the latter.

as “an internationally wrongful act”. Surely such aid or assistance must have been rendered before or during the wrongful act, and a specific link of “intention” is required. Nevertheless a duty to refrain from voluntary acts which constitute support *a posteriori* of a wrongful act may be considered to be justified by similar considerations.

72. The point is, however, that a third State may itself commit an internationally wrongful act in

⁴³ For reference, see footnote 33 above.

⁴⁴ Para. 55 above.

refraining from what could be construed as support *a posteriori* of a wrongful act. A right (let alone a duty) of a State which is not a State injured by the wrongful act to do so seems sufficiently exceptional as to be made dependent upon a collective decision to that effect.

73. The requirement of a collective decision, suggested above, seems all the more justified in cases where the response of the third State is more than a mere refusal of support *a posteriori* of the wrongful act. In this connection, passing reference has been made earlier⁴⁵ to a possible measure of response consisting not only of a refusal to recognize the result of a wrongful act, but actually substituting that result by a fictitious situation which would have materialized if the guilty State had acted in conformity with its international obligations. Such substitution is a measure of "self-help" which is in principle inadmissible under international law, unless the State taking such measure of response thereby merely exercises a pre-existing right purportedly infringed by the wrongful act of another State (in other words, simply does not recognize the infringement). Thus, for instance, if a coastal State, in its national legislation, requires previous authorization for the pure passage of foreign fishing boats through its economic zone, another State is allowed to ignore that legislation. If, however, the coastal State, under a treaty is obliged to give in respect of its economic zone licences to the fishermen of another State and does not fulfill this obligation, that other State may not act as if the obligation had been fulfilled. (cf. also the advisory opinion of the International Court of Justice of 3 March 1950,⁴⁶ where the Court declared: "...nowhere has the General Assembly received the power to change, to the point of reversing, the meaning of a vote of the Security Council.") Furthermore, in some specific cases, the rules of international law do admit "self-help", albeit generally only if covered by a collective decision to that effect.

74. Up till now we have discussed the possible "right" of the third State to a non-neutral position in respect of a wrongful act committed by another State. The next step in the *scala* of legal consequences is obviously a possible *duty* of third States to take a non-neutral position. In general, such a duty could only be justified by the necessity of ensuring the "credibility" of a primary rule itself, regardless of the relationship between the guilty State and the injured State involved in the breach of that primary rule. We have seen that the International Court of Justice accepted, in its advisory opinion on the legal consequences for States of the continued presence in South Africa in Namibia,⁴⁷ the possibility of such a duty

(even, to a certain extent, incumbent upon non-member States of the United Nations, if not directly, then at least in the sense of a "non-recognition" by the Member States of the United Nations of the result of conduct of a non-member State which is not in conformity with that "duty": see para. 126 of the Advisory Opinion). It is true that the Court derived this duty from the (collective) decision of the Security Council itself, and that the particular legal status of the territory involved cannot but have influenced the advisory opinion. Indeed, the Court founded the duty of all the Member States of the United Nations on Articles 24 and 25 of the Charter, i.e. on the "primary responsibility for the maintenance of international peace and security" conferred on the Security Council, and apparently leaves to the Security Council full discretion to "deem" (para. 109 of the opinion) that responsibility to be involved irrespective of the nature of the international obligation breached by a State, and perhaps even if no such breach had been established (see also para. 112 of the opinion). In a sense, this opinion finds its counterpoint in Article 94, paragraph 2, of the Charter, which empowers the Security Council "if it deems necessary", to make recommendations or decide upon measures to be taken to give effect to a judgement of the International Court of Justice. In this provision, it seems, the mere fact that a "party to a case fails to perform the obligations incumbent upon it under a judgement rendered by the Court" is sufficient, whether or not such a failure in fact compromises the maintenance of international peace and security. One might, therefore, consider Articles 24 and 25 of the Charter (but not Art. 94, para. 2) to fall outside the scope of "legal consequences of an internationally wrongful act" (and of course Art. 94, para. 2, as falling within the scope of the "implementation" of State responsibility). Be that as it may, one cannot, it would seem, exclude *a priori* a duty of States under rules of general international law to act (or to refrain from otherwise admissible acts) in response to a breach of an international obligation, in particular when such a breach constitutes an "international crime" in the sense of article 19 of the draft articles on State responsibility, even if such breach does not, in fact, involve international peace and security. Again, a collective decision to that effect would seem to be a prerequisite for establishing such duty, and the rule of proportionality should at all times be observed.

75. A duty of all States to adopt specific conduct in response to an internationally wrongful act obviously includes a duty of the injured State to adopt such conduct. In other words, it takes away the normal faculty of the injured State to waive its rights to a response. This consequence seems in keeping with article 29, paragraph 2, of the draft articles on State responsibility. On the other hand, such duty of all States may well imply, at least for some States, a "sacrifice" of some of their interests, such sacrifice being required in order to ensure the credibility of the

⁴⁵ See para. 54 above.

⁴⁶ Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion: *I.C.J. Reports 1950*, p. 10.

⁴⁷ For reference, see footnote 33 above.

primary rule breached by the wrongful act. The question arises whether, under certain circumstances, another sacrifice may be required, in particular a loss of a right (as contrasted with a mere faculty). This question has been very briefly addressed in the Commission on the occasion of the discussions relating to articles 29 and 30. Since article 29—concerning consent—provides that consent only precludes the wrongfulness of the act in relation to the State which has given the consent, and article 30 does not contain a similar wording, the question was put as to whether, under article 30, “a measure legitimate under international law” taken by State A against a guilty State B might also preclude the wrongfulness of that measure in relation to State C. In other words, the question is: does international law legitimate measures of response to a wrongful act of a State, even if such measures of response are not in conformity with an obligation of the State taking such a measure, as against an “innocent” State?

76. In the first instance, the question must be answered in the negative. However, here again there might be exceptions, corresponding to those discussed above.⁴⁸ Thus it may be that a legitimate counter-measure of State A in its relationship with State B would in fact have no effect if it were not accompanied by measures designed to prevent their evasion through dealings in the relationship between State A and State C or their substitution by dealings in the relationship between State C and State B. This fact in itself could not, it seems, justify either interference by State A in the relationship between State C and State B, or a measure not in conformity with the rules governing the relationship between State A and State C, unless the measure is based on a collective decision in which State A and State C participate, and this collective decision imposes a legal duty on State C to take corresponding measures, or at least to render its assistance in the carrying out of such measures. In the particular context of measures taken under Chapter VII of the Charter of the United Nations, articles 48 to 50 seem to reflect such a rule (see also Article 2, para. 5 of the Charter).

77. Among the legal consequences of a wrongful act, a special position is taken by measures taken within the framework of an international organization in respect of the rights of a member State of such organization under its “rules of the organization” (in the sense of art. 2, para. 1(j), of the draft articles on treaties concluded between States and international organizations or between international organizations)⁴⁹ in consequence of an internationally wrongful act of that member State. The constituent instruments (or other “rules of the organization”) of several international organizations provide for suspension of a member State from the exercise of (some of) its rights and

privileges of membership, or even expulsion, in case of such member State having committed a breach of its international obligations (e.g., Articles 5, 6 and 19 of the Charter of the United Nations). It is to be noted, however, that there are also provisions for such measures of suspension in cases where there is not a (direct) breach of an obligation under international law, but rather an attitude of a member State in defiance of resolutions, validly taken by organs of the organization which, in themselves, do not create legal obligations for the member State concerned nor are founded on an internationally wrongful conduct of that State. Thus, for example, article II, section 1, of the International Air Services Transit Agreement of 1944⁵⁰ envisages an ultimate suspension of membership rights in a case where a member State had failed to give reasonable attention to a recommendation made by the Council of ICAO in consequence of a complaint by another member State, such complaint being founded not on a wrongful act of the former member State, but on hardship caused to the latter member State by an act which is in itself not illegal. (See, on this particular clause, the judgement of the International Court of Justice of 18 August 1972;⁵¹ the overlapping of a “complaint” and an “application” is discussed in paras. 21 to 24 of the judgement).

78. Indeed, the membership of an international organization may well entail a general obligation of “solidarity”, the concrete contents of which cannot be defined in advance, while on the other hand the consequences to be drawn from a breach of that obligation are rather a matter of political discretion of the other members, exercised through the competent organs of the organization. For this reason, the Special Rapporteur is inclined to advise the Commission not to deal with this matter within the framework of Part 2 of the draft articles on State responsibility. Another reason is that—to the extent that wrongful acts and legal consequences thereof are involved—the “sanction” of suspension of membership rights or expulsion from an international organization is rather the ultimate means of enforcing a decision of the competent organs of that organization, acting by way of “settlement of disputes” in the largest sense; thus the matter seems to be more related to the subject-matter that will be dealt with in part 3 of the draft articles on State responsibility.

79. Having drawn up a catalogue of possible “new legal relationships established by a State’s wrongful act”⁵² (obligation of the guilty State, rights of the injured State, rights of third States, obligations of third States), we now must turn to the problem of proportionality between the wrongful act and the “response”

⁴⁸ See paras. 62 *et seq.*

⁴⁹ See *Yearbook... 1979*, vol. II (Part Two), p. 138, document A/34/10, chap. IV, sect. B.1.

⁵⁰ United Nations, *Treaty Series*, vol. 84, p. 389.

⁵¹ Appeal Relating to the Jurisdiction of the ICAO Council, *Judgment: I.C.J. Reports 1972*, p. 46.

⁵² See *Yearbook... 1971*, vol. II (Part One), p. 211, document A/CN.4/246 and Add.1–3, para. 43.

thereto. Logically the first question which arises in this context is whether the response—being itself either a limitation of rights or a breach of an obligation under international law—is admissible at all under international law and, if so, under what circumstances (other than the mere fact of the breach of any international obligation by the guilty State). This question even arises as regards the new legal relationship consisting of a new obligation of the guilty State. Thus, for instance, under article 18, paragraph 2, of the draft articles on State responsibility, an act internationally wrongful at the time when it was performed “ceases to be considered an internationally wrongful act if, subsequently, such an act has become compulsory by virtue of a peremptory norm of general international law”. Incidentally, one might compare this rule with the one laid down in article 71, paragraph 2, of the Vienna Convention, since it might well be that the act internationally wrongful at the time when it was performed did have this quality by virtue of an international obligation embodied in a treaty. There would seem to be some contradiction between subparagraph (b) of the provision just referred to and article 18, paragraph 2, of the draft articles on State responsibility, at least if one considers the new legal obligation of the guilty State which was established at the time the wrongful act was committed as a “right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination”. Surely, to the extent that this new obligation is an obligation to pay damages (*ex tunc*) to the injured State, one might wonder if the maintenance of that obligation is “in itself in conflict with the new peremptory norm of general international law”. Indeed, one might envisage at least the possibility that a new peremptory norm of general international law does not purport to have such retroactive effect. The case seems to be somewhat analogous to those dealt with in article 31, paragraph 1, and article 32, paragraph 1, of the draft articles on State responsibility. In those cases the Commission recognized that, although the wrongfulness of the act is precluded, there might still be an obligation of the State having committed the act to pay damages to the injured State since, in general, there seems to be no reason for the injured State to bear the full burden of the consequences of a situation of *force majeure*, fortuitous event or distress (even if the guilty state in question has not “contributed to the occurrence of the situation...”).

80. Be that as it may, it is clear that a *restitutio in integrum* (*ex nunc*) and *a fortiori* a guarantee against repetition of the conduct (*ex ante*) are excluded in the situation envisaged in article 18, paragraph 2, of the draft articles on State responsibility. Furthermore, if there is still an obligation of the—no longer guilty—State to pay damages, such damages cannot include any amount of *lucrum cessans* beyond the date the new peremptory norm came into force (nor, obviously, have any “punitive” element). One can hardly imagine

a new peremptory norm of international law not having at least this degree of retroactivity.

81. In connection with the admissibility of the new legal relationship under international law, reference must be made to the possibility that the primary rule itself describes what the legal consequences of certain conduct should be. Thus one can easily imagine a primary rule of conventional international law—i.e., a treaty which obliges a State party to the treaty to pay an “adequate indemnity” to the national of another State party to the treaty in case the former State proceeds to expropriation of property of that national. This being a primary rule, it is clear that under that rule it is not the expropriation in itself, but the non-payment of the “appropriate indemnity”, which constitutes an internationally wrongful act. It would seem equally clear that this internationally wrongful act cannot establish a new duty of the guilty State to pay damages amounting to more than appropriate indemnity (plus possibly a normal percentage as compensation for the fact that the prescribed payment has not taken place at the prescribed moment).

82. The case just mentioned is certainly not the only instance of a primary rule the content of which determines an element of the new legal relationship that is established by international law as a consequence of the breach of that primary rule. Indeed, more generally, if a primary rule is established by a treaty, that treaty may itself determine, at least as between the parties to the treaty, and subject to any rule of *jus cogens* to the contrary, the legal consequences of a breach of an obligation under that treaty. As regards the legal consequence, consisting of a right of the injured State to terminate or suspend the operation of the treaty, this principle underlies article 60, paragraph 4, of the Vienna Convention.

83. We discussed above⁵³ the case of a new peremptory norm of general international law having an impact on the new legal relationship normally established as a consequence of an internationally wrongful act. Apart from *jus cogens* in the sense of article 53 of the Vienna Convention, there are other primary rules of international law with special effects. Thus, for example, Article 103 of the Charter of the United Nations, while not laying down the rule that an international agreement imposing obligations *in abstracto* which may *in concreto* conflict with obligations under the Charter are void, nevertheless proclaims that, in such an event, the latter obligations shall prevail. This rule cannot but have an impact on the legal consequences of a breach of the obligation under that other international agreement. Obviously, the fulfilment of the obligations under the Charter can never be considered as an act entailing the same legal consequences as an internationally wrongful act. The question is, rather: does it, under all circumstances, not

⁵³ See paras. 79 and 80.

entail any of the normal consequences of a breach of an obligation under an international agreement? The Special Rapporteur is inclined to answer this question in the positive sense. There can be, it would seem, no doubt on this score if the "obligations under the present Charter" are, in fact, obligations imposed by the Security Council on a State to apply a certain measure of response to an internationally wrongful act of another State. Article 103 of the Charter certainly envisages just such a case. But the same conclusion seems to be valid as regards other obligations *in concreto*, imposed by the Security Council—or, for that matter, by another organ of the United Nations—in accordance with the Charter. Furthermore, there certainly are other obligations directly imposed by the Charter on each individual State and which must be considered as *jus cogens*, even as *jus cogens* with full retroactive effect. On the other hand, it would clearly go too far to construe every conceivable duty of a State in relation with its being a party to the United Nations Charter as an international obligation under the Charter in the sense of Article 103. Where to draw the line is obviously not a matter to be dealt with in the context of the present report.

84. As a matter of fact, the Charter of the United Nations primarily involves the creation of a new "entity" (or a new "subject" of international law) standing in legal relationship with the States, under rules of international law. The legal existence of this international organization cannot but have an impact on the legal consequences of internationally wrongful acts of States in their relations with other States. In the opinion of the Special Rapporteur, it is this impact of the legal relationship between the United Nations and its Member States on the relationships between Member States which is the subject-matter of Article 103 of the Charter.

85. In this connection, we must turn our attention to other examples of international organizations in the larger sense of the word. We have already noted before that, under article 60, paragraph 2, of the Vienna Convention, a material breach of a multilateral treaty by one of the parties entitles the other parties by unanimous agreement to take certain measures of response, notably, a measure comparable to a suspension or expulsion of the defaulting State from the group of States parties to the multilateral agreement (art. 60, para 2(a)(i)). Still in respect of multilateral treaties, articles 41 and 58 of the Vienna Convention deal with the limits of the possibility of two or more parties to a multilateral treaty creating a legal relationship *inter se* which is at variance with the legal relationships envisaged by the multilateral treaty. Even if those articles are not intended to proclaim that the agreement to this effect between two or more parties to the multilateral treaty which oversteps the limits of the possibilities envisaged in those articles is void *ab initio*, there is sufficient analogy between the matter dealt with in these articles (i.e., with what could be called "regional" *jus cogens*) and the effect of a peremptory

norm of general international law to justify putting the question of the possible impact of such multilateral treaties on the "normal" legal consequences of an internationally wrongful act. Indeed, we have already dealt with⁵⁴ one aspect of this question. It appeared there that even a material breach of a multilateral treaty by one of the parties (a guilty State) does not entitle another party (the injured State) to terminate the treaty—even in the relations between itself and the guilty State—but only to suspend the operation of the treaty. But even such unilateral suspension, one would presume, could, particularly in combination with the material breach by another party, create a legal situation which is comparable with the one created by an agreement between the two States involved. Does this fact have an impact on the normal entitlement of the injured State not to fulfil its obligations under the treaty in respect of the guilty State? The Special Rapporteur is inclined to give a positive answer to this question, article 60, paragraph 2(b) of the Vienna Convention notwithstanding, at least if the multilateral treaty is not simply a "unification" of the contents of bilateral legal relationships, and with the proviso that the right of the injured State under article 60, paragraph 2(b) revives if the parties other than the defaulting State fail to take the adequate measure of response by unanimous agreement. Furthermore, the right of the injured State as a "party other than the defaulting State" under article 60, paragraph 2(c) remains valid.

86. Treaties, even bilateral ones, along with determining substantive rights and obligations of the parties, often create a *mechanism of consultation and negotiation* in respect of their interpretation and application. Does the resulting duty to negotiate inhibit a party from taking a countermeasure in response to conduct of another party which the first party considers to be in breach of an obligation under that treaty? This question was dealt with in a recent arbitral award⁵⁵ and answered there in the negative.

87. In the same award, the tribunal discussed the question whether the provision, in the treaty, of *an arbitral or judicial machinery which can settle disputes* relating to the interpretation and application of the treaty, entails a prohibition of counter-measures. Since the award has not yet been published, it may be useful to cite here *in extenso* the relevant considerations of the tribunal.

94. However, the lawfulness of such counter-measures has to be considered still from another viewpoint. It may indeed be asked whether they are valid in general, in the case of a dispute concerning a point of law, where there is arbitral or judicial machinery which can settle the dispute. Many jurists have felt that while arbitral or judicial proceedings were in progress, recourse to

⁵⁴ See para. 64 above.

⁵⁵ Case concerning the Air Services Agreement of 27 March 1946 (United States *v.* France) (to appear in: United Nations, *Reports of International Arbitral Awards*, vol. XVIII (Sales No. E/F.80.V.7), p. 417).

counter-measures, even if limited by the proportionality rule, was prohibited. Such an assertion deserves sympathy but requires further elaboration. If the proceedings form part of an institutional framework ensuring some degree of enforcement of obligations, the justification of counter-measures will undoubtedly disappear, but owing to the existence of that framework rather than solely on account of the existence of arbitral or judicial proceedings as such.

95. Besides, the situation during the period in which a case is not yet before a tribunal is not the same as the situation during the period in which that case is *sub judice*. So long as a dispute has not been brought before the tribunal, in particular because an agreement between the Parties is needed to set the procedure in motion, the period of negotiation is not over and the rules mentioned above remain applicable. This may be a regrettable solution, as the Parties in principle did agree to resort to arbitration or judicial settlement, but it must be conceded that under present-day international law States have not renounced their right to take counter-measures in such situations. In fact, however, this solution may be preferable as it facilitates States' acceptance of arbitration or judicial settlement procedures.

96. The situation changes once the tribunal is in a position to act. To the extent that the tribunal has the necessary means to achieve the objectives justifying the counter-measures, it must be admitted that the right of the Parties to initiate such measures disappears. In other words, the power of a tribunal to decide on interim measures of protection, regardless of whether this power is expressly mentioned or implied in its statute (at least as the power to formulate recommendations to this effect), leads to the disappearance of the power to initiate counter-measures and may lead to an elimination of existing counter-measures to the extent that the tribunal so provides as an interim measure of protection. As the object and scope of the power of the tribunal to decide on interim measures of protection may be defined quite narrowly, however, the power of the Parties to initiate or maintain counter-measures, too, may not disappear completely.⁵⁶

88. It may be recalled that under the Vienna Convention the procedure of conciliation specified in the annex to that Convention may be set in motion after the application by a party of article 60 of the Convention (Termination or suspension of the operation of a treaty as a consequence of its breach), in accordance with the procedure prescribed in articles 65 and 66 of that Convention. Under paragraph 4 of the annex to that convention, the Conciliation Commission "may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement". This would seem to include a power of the Commission to draw the attention of the parties to interim measures such as the suspension, in whole or in part, of the counter-measure taken under article 60. Obviously this power does not inhibit the right to take and maintain the counter-measure. Furthermore, as we have seen in discussing the advisory opinion of the International Court of Justice in the Namibia case,⁵⁷ there may be special treaty relationships in which a competent organ of an international organization can act without any third-party procedures of testing the existence of a breach being required either before or after the taking of the counter-measure.

⁵⁶ *Ibid.*, pp. 445–446.

⁵⁷ See para. 58 above.

89. Indeed, it is quite possible that, in a treaty establishing an international organization, the substantive rights and obligations of the parties are so closely connected with the object and purpose of the organization as a whole that the right of one member State to suspend the operation of the treaty in whole or in part on the ground that another member failed to fulfil its obligation disappears altogether and is replaced by the power of the organization to take the measures it considers necessary in the situation created by the alleged breach (or, for that matter, created by a member State's conduct which is not illegal at all).⁵⁸

90. Apart from the procedural restraints on the taking of counter-measures, there are obviously *substantive* obligations of States which may not be breached even in response to a previous internationally wrongful act of another State. Thus, to mention only two examples, article 60, paragraph 5 of the Vienna Convention recalls the existence of "provisions relating to the protection of the human person contained in treaties of a humanitarian character", and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations⁵⁹ proclaims that "States have a duty to refrain from acts of reprisal involving the use of force". In this connection, article 19 of the draft articles on State responsibility comes to mind. Indeed, at first sight one could hardly imagine an "international crime" to be justified as a counter-measure against any breach of an international obligation, even a breach which constitutes itself an international crime. It would seem, however, that a note of caution is in order here. As a matter of fact, several fundamental obligations of States are formulated in such a way that exceptions are explicitly or implicitly provided for, which may include situations of response to a particular course of conduct of another State or States. Thus, to take an obvious example, the Definition of Aggression adopted by the General Assembly of the United Nations⁶⁰ contains a clause (art. 6) stating that:

Nothing in this Definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful.

Reference may also be made to a general clause, which was introduced in the 1970 Declaration of Principles of International Law cited above and which since then has been included in several other instruments dealing with fundamental obligations of States, to the effect that:

In their interpretation and application the above principles are interrelated and each principle should be construed in the context of the other principles.

These and other clauses—notably, clauses safeguarding the powers of the Security Council under the

⁵⁸ See paras. 77 and 78 above.

⁵⁹ General Assembly resolution 2625 (XXV), annex.

⁶⁰ General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

Charter—seem to exclude any automatic assumption that all international obligations “essential for the protection of fundamental interests of the international community”, or even all these obligations the breach of which, in isolation, is “recognized as a crime”, are immune under international law from being justifiably breached. Indeed, some fundamental obligations of every State as a member of the international community of States are predicated upon the effective maintenance of “law and order” within that community.

91. On the other hand, there are several obligations under international law the breach of which is not considered to be an “international crime” by the international community as a whole, but which are nevertheless of such a peremptory character that their breach can never be justified as a counter-measure against an internationally wrongful act. Thus, obviously, a violation of internationally protected human rights in one State cannot justify a violation of those rights in another State. Nor is the breach of an obligation relating to the protection of the human environment justifiable as a counter-measure against a similar breach by another State. In both cases, it would seem, the international obligations involved are not primarily inter-State obligations but rather parallel obligations of States for the protection of “extra-State” interests. There is clearly here an analogy with the situation referred to above⁶¹ where the relationships between member States of an international organization are, as it were, superseded by their parallel obligations towards that organization. The difference, or course, is that the “extra-State” interests protected here cannot (always) be allocated to a subject of international law, which inversely is the reason for assimilating these parallel obligations to obligations between States. Incidentally, as we have seen before,⁶² the International Court of Justice in its advisory opinion on Namibia expressly excluded from the duty not to recognize the situation as lawful such counter-measures as would damage the “injured entity”, i.e. the population of Namibia itself.

92. Apart from international obligations the breach of which can never be justified as a counter-measure against any internationally wrongful act, there are, it seems, international obligations which are of such a character that a breach of the obligation can only be justified as a consequence of an internationally wrongful act which violates the same obligation. One could call this a requirement of “qualitative proportionality” (in contradiction to the “quantitative proportionality” discussed below). This category of international obligations lies, as it were somewhere between the “parallel obligations” discussed above and the “reciprocal obligations” resulting from bilateral treaties. What comes to mind here are obligations

resulting from an international regime. Indeed, it would seem that those obligations cannot be treated in quite the same way as other international obligations, inasmuch as counter-measures in this field tend to destroy the regime itself and should, as such, only be allowed against wrongful acts already tending in the same direction. It is tempting to point here to analogies with the immunity of “international regimes” against other circumstances which normally may have an impact on international obligations, particularly conventional ones. Thus it may be noted that, under article 62, paragraph 2 of the Vienna Convention, “A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty... if the treaty establishes a boundary”. Furthermore, articles 11 and 12 of the Vienna Convention on Succession of States in Respect of Treaties⁶³ exclude “frontier regimes” and “other territorial regimes” from the normal “clean-slate” rule. Finally, in article 33 of the draft articles on State responsibility proposed by Mr. Ago,⁶⁴ it is envisaged that there may be conventional instruments which implicitly exclude the invoking of “state of necessity” in order to excuse a breach. All these provisions seem to tend towards the recognition of certain types of obligations which have a particular persistency. Of course, there is a basic difference between the circumstances dealt with in those provisions and an internationally wrongful act (although, inversely, those circumstances may not be invoked if they are the result of a wrongful act of the State wishing to invoke them). Nevertheless, in the opinion of the Special Rapporteur, the Commission might well wish to refer in part 2 of the draft articles to such particular categories of international obligations.

93. In this connection, one might also point to new forms of international regimes resulting from the “filling-in” by multilateral and even by bilateral treaties of a general set of legal principles accepted as such by the international community. Here again, such international regimes may have an impact on the possibility of invoking breaches of international obligations lying *outside* the field covered by that international regime as a ground for a counter-measure *within* that field. Thus, in the opinion of the Special Rapporteur, multilateral and even bilateral agreements intended to “fill in” the requirement of establishing a new international economic order might well be regarded as creating legal obligations that (unless, of course, the agreement itself provides otherwise) cannot be terminated or suspended on the ground of an alleged wrongful act which in itself has no bearing on the fulfilment of the object and purpose of such agreements.

94. The requirement of qualitative proportionality may also have an impact on the modalities of

⁶¹ See para. 89.

⁶² Para. 56 above.

⁶³ For reference, see footnote 40 above.

⁶⁴ See p. 51 above, document A/CN.4/318/Add.5-7, para. 81.

quantitative proportionality. In the award mentioned above,⁶⁵ the Tribunal stated, *inter alia*:

83. It is generally agreed that all counter-measures must, in the first instance, have some degree of equivalence with the alleged breach; this is a well-known rule. In the course of the present proceedings, both Parties have recognised that the rule applies to this case, and they both have invoked it. It has been observed, generally, that judging the "proportionality" of countermeasures is not an easy task and can at best be accomplished by approximation. In the Tribunal's view, it is essential, in a dispute between States, to take into account not only the injuries suffered by the companies concerned but also the importance of the questions of principle arising from the alleged breach. The Tribunal thinks that it will not suffice, in the present case, to compare the losses suffered by Pan Am on account of the suspension of the projected services with the losses which the French companies would have suffered as a result of the counter-measures; it will also be necessary to take into account the importance of the positions of principle which were taken when the French authorities prohibited changes of gauge in third countries. If the importance of the issue is viewed within the framework of the general air transport policy adopted by the United States Government and implemented by the conclusion of a large number of international agreements with countries other than France, the measures taken by the United States do not appear to be clearly disproportionate when compared to those taken by France. Neither Party has provided the Tribunal with evidence that would be sufficient to affirm or reject the existence of proportionality in these terms, and the Tribunal must be satisfied with a very approximative appreciation.⁶⁶

And, in connection with the admissibility of counter-measures when a machinery for consultation and even dispute settlement is provided for, the Tribunal said:

90. Indeed, it is necessary carefully to assess the measuring of counter-measures in the framework of proportionality. Their aim is to restore equality between the Parties and to encourage them to continue negotiations with mutual desire to reach an acceptable solution. In the present case, the United States of America holds that a change of gauge is permissible in third countries; that conviction defined its position before the French refusal came into play; the United States counter-measures restore in a negative way the symmetry of the initial positions.

91. It goes without saying that recourse to counter-measures involves the great risk of giving rise, in turn, to a further reaction, thereby causing an escalation which will lead to a worsening of the conflict. Counter-measures therefore should be a wager on the wisdom, not on the weakness of the other Party. They should be used with a spirit of great moderation and be accompanied by a genuine effort at resolving the dispute. But the Arbitral Tribunal does not believe that it is possible, in the present state of international relations, to lay down a rule prohibiting the use of counter-measures during negotiations, especially where such counter-measures are accompanied by an offer for a procedure affording the possibility of accelerating the solution of the dispute.

92. That last consideration is particularly relevant in disputes concerning air service operations: the network of air services is in fact an extremely sensitive system, disturbances of which can have wide and unforeseeable consequences.⁶⁷

95. More generally, one might argue that the proportionality between wrongful act and legal consequence is always "qualitative", inasmuch as "the scales

of justice" are involved. Indeed, the choice between the various possible legal consequences enumerated above will always be influenced by the seriousness of the actual wrongful act as well as by the seriousness of the actually applied sanction, but there can never be an exact "weighing" as in the case of physical objects. Thus, even in measuring, for example, the amount of damages to be paid in case of the wrongful taking of the property of an alien, questions arise as to the elements to be taken into account.⁶⁸ On the other side of the *scala* of legal consequences, the allowable degree and duration of the response to an aggression are difficult to determine *in abstracto*. The same problem of translating quantity in terms of quality and vice versa arises in regard to the determination of the "points" where a wrongful act not only creates an obligation of the guilty State to *restitutio in integrum*, but entitles the injured State to counter-measures, or creates a right for third States to take a non-neutral attitude, or even creates a duty of third States to take such an attitude (compare also the notion of "collective self-defence").

96. These difficulties are increased by the obvious correlation between the content of a primary rule, imposing an obligation on a State, and the content of the new legal relationships established by international law as a consequence of a breach of that obligation, including the question of coincidence of the "parties" to the rule and the "parties" to the relationship. As a matter of fact, the change from rule to relationship and vice versa is a question bothering the law of torts in various national legal systems. Whether the breach of an obligation imposed by legislation constitutes a wrongful act in the relationship between the guilty person and anyone having a material interest in the performance of that obligation (sometimes called the question of "relativity" of the wrongful act) is often doubtful. Contrariwise, the breach of an obligation imposed by a contract may nowadays well be considered a wrongful act vis-à-vis a person who has a material interest in the performance of that obligation but who is not a party to the contract. The two problems just referred to reflect structural changes in a national society, the legal relevance of which is not always easy to determine. It is submitted that this is even more valid for the determination of the legal relevance of structural changes in the international community of States.

97. In dealing with part 2 of the draft articles on State responsibility, the Commission is thus faced primarily with a *problem of method* which is caused not only by the circumstance just mentioned but also by the relative paucity of "hard" legal materials in this field. Indeed, while there are many decisions of international tribunals dealing with damages, there is little on counter-measures of injured States, and even less on responses of third States. Actually, the more

⁶⁵ See footnote 55 above.

⁶⁶ United Nations, *Reports of International Arbitral Awards*, vol. XVIII (op. cit.), pp. 443-444.

⁶⁷ *Ibid.*, pp. 444-445.

⁶⁸ See para. 81 above.

serious the breach of an international obligation, the less likely it is to find an objective legal appraisal of the allowable responses to such a breach. Furthermore, whereas already in 1961 the Special Rapporteur, Mr. F.V. García Amador, noted in his sixth report on State responsibility that, in respect of the duty to make reparation, “the diplomatic and arbitral practice, as also the writings of the authorities thereon, are at present in a state of complete anarchy”,⁶⁹ the practice of States in relation to counter-measures is (also) dictated to a large extent by purely political factors.

98. The problem of method then, in the view of the present Special Rapporteur, is the following. It is relatively easy to formulate a catalogue of possible “new legal relationships” established by international law as consequences of an internationally wrongful act, and even to arrange this catalogue in a *scala* of strength. When one comes, however, to the choice between those consequences (that is, the question of the legal admissibility of one consequence or another), there is no escape from the necessity to draw up a scale of values, both as regards the values affected by the breach and as regards the values affected by the response. A mere statement that there should be “proportionality” between response and breach simply leaves the question fully open. On the other hand, drawing up a scale of values obviously means operating in the field of primary rules, an operation the Commission has, in general, studiously avoided in drafting part 1 of the draft articles on State responsibility. The main exception to this “neutral” approach of the Commission is, of course, article 19 of the draft articles: the qualification of some internationally wrongful acts as “international crimes”. But even there it seems clear that the international crimes listed (as possible examples) in paragraph 3 of the draft article cannot each entail the same new legal relationships.⁷⁰

99. A possible way out could be the Commission proceeding by way of approximation. Starting on the one side from a *scala* of possible responses and on the other from the general rule of proportionality between the actual breach and the actual response, and recognizing on the one hand that a bilateral treaty, a multilateral treaty or a rule “recognized by the international community of States as a whole” may explicitly or implicitly determine the content of proportionality, and on the other hand that the seriousness of the situation created by the actual breach may entail moving to a stronger actual response, the Commission could give examples of “normal” implications of proportionality. Such examples could then deal with the following heads of limitation of possible responses:

(a) Normal limitations by virtue of the particular protection given by a rule of international law to the object of the response;

(b) Normal limitations by virtue of a linkage, under a rule of international law, between the object of the breach and the object of the response;

(c) Normal limitations by virtue of the existence of a form of international organization *lato sensu* covering the situation, resulting from an actual breach, and a possible response thereto.

100. This approach, it would seem, has the advantage of flexibility. The examples to be given by the Commission would indeed be no more than examples, since it seems impossible to cover all situations which may arise in practice by hard and fast, quasi-automatic rules. Furthermore, they would be examples of normal implications of proportionality. The rapid development of rules of international law in bilateral, regional and world-wide international relations seems to preclude a more abstract approach.

101. A final point on which the Commission has to decide is the question whether part 2 of the draft articles on State responsibility should address the matter of the loss of the right to invoke the new legal relationship established by the rules of international law as a consequence of a wrongful act, because of the passage of time, estoppel, waiver, failure to contribute to a limitation of the actual damage caused by the wrongful act, or any other conduct of the injured State or third State involved creating a situation in which the invoking of the new legal relationship might be considered an abuse. The Special Rapporteur is somewhat hesitant to embark on this course within the framework of the preparation of part 2 since, in any case, these matters are rather connected with part 3, on the “implementation” of international responsibility. It should, however, be noted that, as regards the counter-measure of termination or suspension of the operation of a treaty, article 45 of the Vienna Convention contains a provision on the loss of the right to invoke a material breach of a treaty as a ground for this counter-measure. Furthermore, article 61, paragraph 2 and article 62, paragraph 2(b) of that Convention, as well as articles 31, paragraph 2, 32, paragraph 2 and the newly proposed article 33, paragraph 2 and—in another context—articles 27 and 28 of the draft articles on State responsibility, deal with related matters of the “contribution” of a State to a situation, having consequences for the new legal relationships arising therefrom. In all those cases, however, the “contribution” is a conduct prior to the establishment of the new legal relationship. All in all, the present Special Rapporteur is inclined to suggest for inclusion in part 2, at the utmost, a provision analogous to article 45 of the Vienna Convention.

⁶⁹ *Yearbook... 1961*, vol. II, p. 2, document A/CN.4/134 and Add.1, para. 1.

⁷⁰ See para. 67 above.