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A/CN.4/354 and Corr.1 and Add.1 & 2

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

Topic:

State responsibility

Extract from the Yearbook of the International Law Commission:-

1982, vol. II(1)

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DOCUMENT A/CN.4/354 and Add.1 and 2*
**Third report on the content, forms and degrees
of international responsibility (part 2 of the draft articles),
by Mr. Willem Riphagen, Special Rapporteur**

[Original: English]
[12 and 30 March and 5 May 1982]

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NOTE

Multilateral conventions mentioned in the present report:

| | <i>Source</i> |
|---|---|
| Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) | United Nations, <i>Juridical Yearbook 1969</i> (Sales No. E.71.V.4), p. 140. |
| Vienna Convention on Succession of States in respect of Treaties (Vienna, 23 August 1978) | <i>Ibid.</i> , 1978 (Sales No. E.80.V.1), p. 106. |

* Incorporating document A/CN.4/354/Corr.1.

Introduction

1. The present report is the third dealing with the issues under the topic of State responsibility (part 2 of the draft articles) submitted by the Special Rapporteur for consideration by the International Law Commission. A first preliminary report¹ was submitted by the Special Rapporteur in the course of the Commission's thirty-second session in 1980, and the second report² was submitted by him in the course of the Commission's thirty-third session in 1981.

2. The historical development of the consideration of the draft articles on the topic of State responsibility is summarized in the first report.³ Thus, under the general plan adopted by the Commission, the origin of international responsibility forms the subject of part 1 of the draft, with respect to which the Commission has completed a first reading of the text of 35 articles which it has provisionally adopted.⁴ These 35 draft articles, which have been referred to Member States for their comments, are concerned with determining on what

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

² *Yearbook . . . 1981*, vol. II (Part One), p. 79, document A/CN.4/344.

³ *Yearbook . . . 1980*, vol. II (Part One), pp. 107 *et seq.*, document A/CN.4/330, paras. 1-9.

⁴ *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

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.

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

4. By its resolution 36/114 of 10 December 1981, the General Assembly, having considered the report of the Commission on the work of its thirty-third session, recommended, *inter alia*, in paragraph 3 (b), that the Commission should:

. . . Continue its work aimed at the preparation of draft articles on . . . part two of the draft on responsibility of States for internationally wrongful acts, bearing in mind the need for a second reading of the draft articles constituting part one of the draft.

CHAPTER I

Status of the work on part 2 of the topic

A. The Special Rapporteur's preliminary report: identification of the three parameters and analysis of the problem of method of dealing with part 2

5. In his preliminary report, the Special Rapporteur analysed, in a general way, various possible new legal relationships (i.e., new rights and corresponding obligations) arising from an internationally wrongful act of States as determined by part 1 of the draft, and noted a number of circumstances which are, in principle, irrelevant for the application of part 1 but have relevance in the development of part 2.⁵

6. The Special Rapporteur then analysed in that preliminary report the problem of method of dealing with part 2, as follows:

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 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",* 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.

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

⁵ *Yearbook . . . 1980*, vol. II (Part One), pp. 110-112, document A/CN.4/330, paras. 10-25.

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

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.⁶

7. The preliminary report then set out three parameters for the possible new legal relationship arising from internationally wrongful acts of a State. The first parameter was the new obligations of a State whose act is internationally wrongful, the second was the new right of the "injured" State, and the third was the position of the "third" State in respect of the situation created by the internationally wrongful act. In drawing up a catalogue of possible new legal relationships established by a State's wrongfulness, the report discussed: the duty to make reparation in its various forms (first parameter), the principle of non-recognition of *exceptio non adimpleti contractus* and other "countermeasures" (second parameter), and the right, possibly even duty, of a "third" State to take a non-neutral position (third parameter).

8. Two other problems were addressed by the report: (a) the problem of "proportionality" between the wrongful act and the response thereto, and in this connection, the limitations of allowable responses by virtue of the particular protection, given by a rule of international law, to the object of the response, and by virtue of the existence of a form of international organization *lato sensu*; and (b) the question of loss of the right to invoke the new legal relationship established by the rules of international law as a consequence of a wrongful act. It was suggested in this connection that the matter be dealt with rather within the framework of part 3 of the draft articles on State responsibility.

B. The Special Rapporteur's second report: focus upon the first parameter

9. Taking into account the discussion of the preliminary report in the Commission⁷ and the comments on the topic made in the Sixth Committee during the thirty-fifth session of the General Assembly,⁸ the Special

⁶ *Ibid.*, pp. 128-129.

⁷ *Yearbook . . . 1980*, vol. II (Part Two), pp. 62-63, paras. 35-48.

⁸ See "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-fifth session of the General Assembly" (A/CN.4/L.326), paras. 145-154.

Rapporteur prepared his second report on the topic, which is briefly analysed below.

10. In this second report,⁹ the Special Rapporteur dealt primarily with the first parameter, i.e., the new obligations of the State which is held to have committed an internationally wrongful act entailing its international responsibility (the author State).

11. For the consideration of the Commission, the Special Rapporteur proposed, in chapter II of this report, a set of five draft articles in two chapters, as follows:

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

CHAPTER I

GENERAL PRINCIPLES

Article 1

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

Article 2

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

Article 3

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

CHAPTER II

OBLIGATIONS OF THE STATE WHICH HAS COMMITTED AN INTERNATIONALLY WRONGFUL ACT

Article 4

Without prejudice to the provisions of article 5,

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

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

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

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

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

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

Article 5

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

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

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

⁹ See footnote 2 above.

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

12. The Special Rapporteur suggested the advisability of starting the draft articles of part 2 with three "preliminary" rules (arts. 1–3), providing a frame for the rest of the chapters of part 2, which dealt separately with each of the three parameters outlined in the preliminary report. By way of introduction of those preliminary rules, the report noted the fundamental structural difference between international law and any system of internal law, and the interrelationship between—and essential unity of purpose of—the rules relating to the methodologically separated items of "primary rules", "rules relating to the origin of State responsibility", "rules relating to the content, forms and degrees of State responsibility" and "rules relating to the implementation of State responsibility". The report also noted that the "rule of proportionality" underlying the responses of international law to a breach of its primary rules, should be understood as to be rather of a negative kind, excluding particular responses to particular breaches.

13. The report then stated the reasons for including the three preliminary rules, articles 1 and 3 of which dealt with the continuing force, notwithstanding the breach, of the primary obligations and rights of the States concerned, while article 2 referred to possible special, self-contained régimes of legal consequences attached to the non-performance of obligations in a specific field (see para. 11 above).

14. The report then turned to the *first parameter* and analysed the three steps associated with that parameter: the obligation to stop the breach, the obligations of "reparation", and the obligations of *restitutio in integrum stricto sensu* and "satisfaction" in the form of an apology and guarantee against repetition of the breach.

15. This analysis is then confronted with State practice, judicial and arbitral decisions and doctrine, leading up to the proposed articles 4 and 5 (see para. 11 above). Article 4, paragraph 1, referred to the new obligations tending towards a belated performance of the original primary obligation (stop the breach *stricto sensu*, stop the breach *lato sensu*, and *restitutio in integrum stricto sensu*). Paragraphs 2 and 3 of article 4 referred to the new obligations tending towards a substitute performance (reparation *ex nunc*, reparation *ex tunc* and reparation *ex ante*).

16. Article 5, paragraph 1, provided for a deviation from the general rules contained in article 4 in the case of a breach of obligations in a particular field (treatment of aliens), and left it in such a case to the author to state the choice between re-establishment of the situation as it existed before the breach and reparation in pecuniary terms. If the latter course of action is chosen, the author State, under paragraph 2 of article 5, still has the additional duty to provide satisfaction in cases where the wrongful act is aggravated by one of the two circumstances described in subparagraphs (a) and (b) of that paragraph.

17. In its consideration of the report, the Commission decided to discuss first articles 1–3 together. It was suggested, and found generally acceptable, to start part

2 of the draft with an article providing for a link between the draft articles in part 1 and those to be drafted in part 2, in the form of a statement that "an internationally wrongful act of a State gives rise to obligations of that State and to rights of other States in accordance with the following articles".

18. There was considerable discussion and divergence of opinions within the Commission on the advisability of including articles 1–3 in an introductory chapter of part 2. While most members felt that the ideas underlying articles 1–3 should be expressed at the outset as a frame for the provisions in the other chapters of part 2, other members expressed doubts as regards the advisability of including articles of this kind in a first chapter.

19. It was suggested that articles 1 and 3 ought to be combined in one article dealing with both the obligations and the rights of the author State, the injured State and other States, and providing that those rights and obligations could be affected by a breach *only* to the extent stipulated in the other articles of part 2. In this way one could also avoid the impression, created by the wording of articles 1 and 3 as proposed, that those articles tended towards protection of the wrongdoing State.

20. As regards article 2, it was generally recognized that a specific rule, or set of rules, of international law establishing an international obligation could at the same time deal with the legal consequences of a breach of that obligation in a way at variance with the general rules to be embodied in the draft articles of part 2. The question was put, however, whether this should be stated at the outset or rather at some other place in the draft articles.

21. During the discussion on articles 4 and 5, several members expressed a preference for dealing with the new *obligations* of the author State arising from its internationally wrongful act, rather in terms of new *rights* of the injured State, and possibly other States, to demand a certain conduct of the author State after the breach occurred. While in part 1, relating to the origin of international responsibility, it was generally irrelevant towards which State or States the primary obligation existed, this question was essential in dealing with the legal consequences of a breach of such primary obligation. Obviously, such an approach would still make it necessary to spell out which conduct of the author State could be demanded by the injured State, and possibly other States. Furthermore, such an approach could leave open the question whether or not the injured State (or, as the case may be, other States) should *first* demand the specified conduct of the author State before taking any other measure in response to the breach. In this respect one member expressed the opinion that any legitimate countermeasure could always be taken *in advance* of any request for *restitutio in integrum* or for reparation.

22. Doubts were also expressed in respect of article 5 as proposed. While some members did not consider that the breach of an obligation concerning the treatment to be accorded by a State to aliens entailed, within the framework of the first parameter, other legal consequences than a breach of any other international obligation, other members wondered whether the special regime of article 5 should not also apply in cases of breach of other international obligations than those mentioned in paragraph 1 of that article.

23. The view was also expressed that article 4, paragraph 1 (b), and article 5, paragraph 2 (b), created the impression that the state of the internal law of a State influenced the extent of its obligations under international law. In this connection it was recalled that article 22 of part 1 of the draft articles (Exhaustion of local remedies) dealt with the *existence* or *non-existence* of a breach of an international obligation of result and only where that result or an equivalent result may be achieved by subsequent conduct of the State.

24. After having examined at its thirty-third session the five draft articles submitted by the Special Rapporteur, the Commission decided to refer them to the

Drafting Committee, which was unable to consider them because of lack of time. Taking into account the views expressed during the Commission's discussions, and at the Sixth Committee during the thirty-sixth session of the General Assembly,¹⁰ the Special Rapporteur proceeded in the present report to a re-evaluation of the approach to the development of part 2 of the draft articles.

¹⁰ See "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-sixth session of the General Assembly" (A/CN.4/L.339), paras. 111-130.

CHAPTER II

Revision of the draft articles submitted in the second report

25. It was suggested during the discussions in the Commission and the Sixth Committee that part 2 of the draft articles on State responsibility should begin with an article explaining the link between the 35 articles composing part 1 (as adopted by the Commission on first reading) and part 2. The Special Rapporteur agrees with this suggestion. Consequently, it is now proposed that a new article 1 of part 2 should read as follows:

Article 1

An internationally wrongful act of a State entails obligations for that State and rights for other States in conformity with the provisions of the present part 2.

26. It is submitted that the question whether this article should have a title and, if so, which title, could perhaps better be decided at a later stage. It is also submitted that the wording of the new article 1 does not necessarily mean that the other articles of part 2 would give an exhaustive picture of all the legal consequences of any internationally wrongful act of a State. Indeed, in the opinion of the Special Rapporteur, it would seem unwise to commit the Commission at this stage to draw up such an exhaustive catalogue. The conceptual reasons for this opinion are set out in paragraphs 97-100 of the preliminary report (see para. 6 above). To these may be added the practical reason that it may prove to be impossible to reach a measure of consensus on such a complete solution. It may well be that, as in so many other fields of international law, there is a consensus on a number of legal consequences of certain types of internationally wrongful acts of a State, and a consensus on the absence of certain types of legal consequences in certain situations, but that a "grey zone" is left on which opinions differ. If, then, the grey zone is not too large, the codification of those points on which consensus exists would still be a meaningful achievement.

27. Obviously, the new article 1 as proposed is not an alternative for the article 1 proposed earlier (see para. 11 above). Articles 1-3 as proposed in the second report (*ibid.*) were intended to have a different function. In this connection, it should be recalled that the

Commission had already, at a relatively early stage of its consideration of the topic of State responsibility, remarked:

... The Commission must nevertheless emphasize here and now that it would be absolutely mistaken to believe that contemporary international law contains only one régime of responsibility applicable universally to every type of internationally wrongful act, whether more serious or less serious and whether injurious to the vital interests of the international community as a whole or simply to the interests of a particular one of its members. Having said that, it must quickly be added that this by no means implies—indeed it is very unlikely—that when the Commission considers the question of forms of responsibility and of the determination of the subject or subjects of international law permitted to implement (*mettre en oeuvre*) the various forms concerned, it will conclude that there is one uniform régime of responsibility for the more serious internationally wrongful acts, on the one hand, and another uniform régime for the remaining wrongful acts, on the other. In point of fact, international wrongs assume a multitude of forms and the consequences they should entail in terms of international responsibility are certainly not reducible to one or two uniform provisions. Moreover, we have seen the extent to which State practice and the authors of legal writings bring out the differences in gravity that exist even among the various internationally wrongful acts which are lumped together under the common label of international crimes. The same must undoubtedly be true of other internationally wrongful acts; the idea that they always entail a single obligation, that of making reparation for the damage caused, and that all they involve is the determination of the amount of such reparation, is simply the expression of a view which has not been adequately thought out.¹¹

The Commission went on to say, in particular:

The idea that there is some kind of least common denominator in the régime of international responsibility must be discarded.¹²

These remarks are, no doubt, substantially correct. But their impact on the task with which the Commission is confronted at present—the drafting of part 2—is somewhat staggering and calls for a cautious approach.

28. If there are indeed a multitude of different régimes of State responsibility, and if there is even no "least common denominator" of those régimes, the prospect of drawing up a complete set of articles in part 2 would seem rather dim. In any case, there is much to

¹¹ *Yearbook . . . 1976*, vol. II (Part Two), p. 117, para. (53) of the commentary to art. 19 (International crimes and international delicts).

¹² *Ibid.*, para. (54).

be said in favour of postponing the consideration of a set of "framework" articles, as suggested by the present Special Rapporteur in his second report, until the Commission has reached conclusions as to the three parameters of the legal consequences of an internationally wrongful act of a State.

29. As a matter of fact, articles 1–3 as proposed in the second report—particularly article 2—were meant to point out at the outset that there are more than one or two different régimes of responsibility and that in any case an internationally wrongful act of a State does not necessarily make a *tabula rasa* of its legal relationships with other States as they existed before. Actually such statements, though true, would lead up to the drafting of an article which combined articles 1 and 3 proposed in the second report—as Mr. Aldrich suggested in the Commission at its thirty-third session (see para. 31 below). But this clearly would commit the Commission to draft a complete set of articles for part 2 of the draft. Without giving up the hope of doing just that, the Commission would perhaps prefer not to indicate its ambitions too early.

30. An additional reason for such an attitude might be that—at least in the opinion of the Special Rapporteur—a complete codification of the rules relating to State responsibility is highly unlikely to be workable in practice, and thereby acceptable to the States composing the international community, without some machinery of dispute settlement being provided for as an integral part of the draft articles.¹³

31. In case, however, the Commission—possibly without prejudice to the place where the articles eventually would appear in the draft—would wish to confirm the earlier decision to let the Drafting Committee consider those articles, the Special Rapporteur would withdraw his original proposal and suggest that the Drafting Committee take as a basis of discussion the wording, orally presented in 1981 by Mr. Aldrich,¹⁴ to wit:

Article . . . [replacing articles 1 and 3 as suggested in the second report]

A breach of an international obligation by a State affects the international rights and obligations of that State, of the injured State and of third States only as provided in this part.

Article . . . [replacing article 2 as suggested in the second report]

The provisions of this part apply to every breach by a

¹³ Already in para. (36) of its commentary to article 33 (State of necessity) of part 1 of the draft the Commission remarks: ". . . that the State invoking the state of necessity is not and *should not be the sole judge** of the existence of the necessary conditions in the particular case concerned." (*Yearbook . . . 1980*, vol. II (Part Two), p. 50). Furthermore, the articles of part 1 often refer to *jus cogens* and similar notions as affecting State responsibility. Would it be likely that States are willing to accept such provisions without some guarantee for impartial dispute settlement? The history of the law of treaties and the United Nations Conference on the Law of Treaties of 1968 and 1969 would seem to point in the direction of a negative answer to this question.

¹⁴ *Yearbook . . . 1981*, vol. I, p. 136, 1669th meeting, paras. 5–6.

State of an international obligation, except to the extent that the legal consequences of such a breach are prescribed by the rule or rules of international law establishing the obligation or by other applicable rules of international law.

32. Turning now to articles 4 and 5 as proposed in the second report, the Special Rapporteur would like first of all to do justice to a remark made both in the Commission and in the Sixth Committee, to the effect that those articles—and, presumably, the title of chapter II—should rather be drafted in the form of what the "injured" State—and, possibly, "third" States—is or are entitled to require from the "author" State of an internationally wrongful act. Indeed, in the articles adopted in first reading by the Commission for part 1, reference is often made to conduct (consisting of action or omission) of a State which is not in conformity with what is required of it by an international obligation. It would seem that everyone agrees that such conduct—i.e., an internationally wrongful act—does not destroy the original obligation, but rather creates a situation in which additional, or at least more specific, obligations are "automatically" added.¹⁵ But it is surely up to the other State or States to invoke the "new" obligations of the author State.¹⁶

33. Since, at this stage, the question whether only the directly injured State or also other States may—or possibly, should—invoke the "new" obligation of the author State, should not be prejudiced, a neutral formulation of the introductory part of the article might be the following:

Article . . .

An internationally wrongful act of a State entails for that State the obligation:

. . .

34. Apart from this drafting point, articles 4 and 5 as proposed in the second report raise the point of substance and of method already touched upon above (para. 27). Indeed, if there were no "least common denominator in the régime of international responsibility", this would apply also to the first parameter: the description of the "new obligations" of the author State.¹⁷ This brings us back to our general problem, on which it would seem useful to elaborate, since its solution determines our total method of work in respect of the topic of State responsibility.

¹⁵ Obviously, the original obligation may not be couched in abstract terms, but may require only a specified conduct at a specified time; in such a case, by definition, the absence of that specified conduct at that specified time constitutes not only a breach of that obligation, but actually renders the obligation so to speak obsolete; no belated performance but only substitute performances can be envisaged in such a case. But all this is self-evident, and anyway the bulk of international obligations are formulated in abstract terms.

¹⁶ Although in some cases, the other State or States may not be free not to invoke the new obligation; this, however, is a matter of the third parameter.

¹⁷ Actually, article 5, as proposed in the second report, deviates from article 4 in respect of a particular type of primary rules—namely, those relating to "the treatment to be accorded by a State [within its jurisdiction] to aliens" and, as such, introduces another régime of State responsibility.

CHAPTER III

The general problem underlying the drafting of part 2
of the draft articles

35. In the opinion of the Special Rapporteur, international law as it stands today is not modelled on one system only, but on a variety of interrelated subsystems, within each of which the so-called "primary rules" and the so-called "secondary rules" are closely intertwined—indeed, inseparable.

36. Actually, every single primary rule—as an expression of what ought to be—necessarily raises the next question: what should happen if what is is not in conformity with what ought to be under that primary rule? Since the answer to this question is also framed in terms of "ought to be", this answer raises the same type of next question, and so forth. The circuit is finally closed by either accepting the actual set of facts, or by creating—by the exercise of factual power—another set of facts, which may be more or less far removed from the realization of the original "ought to be", more or less equivalent to the situation originally envisaged by the primary rule.

37. Now, obviously, in the process of creation of a rule of international law—be it through custom, treaty, decisions of competent international institutions, or even judgments of international tribunals—the questions referred to in the foregoing paragraph are very seldom (fully) looked at, let alone explicitly answered. This does not mean that there are no answers in international law. Sometimes some of the questions are explicitly addressed and answered in respect of particular primary rules. In other cases there may be a more or less consistent practice of States, and even a practice which is considered as "law". But, since practice is made up from conduct in a great variety of actual circumstances, and such conduct is often inspired, or at least influenced, by "political"—that is, *ad hoc*—considerations, it is awfully hard to draw from it general rules, and even impossible, as the Commission had realized earlier, to draw from it one set of general rules applicable to all primary rules.¹⁸

38. Under those circumstances, there is no escape from a categorization of primary rules for the purpose of determining the legal consequences of their breach, and from formulating different sets of legal consequences for each category of primary rules. And even then, it must be realized that in a given situation more than one subsystem of interlinked primary and secondary rules may apply. This, then, requires a determination of the interrelationship between those subsystems. Thus we will get ever further away from the unitary concept of international obligation which is the cornerstone of part 1 of the draft articles.¹⁹

¹⁸Of course, the Commission is not bound only to describe or codify the actual practice of States in so far as it appears to be accepted as law; it also has a task of progressive development, which, of necessity, implies some power to suggest a way to "cut the Gordian knot".

¹⁹Surely part 1, as adopted on first reading (see footnote 4 above), itself makes some distinctions between categories of primary rules, and—in its chapter V on "Circumstances precluding wrongfulness"—what the Special Rapporteur called the "zero-parameter" in his

39. A first attempt to distinguish subsystems of international law may, in the opinion of the Special Rapporteur, be based on the function of the different subsystems.²⁰ It would seem that, roughly, one could distinguish (a) rules of international law the purpose of which is to keep the States apart, from (b) rules which reflect the idea of a sharing between States of a common substratum, and from (c) rules which organize a parallel exercise of sovereignty in respect of certain international situations.

40. The prime example of category (a) rules is the rule, now recognized as being a rule of universal customary law, which stipulates that every State "shall refrain . . . from the threat or use of force against the territorial integrity or political independence of any state". Here the sovereignty of one State (in the final analysis exercised through "the threat or use of force") is confronted with the sovereignty (in the form of its "territorial integrity" and "political independence") of another State, and the resolution of this conflict is found in a conduct-rule of international law. It should be noted that the rule envisages the existence of a particular intent on the part of one State, in respect of a particular effect on the part of another State. A breach of the international obligation stipulated in this rule, by a State, cannot be distinguished from the violation of a right, implied in this rule, of another State.²¹ There would seem to be no doubt that the legal consequence of a breach of this obligation is a duty to restore completely the *status quo ante*, including a wiping out of all the consequences of the wrongful act and a providing of guarantees against repetition (first parameter). As to the second and third parameters of the legal consequences, article 34 of part 1 of the draft articles implies, and the United Nations Charter gives, an answer to some of the relevant legal questions.²²

41. It is to be noted in this respect that measures of individual and collective self-defence, as well as enforcement action by the United Nations, must respect the set of rules of international law relating to humanitarian *ius in bello*, and that a guarantee against repetition may not, in principle, be sought in the permanent annexation of the State which is author of the internationally wrongful act in question.

second report (*Yearbook . . . 1981*, vol. II (Part One), p 85, document A/CN.4/344, para. 49, footnote 22)—recognizes the fact that a given situation may be governed by different and even conflicting rules. At some stage in the second reading of those draft articles the Commission may wish to consider the question whether even part 1 does sufficiently reflect the diversity of primary rules.

²⁰Here, as will appear below, we have to take into account the dimensions of any subsystem: rules of procedure, of conduct and of status.

²¹The relationship between this obligation and this right is underlined in the words "in their international relations" appearing in Article 2, para. 4, of the United Nations Charter; of course, which relationships are considered to be "international" is another matter.

²²As to the ultimate "closing of the circuit", reference must, alas, be made to the last sentence of para. 36 above.

42. There are other primary rules of international law which have the same function of keeping the States apart, though perhaps the breach of none of those other primary rules entails all the legal consequences outlined above, at least in so far as the second and third parameters are concerned. Nevertheless, some kind of "least common denominator" seems to apply to the régimes of State responsibility in regard to this category of rules.

43. While the scope of the prohibition of aggression is not entirely clear,²³ the scope of other primary rules having the same function is even less clear. Actually, it seems that it was not so much the scope of the primary rules as, rather, considerations concerning the legal consequences of the breach of such rules, which inspired doubts as to the formulation of such primary rules.

44. Indeed, while it is easy to recognize that no State has the right to intervene in the affairs of any other State, it is less easy to determine specific obligations deriving therefrom, and even more difficult to determine the limits of allowable responses to a breach of such obligations, particularly in terms of the second and third parameters. As a matter of fact, one is bound to admit that intervention may be less serious as to its effects than aggression, and that measures of self-help strictly limited (also in time) to the purpose of terminating *ex nunc* a factual situation constituting an infringement of a right may not be identifiable with an action directed against the territorial integrity and political independence of another State.²⁴ In short, it is more difficult to strike the balance between conduct on the part of one State and the response to such conduct by another State when one arrives at situations which are less serious than an outright war.²⁵

45. While the main difference between aggression and intervention is that the former implies the exercise of factual or military power not only within but "over" foreign territory—the most blatant disregard of the sovereignty of another State—there are less serious forms of conduct, also prohibited by rules of universal customary law, the function of which is to keep the States apart. Hence the principle that a State may not "use" the territory of another State for the performance of its government functions.²⁶ Here again, there

²³ Cf. the Definition of Aggression (General Assembly resolution 3314 (XXIX) of 14 December 1974, annex), and in particular the various reservations made and interpretations given in the course of its preparation and adoption (see *Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 19 (A/9619 and Corr. 1)*, annex I).

²⁴ In this connection it is interesting to note that the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV) of 24 October 1970, annex), in the second paragraph of the part on non-intervention, refers to: "measures to coerce another State in order to obtain from it the *subordination** of the exercise of its sovereign rights and to secure from it *advantages** of any kind".

²⁵ Even the Definition of Aggression (see footnote 23 above), in its article 2, contains the proviso that "the Security Council may . . . conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity". Cf. also the reference to "gravity" in article 3, under (g), of the same definition.

²⁶ Perhaps one might also mention in this connection the "hard core" of a State's immunity, as regards the *imperium* of another State, for acts committed within the former's territory. It is to be

may be no difference between the legal consequences of a breach of the relevant obligations and those of a breach of the obligations mentioned earlier, in so far as the first parameter is concerned; but the admissibility of countermeasures in such a case may be judged differently and the existence of a third parameter of legal consequences—rights, let alone duties, of third States—seems, in principle, excluded.²⁷

46. While the rules of universal customary international law mostly have the function of keeping the States apart,²⁸ obligations founded on treaties may have quite a different function and may reflect a notion of sharing a common substratum, or at least a notion of organizing a parallel exercise of sovereignty in respect of certain international situations.²⁹

47. Situated between obligations arising out of universal customary international law and obligations arising out of treaties are the rules of customary law which apply to relationships between States and which are, so to speak, "triggered" or filled in by some form of consent between those States. The procedure of consent then creates a status from which rights and obligations between States are derived. A typical example are the rules of customary law relating to diplomatic intercourse. The mutual consent to establish diplomatic relations implies the consent of the receiving State to the exercise of some governmental functions by the sending State within the former's territory, as well as privileges and immunities of the diplomatic mission, its personnel and its materiel, and entails corresponding obligations of the sending State. It is significant to recall here that the corpus of rules of diplomatic law is considered by the International Court of Justice to be a self-contained régime, thus that the breach of an obligation in this field by the sending State can be countered only by what is in essence a partial (declaration of *persona non grata*) or total (breaking off of diplomatic relations) termination or suspension of the relationship, comparable to the *exceptio non adimpleti contractus* in the law of treaties.³⁰

48. The rules of customary international law relating to the treatment of aliens are also often linked with an element of consent on the part of the receiving State, in the form of admission of the alien.³¹ In this field, however, a different function appears. While a *ius communicationis*, in the sense that a State is obliged to admit aliens, does not exist under customary international law, the rules on the treatment of aliens apply irrespective of any formal act of admission. In other words, the mere presence of the alien within the

noted that, both in this case and in the case mentioned in para. 44 above, the rules of international law relate to jurisdiction rather than to sovereignty.

²⁷ If only because the obligations referred to here may be suspended by the consent of the State the "immunity" or "independence" of whose territory is concerned.

²⁸ Also by making a distinction between States directly concerned with a rule and its application, and third States.

²⁹ On the other hand, treaties may also serve to specify in more detail the customary rules of separation of States, such as treaties establishing a boundary.

³⁰ Actually, in view of the rules applicable in the case of breaking off of diplomatic relations, the qualification "suspension of the relationship" seems more adequate. The status character of the régime is also reflected in the obligations of third States.

³¹ The "sending State" being presumably the State of nationality of the alien.

jurisdiction of another State is considered to give rise to an international situation which entails obligations and rights of the States concerned. The recognition that international trade in the larger sense of the word is *grosso modo* in the interest of all States is at the basis of the rules of customary international law in this field.³²

49. It would seem, therefore, that even in the realm of universal customary international law there are different sets of obligations of States, fulfilling different functions. It is submitted that this difference in primary rules cannot but influence the content of the applicable secondary rules.

50. The differentiation of obligations becomes even more necessary if obligations arising out of treaties are taken into account.³³ Treaties fulfil a variety of functions. Their "least common denominator" is the fusion of the *voluntates* of individual States at a particular time into an instrument the content of which thereafter becomes, in principle, independent of each individual *voluntas*. This procedure, in itself, cannot but influence the relationship between States, and not necessarily only between those States which are parties to it. Actually, the 1969 Vienna Convention on the Law of Treaties³⁴ contains several provisions dealing with the legal consequences of conduct of a State, within the framework of the validity of the treaty and of the basic principle of *pacta sunt servanda*, the latter principle forming the link between the law of treaties and the law of State responsibility.³⁵

51. As to the various functions of rules laid down in treaties, the same distinctions can be made as were made above in regard of rules of customary international law. Indeed, article 43 of the Vienna Convention presupposes that rules laid down in treaties may well be an elaboration of rules of customary international law. But in any case, a treaty always implies some element of organization, as well as some element of object and purpose, of the relationship as a whole established by that treaty. Again, these elements may influence the legal consequence of a breach of an obligation resulting from the treaty even if the treaty does not itself spell out the legal consequences of such breach. Admittedly, the elements of organization and of object and purpose, separable from rules of conduct contained in the treaty, may be so minimal as to be negligible for the purpose of determining the legal consequences of a breach of those rules of conduct. Furthermore, just as a

rule of conduct in a sense fails if it is not implemented, the elements of organization and of object and purpose may fail.³⁶

52. The element of "object and purpose" of the treaty is particularly important in the context of secondary rules, if that object and purpose includes the creation or recognition of extra-State interests involved in the treaty and its implementation. Such interests may be of different kinds. Actually, very few treaties are in the nature of a pure barter transaction, a simple *do ut des* relationship, in which only the respective separate interests of each individual State-party are involved. The very notion of an object and purpose of a treaty as a whole already implies some measure of extra-State interest, if only in the form of an inseparable common interest of the parties. In addition, a treaty may envisage interests of third States, and even of entities other than States, such as individual human persons.

53. On the other hand, the element of "organization" of relationships, inchoate in every treaty, may be more developed in a particular treaty. Typical examples are the provision, in a treaty, of a procedure of dispute settlement as regards the interpretation and application of the treaty in concrete circumstances, or of procedures for collective elaboration (and interpretation) of the general rights and obligations under the treaty. In this connection it should also be noted that, increasingly, treaties do not so much address the State as such—that is, as an indivisible "person"—but rather take into account the relative independence of its elements *inter se*, by addressing those elements directly, both passively and actively.³⁷

54. In short, a treaty may create a subsystem of international law with its own, express or implied, secondary rules, tailored to its primary rules. This does not necessarily mean that the existence of the subsystem excludes permanently the application of any general rules of customary international law relating to the legal consequences of wrongful acts. As already remarked, the subsystem itself as a whole may fail, in which case a fall-back on another subsystem may be unavoidable.³⁸ On the other hand, such a subsystem is, in principle, self-contained, in the sense that it cannot be overruled by situations and considerations belonging to another subsystem. This might seem in contradiction with what has just been said. As a matter of fact, the interrelationship between the subsystems may be complicated by the fact that a particular set of actual circumstances may be relevant for more than one subsystem. Here the measure of organization of the relationship becomes particularly important; if it is not possible to allocate the situation to one or the other

³² A functional approach which also underlies the particular position of merchant ships flying the flag of a foreign State and engaged in navigation; to a lesser extent the same applies to civil aircraft.

³³ There are international instruments of consensus between two or more States which do not intend to create obligations and rights, but which may nevertheless entail legal consequences in the relationship between the States involved. Actually, the frequent reference in the Vienna Convention on the Law of Treaties to the legal relevance of what is "otherwise established", together with the various legal consequences attached to what is laid down in the text of a treaty as soon as that text is adopted, as well as to the "object and purpose" of a treaty even before it is ratified, already suggest a sliding scale of legal force of transactions between States which is not easily reconciled with the simple doctrinal dichotomy between the existence or absence of "true legal obligations". Indeed, how true is a legal obligation if there are circumstances precluding the wrongfulness of its breach?

³⁴ Hereinafter called Vienna Convention.

³⁵ Consequently, the question arises as to the relationship between the two sets of rules; thus, for example, between the *exceptio non adimpleti contractus* and a prohibition of reprisals.

³⁶ The question arises as to what should happen then (see para. 36 above and para. 54 below).

³⁷ This is not the same phenomenon as the one referred to at the end of para. 52 above, since a link between the element involved and the State to which it belongs remains essential. Actually, the rules referred to here are more in the nature of rules of conflict of laws; in this respect they are akin to the rules of diplomatic law referred to in para. 47 above.

³⁸ An example of such fall-back is given by the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States (United Nations, *Treaty Series*, vol. 575, p. 159). Article 27 of this convention bars the exercise of diplomatic protection; but such diplomatic protection revives if the receiving State does not comply with the award, rendered in its dispute with the foreign investor.

system, the more organized system prevails until it fails as such.

55. What conclusions can be drawn from the foregoing analysis? It seems clear that part 2 of the draft articles on State responsibility cannot exhaustively deal with the legal consequences of any and every breach of any and every international obligation. The other extreme solution is to leave the determination of such legal consequences entirely to the judgment of those bodies which are charged with the peaceful settlement of international disputes. The latter solution, in the final analysis, leaves the matter to the individual sovereign States, since (a) they choose the means of settlement of disputes, and (b) they have to determine their action if those means of settlement fail. Clearly, then, the Commission has to seek a solution between those two extremes.

56. Actually, the Commission was faced with a similar problem when it dealt with the law of treaties. Then it singled out a particular type of transaction and also took care of the different subsystems created by treaties by saving clauses, such as that embodied in article 5 of the Vienna Convention;³⁹ while the United Nations Conference on the Law of Treaties added, as an integral part of the Vienna Convention, a general procedure for dispute settlement with respect to "invalidity, termination, withdrawal from or suspension of the operation of a treaty" (art. 65).

57. A general saving clause comparable to the one in the Vienna Convention⁴⁰ was suggested in the second report as article 2. The reference in that article to a "rule of international law"—and, in the redraft, to "other applicable rules of international law" (see para. 31 above)—is sufficiently wide as to make all other articles of part 2 of the draft no more than rebuttable presumptions as to the legal consequences of internationally wrongful acts. A consequence of such an approach would seem to be that part 3 of the draft should contain a meaningful procedure for dispute settlement as to the lawfulness of the action taken, including the demands presented by a State invoking the legal consequences of a breach of an international obligation by another State as a ground for its action in response to such breach.

58. Just as in the case of the Vienna Convention, the dispute settlement procedure would be limited to a particular legal question, which is only one of the questions to which a particular set of actual facts gives rise. Indeed, the procedure would not deal with the

³⁹ Other saving clauses are contained in the Vienna Convention, for example, in articles 73 and 75, and, of course, in the frequent use of terms such as "except in so far as the treaty may otherwise provide". It may be recalled that the then Special Rapporteur suggested in the Commission a special article dealing with a particular subsystem of international law, namely "Treaties providing for objective régimes" (*Yearbook . . . 1964*, vol. II, pp. 26 *et seq.*, document A/CN.4/167 and Add.1-3, draft article 63). The Commission as a whole did not favour such a special clause, considering that the matter could be dealt with within the framework of the articles on treaties and third States. The "State responsibility" aspects of that type of subsystem were, of course, not under discussion then (about those aspects, cf. E. Klein, *Statusverträge im Völkerrecht: Rechtsfragen territorialer Sonderregime* (Berlin, Springer, 1980), p. 225). Another saving clause adopted at the time was more or less "hidden" in the introduction of *jus cogens*.

⁴⁰ "Unless otherwise provided for by the treaty". Compare in particular, in the field where the law of treaties and the law of State responsibility meet, article 60, para. 2, of the Vienna Convention.

question whether there has in fact been a breach of an international obligation in the first place. Such an isolation of one of many legal questions which may be relevant in a given situation surely has its disadvantages and its inherent difficulties of application. Nevertheless, it is a feasible machinery and one which is well known in international practice.

59. The first example is of course the Vienna Convention itself. Obviously, the questions "concerning the application or the interpretation of article 53 or 64" (*jus cogens*), as well as those "concerning the application or the interpretation of any of the other articles in Part V of the present Convention" (art. 66) are, in fact, only incidental to a situation where the implementation of a treaty is in issue. They are preliminary or prejudicial legal questions, taken out of the context of the legal appreciation of total situation in which they arise.

60. Another example is the separation of the preliminary legal question "whether the existing dispute is wholly or partly within the scope of the obligation to go to arbitration", as mentioned in article 1 of the "Model Rules on Arbitral Procedure" adopted by the Commission in 1958.⁴¹ Though these "Model Rules" have as yet not been embodied in a convention, they reflect a practice of States.⁴² Sometimes a distinct legal question is put to the ICJ by the States parties to a dispute, as in the *North Sea Continental Shelf* cases between the Federal Republic of Germany and, respectively, Denmark and the Netherlands.⁴³

61. In this connection, reference may also be made to the machinery for making a preliminary decision ("*pour statuer, à titre préjudiciel*") adopted in the Treaty establishing the European Economic Community.⁴⁴ A similar machinery has been suggested for questions relating to the interpretation of rules of international law to be submitted to the ICJ by national courts for an advisory opinion. Indeed, the isolation of one or more legal questions arising in a dispute can just as well be envisaged as the isolation of the establishment of the facts of the case in an international procedure of fact-finding.

62. Obviously, a general machinery for dispute settlement, as envisaged above, should be without prejudice to existing procedures in which the whole situation may be dealt with, in particular, to the competence of the Security Council of the United Nations.

63. Within the framework of, on the one side, a general saving clause, and, on the other, a general dispute-settlement clause, part 2 could afford to be reasonably abstract; but, it is submitted, not to the same extent that the draft articles of part 1 are abstract, in the sense of making virtually no distinction at all between the content of the international obligations involved. Some "categorization" of those obligations, some recognition of the difference between possible subsystems of rules of international law, remains necessary in order to give to part 2 of the draft meaningful scope and content.

64. Of course, any subsystem of international law

⁴¹ *Yearbook . . . 1958*, vol. II, pp. 83-86, document A/3859.

⁴² See, for example, the *Ambatielos* case, Judgment of 1 July 1952, *I.C.J. Reports 1952*, p. 28.

⁴³ Judgment of 20 February 1969, *I.C.J. Reports 1969*, p. 3.

⁴⁴ Art. 177 of the treaty (United Nations, *Treaty Series*, vol. 298, pp. 76-77).

remains abstract in the sense that it generally does not take into account the quantitative aspects of the facts of a given situation, or, if it does seem to do so, it does so often by using even more abstract, non-legal terms, which appeal to “*les données immédiates de la conscience*”, to use the term of Bergson, such as “serious”, “important”, “gravity”, etc.⁴⁵ This is particularly true for the link between primary and secondary rules. Accordingly, any such link can never be “automatic”. A wrongful act may, in fact, be of such negligible importance that it should not entail the legal consequences determined by the secondary rules. Thus the Definition of Aggression⁴⁶ presupposes that even an act of aggression as there defined, may be not “of sufficient gravity” to be treated as such.

65. The mirror-image of this immediate appreciation of a particular set of factual circumstances is the principle of law called the principle of proportionality, which in a sense may be said to underlie every link between norm and sanction in a system of law. Here, the principle may be concretized in a rule of positive law.

66. It would not seem necessary to refer explicitly in the draft articles of part 2 to the considerations in paragraphs 64 and 65 above, which apply to all subsystems of international law, provided that the two safeguards—a general saving clause and a general machinery for dispute settlement—are adopted.

67. On the other hand, it may be advisable to give explicit recognition to the fact that a given set of actual circumstances, in other words a factual situation, may be relevant for more than one subsystem, or, to put it inversely, that more than one subsystem may be applicable to such a situation.⁴⁷ In such a case a choice between, or combination of, such subsystems may be unavoidable.⁴⁸

68. In a sense, one might consider the matter of the so-called “aggravating” or “extenuating” circumstances as falling within the scope of this choice between, or combination of, subsystems. However, a note of caution should be entered here. First of all, the terminology itself is derived from municipal law systems and practices and is, as such, prone to evoke false analogies. Actually, many aggravating or extenuating

circumstances can be taken care of through the application of the considerations outlined in paragraphs 64 and 65 above. They are either elaborated in the abstract rule of law itself, or immediately apparent as a matter of fact.⁴⁹

69. What is meant in paragraph 67 above is a somewhat different phenomenon from that which was touched upon in paragraphs 38 and 54 above, to wit, the *concursum* of different subsystems. Various types of such *concursum* can be distinguished. First, the conduct of a State, which is not in conformity with what is required of it by an international obligation of that State, may at the same time be not in conformity with what is required by another, parallel, obligation. In particular, treaty rights and obligations between States may well be created in order to specify, in *per se* rules, what under particular circumstances could be considered to be already covered by a more general rule of customary law.⁵⁰ Similarly, and inversely, treaty rights and obligations may specify, in *per se* rules, conduct which, again under particular circumstances, would otherwise be clearly not only not prohibited but maybe even lawful under the rules of customary international law. If such “parallel” rules belong to different subsystems of international law, a choice between, or combination of, the legal consequences of a breach provided for in such subsystems may be necessary, when the particular circumstances are present.⁵¹ Accordingly, it may be, for example, that the breach of an obligation relating to the treatment of aliens is at the same time an act committed with the intent to cause direct damage to another State, and having this effect. On the other hand, it may be that a breach of an obligation, though not justified by a circumstance precluding wrongfulness, is nevertheless committed under circumstances which should preclude other legal consequences than the duty to compensate the damage caused.

70. It is debatable whether this type of *concursum*, and the interplay of “parallel” and “anti-parallel” primary conduct-rules which is at its basis, should be addressed in part 2 of the draft articles. The problem is somewhat similar to that dealt with in paragraphs 64–66 above, and it might be said that here, too—as in the case referred to in paragraph 68 above—the relative weight of the connecting factors with one or the other applic-

⁴⁵ Of course there are also treaties which do use quantitative terms, directly related to the facts. Thus, for example, the “agreed understandings” relating to articles I and II of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (General Assembly resolution 31/72 of 10 December 1976, annex) translate some of the terms of the treaty, concerning the effects of conduct, into notions of pure fact. But significantly, there was no agreement on whether factual phenomena not covered by the agreed understanding concerning article I were allowed, and the agreed understanding concerning article II is explicitly only illustrative. In any case, the intention of causing “destruction, damage or injury to any other State Party” is made an element of the prohibition.

⁴⁶ See footnote 23 above.

⁴⁷ A situation, in this sense, may extend in time, in other words cover a series of facts occurring at different points of time.

⁴⁸ Actually such choices, for example, and such combinations, are already envisaged in some of the draft articles on circumstances precluding wrongfulness (the “zero-parameter”). Thus, for example, state of necessity cannot be invoked as a justification for not complying with a rule of *jus cogens*. Furthermore, even if the circumstances are such that, in the first instance, countermeasures are allowed or self-defence can be invoked, the measures actually taken should still be legitimate, i.e., remain within the limits of the applicable rules of international law.

⁴⁹ Cf. para. (22) of the commentary to art. 34 of part 1 of the draft (*Yearbook . . . 1980*, vol. II (Part Two), p. 60) where the “necessary” character of the action in self-defence, the “proportionality” and the “immediacy” of the reaction, are qualified as “. . . questions which in practice logic itself will answer and which should be resolved in the context of each particular case”, a nice combination between the most abstract and the most concrete.

⁵⁰ Article 43 of the Vienna Convention, in a different context, seems, *inter alia*, to envisage such a situation.

⁵¹ Again, the “zero-parameter” offers an illustration: under article 35 of part 1 of the draft, a duty to offer compensation for damage—and no more than that—may arise from an act the wrongfulness of which is precluded by some of the earlier articles. Actually, this preclusion of wrongfulness is entailed by another primary (“anti-parallel”) rule, with the result that there is a parallel rule belonging to a different subsystem (which some would describe as the subsystem of “liability for injurious consequences of acts not prohibited by international law”). But, in the cases referred to in articles 31–33, the preclusion does not arise if the State invoking it has contributed to the occurrence of the particular situation. In such particular set of circumstances, another subsystem applies, namely a subsystem of legal consequences of wrongful acts, even though there still is *force majeure*, a material impossibility, distress or state of necessity.

able subsystem is either immediately apparent or—in the case of treaty rules—is elaborated in the treaty itself. The two safeguards mentioned in paragraph 66 above might then be considered sufficient.⁵²

71. There are, however, two other types of *concursum*, where the solution is perhaps less evident. One such type is the *concursum* of subsystems having a clearly separate and different object and purpose; in fact, dealing with separate and different types of relationship. A typical example is given by the set of rules of international law relating to the respect for human rights in armed conflicts. In principle, these rules are applicable even if one of the parties in the armed conflict is an aggressor, and their observance by one party is obligatory even if the other party does not implement its obligations under those rules. This is in conformity with the object and purpose of protection of the human person as such. On the other hand, the restraints those rules put on the methods of warfare of the parties in an armed conflict, and thereby on the possibility of gaining a military advantage in a concrete situation, are sometimes recognized in the formulation of those rules themselves. In this respect—the equality of opportunity to gain a military advantage—a neutral position of the rules, and the non-reciprocity, are perhaps less self-evident. Actually, the conventions in this field address the problem. But in several other fields the questions arising from this type of *concursum* are open.

72. Whereas in the example mentioned in the foregoing paragraph the *lex specialis* character of the relevant rules is generally recognized, there seems to be less consensus on the inverse question, whether the breach of an obligation under a subsystem, which excludes a reciprocal breach as a response, also excludes the response of non-fulfilment of an obligation under another subsystem, which is also applicable in the given situation. Thus, for example, while it is accepted that a member State of the European Economic Community cannot suspend its obligations under the establishing Treaty towards another member State on the ground of non-fulfilment of the latter's obligations as a member State, the question arises whether the first State can suspend its obligations outside the field of the EEC Treaty. A positive response to the general question could be based on two arguments: (a) that the object and purpose, which excludes a reciprocal breach, is not involved, and (b) since a reciprocal breach is excluded, there is a particular need to provide for other means of pressure to obtain observance of the other subsystem's object and purpose.

73. Both arguments are, however, not always decisive, because (a) the object and purpose of a subsystem may well include matters which are not covered by strict rights and obligations as provided for in the subsystem, and (b) the second argument may lose its validity if there are other means indicated in the subsystem's organizational provisions.⁵³

⁵² Indeed, the Commission has already noted in its commentary to chapter V of part 1 of the draft that the articles contained in that chapter are not to be considered as an exhaustive list of circumstances precluding wrongfulness (*Yearbook . . .*, 1979, vol. II (Part Two), p. 106 *et seq.*).

⁵³ Though the treaties establishing the European Communities are of a special kind, they also contain obligations which in some form or

74. Indeed, the organizational provisions of the subsystem may, explicitly or implicitly, exclude some legal consequences of a breach of an international obligation until the procedures indicated in those organizational provisions are exhausted without avail.⁵⁴ Actually, all legal consequences of an internationally wrongful act presuppose that such an act has been established, and it is a matter of organizational provisions to determine how this is brought about.⁵⁵

75. Furthermore, as we have seen (para. 51), the object and purpose of the subsystem may also exclude some legal consequences of a breach of a primary international obligation under that subsystem. Here, too, there is a limit to the exclusion, a fall-back into another subsystem, if the original subsystem fails as such. In that case, the qualitative aspects (law) and quantitative aspects (fact) of the subsystem meet in a general breakdown of the envisaged implementation.

76. In the foregoing paragraphs, several circumstances of law and of fact, precluding one or more legal consequences to be drawn from an internationally wrongful act, have been considered. We have noted that if, on the one hand, the possibility of explicit exclusion of one or more such legal consequences in the formation of (abstract) rules of international law is

another can be found in other multilateral treaties—for example, in the General Agreement on Tariffs and Trade (GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No. GATT/1969-1)—such as the obligation to refrain from imposing quantitative restrictions and measures having equivalent effect (which are not based on certain specified overriding non-economic purposes such as public health protection). The direct effect of this provision, together with the organizational system under which local courts are required to submit to the Court of Justice of the European Communities any legal questions relating to the interpretation of the treaty, and are bound by the Court's opinion—in other words, the combination of local remedies and international court decisions—seems to exclude any claim from one member State against the other for damages, if a breach of the obligation occurs, even if the local remedy falls short of a *restitutio in integrum stricto sensu*. Actually one can discern in the jurisprudence of the Court of Justice of the European Communities a certain tendency to leave at least some of the legal consequences of its declaratory decision on the interpretation of a treaty provision or of a Community regulation entirely to the determination of the local courts.

Furthermore, there is also room for the opinion that the object and purpose of the treaty excludes even countermeasures in a field of obligations outside the treaty, unless the organizational system fails, e.g., because the local courts do not ask for, or do not follow, the decisions of the Court of Justice of the European Communities. Even then, there is a breach of another obligation for which other remedies—be it of a declaratory character only—are provided in the treaty, which must be exhausted. A comparison can be drawn with the Washington Convention on the Settlement of Investment Disputes, where diplomatic protection is excluded pending the settlement procedures between a State and a foreign investor, but revives if the award is not complied with by that State (see footnote 38 above).

⁵⁴ There is a clear analogy with the rule of exhaustion of local remedies in the case of rules concerning the treatment of aliens, particularly if one admits that this rule only applies to the treatment of aliens within the jurisdiction of the State in question. There is also—again—a clear analogy with the state of necessity, which cannot be invoked if the primary rule in question has already taken into account the possibility of such a situation.

⁵⁵ In this connection it seems significant that the European Court of Human Rights does not consider the rule of exhaustion of local remedies to be applicable to a complaint of an individual that the State has not drawn the legal consequences of a finding of that Court that there has been a violation of his rights under the European Convention on Human Rights. In such a case, even the exhaustion of the international remedy of a (new) complaint to the European Commission of Human Rights is—according to the Court—not required.

admitted, and if, on the other hand, a general international procedure of control (*in concreto*) over the admissibility of the drawing of legal consequences is adopted, the task of formulating general rules on those legal consequences is facilitated.

77. Nevertheless, it would still seem necessary to draw up a catalogue of possible legal consequences in a certain order of gravity, and to indicate the principal circumstances precluding one or more legal consequences in a general way.

CHAPTER IV

The catalogue of legal consequences

78. As to the catalogue of legal consequences, in his preliminary report, the Special Rapporteur distinguished three parameters, while underlining, in his second report, the interrelationship between those parameters. In the second report an attempt is made to analyse somewhat further the first parameter, that is, what international law requires of a State in case of a breach of an international obligation by that State.

79. In this connection, another preliminary point should be noted, which was already touched upon in paragraph 32 above. In actual international practice, "State responsibility" means that a rule of international law is invoked against a State by someone else whose interests are affected in an existing factual situation; in general, the "someone else" is another State, and the procedure of invoking is through the diplomatic channel. Now, leaving aside the possible denial of the State whose responsibility is invoked that the alleged existing factual situation in reality exists,⁵⁶ the first reaction of this State will be the requirement of some proof that the situation really is relevant for any rule of international law by which it is bound towards the other State invoking its responsibility;⁵⁷ if not, it will invoke its domestic jurisdiction. In other words, if State responsibility is invoked, immediately the relationship between the international system—or subsystem—and the national system arises. Indeed, while international law is gradually and slowly—sometimes only regionally—building up its own, primarily functional, substratum and its own equally functional, and usually weak, power structure, one cannot escape a "debunking" of the fiction of the State as the sole actor on the international stage. In other words, as regards the State, one has to differentiate.

80. Actually, the functional substratum of the rules of international law is translated into its personal and territorial prolongations. As to its personal prolongations, this is done in part 1 of our draft articles by the provisions of its chapter II relating to the "act of the State".⁵⁸ There the main problem is to distinguish between "organs of the State" (arts. 5–8) and "a person or group of persons not acting on behalf of the State" (art. 11), and to take into account their possible factual

interrelationship through conduct of the one "related to" conduct of the other, possibly by omission.⁵⁹

81. The draft articles just referred to, then, differentiate the State or national system by making a distinction between conduct which can be considered an "act of the State" and conduct which cannot be so considered. Thereby they tend to address only breaches of an international obligation which are intentional as regards another State or are construed to be so.⁶⁰ Now, obviously, *mens rea* is not necessarily an element of the breach of an international obligation, quite apart from the general inapplicability of municipal law analogies in international law. The state of mind of a person, so important in many fields of municipal law, has to be translated, in international law dealing with States, into terms of the internal structure of the national system.⁶¹

82. The foregoing tends to show that, in dealing with the legal consequences of an internationally wrongful act, one cannot fail to take into account the internal structure of the State as well as the character of the primary rules of international law involved.⁶² In these terms, the factual circumstances of the breach—"intentional", "fortuitous", or "incidental"—have to be appreciated.⁶³

83. As a counterpoint, it may not be amiss to analyse the first parameter of the legal consequences of an

nationals of the State concerned, which do rather have a genuine link with the (autonomous) territory of that State which is not covered by the territorial scope of the treaty.

⁵⁹This topic is touched upon in paras. 20–25 of the preliminary report (*Yearbook . . . 1980*, vol. II (Part One), pp. 111–112, document A/CN.4/330). The Special Rapporteur still holds to the opinion expressed in para. 24 thereof, although he also still feels that there is an uneasy discrepancy between the construction of rights of a State in the person of its nationals and the absence of responsibility—i.e., in fact, of obligations—of a State in respect of conduct of persons not acting "on behalf of" the State. Of course, the gap is sometimes more or less filled by treaty provisions which oblige the State to ensure that persons under their jurisdiction or control commit, or refrain from committing certain acts. Whether treaty provisions of such a type are really meant to create an obligation the non-fulfilment of which entails all the possible legal consequences of an internationally wrongful act, is another matter. Perhaps they only reflect a "duty to take care".

⁶⁰Cf. the notion of "constructive intent" known to several municipal legal systems in the field of penal law, such constructive intent being a state of mind in which a person commits an act not actually directed at a particular consequence or effect, but knowingly accepting that consequence as a foreseeable part of attaining a different purpose.

⁶¹If in fact there is any. If not, other constructions are necessary: see, in part 1 of the draft, draft article 14, para. 2, and draft article 15, para. 1, second sentence, in comparison with article 14, para. 3, dealing with a situation of "insurrection"—in other words, of failure of the national system as such.

⁶²In both cases, the legal structure is the starting point; compare draft article 5 of part 1 of the draft.

⁶³There is in principle no State responsibility if the private author

⁵⁶Or will come about, in the case of a "preventive" diplomatic *démarche*.

⁵⁷Of course, the same occurs the other way round if the other State is allegedly acting in response to a wrongful act of the first-mentioned State.

⁵⁸An element of "territorial" prolongation appears in article 28, para. 1 of part 1 of the draft. Cf. also article 29 of the Vienna Convention, relating to the territorial scope of treaties. Incidentally, both treaties and doctrine tend in this respect to focus on obligations only ("binding upon . . ."); consequently, if a limited territorial scope of a treaty is established, some complicated questions arise as to the scope of the rights in that case, particularly in respect of

internationally wrongful act in terms related to the internal structure of the State.⁶⁴ In particular, the distinction between belated performance, culminating in *restitutio in integrum stricto sensu*, and substitute performance, culminating in the giving of guarantees against repetition of the breach, would seem appropriate, as well as the distinctions between the various degrees of either performance.⁶⁵

84. Indeed, the distinction between *restitutio in integrum stricto sensu* and the application of effective local remedies seems essential for the determination of the first parameter of the legal consequences of a breach of an international obligation concerning the treatment to be accorded to aliens.⁶⁶ Those primary rules of international law are obviously not meant to pre-empt all rules of municipal law which are applicable also to aliens, including rules providing for local remedies.⁶⁷ It stands to reason that the particular character of those primary

of the act just happens to be a national of the State, or happens to be acting within the territory of that State. There may be limits to State responsibility if the breach is only incidental to otherwise lawful conduct of State organs.

⁶⁴ After all, the Vienna Convention (art. 46) also takes into account to some extent the internal structure of a State; this is particularly apparent if one compares that provision to the one laid down in art. 48 of the convention.

⁶⁵ In this connection, the Special Rapporteur wishes to correct a misunderstanding which may have been created by the wording of draft article 4, para. 3, as proposed in his second report (see para. 11 above). Actually, an "apology" is rather in the nature of a compensation for immaterial or moral damage suffered (a satisfaction which may sometimes be replaced by a declaratory judgment of an international tribunal), whereas a "guarantee against repetition"—possibly in the form of punishment of the human person who is the author of the act—obviously is a higher degree of substitute performance.

⁶⁶ If it were not considered possible that, in this field, the exhaustion of the available local remedies might entail a result or treatment which would be equivalent to that required by the international obligation, as specified in article 22 of part 1, that article would lose its *raison d'être*. Actually, that article presupposes that, in fact, the interest of the alien is separable from the interest of the State in the performance of the primary obligation and, consequently, that there may be no direct injury to the foreign State. Accordingly, the applicability of the local remedies rule in cases where there is wrongful interference in international communications seems doubtful indeed (cf. the case mentioned in the second report (*Yearbook . . . 1981*, vol. II (Part One), p. 95, document A/CN.4/344) of the *Société Radio-Orient*, cited in footnote 92, and the case of the *Air Service Agreement of 27 March 1946 (United States v. France)*, cited in footnote 57 (*ibid.*, p. 91)): cf. also art. 292 of the recent Convention on the Law of the Sea on the "prompt release of vessels" (see footnote 82 below).

⁶⁷ Cf. footnote 66 above. Cf. also the General Agreement on Tariffs and Trade prohibiting measures having an effect equivalent to quantitative restrictions (the so-called non-tariff barriers to trade) but making an exception for measures having specified (non-commercial) purposes (see footnote 53 above). Actually, the so-called minimum standard (see also second report, para. 89) is the result of a balancing of public and private interests. In the same way, art. XX of the General Agreement balances the interest of free international trade with national non-commercial interests. The "intention" of the national measure involved is decisive here, in order to distinguish between a breach of the obligation and conduct "incidentally" causing the same effect. Furthermore, in respect of all obligations the fortuitous material impossibility of performance is a circumstance precluding wrongfulness, but not necessarily precluding the duty to compensate damage caused thereby. It is interesting to note the jurisprudence of the Court of Justice of the European Communities in respect of the application of arts. 30 and 36 of the Treaty establishing the EEC, which are the equivalent of GATT provisions mentioned before. The Court tests the effects of the national measure on the protection of the non-commercial interest as well as the effects on intra-community trade and, in essence, applies a functional standard of "unreasonable interference" of the one with the other.

rules is reflected in the legal consequences of a breach of those rules.

85. In this connection, it may be noted—though it does not belong to the topic of State responsibility—that the fairly recently perceived interdependences of States in the field of human environment as a "shared resource" has given rise to rules of international law showing distinctions in the primary rules which can be considered as a mirror image of the distinctions in secondary rules, just referred to. In general, in this field the rules do not prohibit the use of the national part of such shared resources but require in successive degrees: (a) the taking into account of the environmental impacts in national regulation of such use; (b) the non-discrimination between environmental impacts within and outside the State frontiers in the application of such national regulation, and (c) the equal access of national and foreign interested parties to local remedies provided for in such national regulations.

86. In view of the foregoing, it would seem useful to mention separately in the catalogue of legal consequences of an internationally wrongful act the degrees of the first parameter, to wit: (a) stop the breach (*ex nunc*), (b) application of local remedies (in principle, *ex tunc*), and (c) *restitutio in integrum stricto sensu* (which, in a way, works *ex ante*). All this is "belated performance" of the original primary obligation. In the case of material impossibility of belated performance, a substitute performance is required in similar degrees, namely: (1) compensation, including possibly an apology as a compensation for moral damage. Compensation is *ex nunc* and is not necessarily the pecuniary equivalent of "wiping out all the consequences of the wrongful act"; (2) reparation (in principle, *ex tunc*); and (3) the giving of guarantees against repetition of the breach (*ex ante*), which may include punishment of the author. All these possible legal consequences in the first parameter can be considered as self-enforcement of the "primary" obligation by the author State.

87. The second parameter deals with what could be called national enforcement by the injured State or States, while the third parameter deals with international enforcement.⁶⁸ If self-enforcement has fully

⁶⁸ The distinction between the three parameters is predicated upon the notion of the "injured" State. One might perhaps object that this notion tends to reintroduce the element of damage in the definition of an internationally wrongful act, which the Commission rejected at an earlier stage. However, "injury" and "damage" are not identical terms. Injury means an infringement of a right, and does not necessarily create a damage in the ordinary sense of the word. Actually—in the opinion of the Special Rapporteur—a right is a "bundle of potential conduct" and not a "thing" which can be damaged, though many rights in this sense are connected with—and sometimes expressed in terms of—physical objects.

On the other hand, in determining the legal consequences of a particular wrongful act of a State under international law, it is simply unrealistic to put all other States on the same footing. It is all right to recognize that some conduct of a State, which is a breach of an international obligation, may infringe a fundamental interest of the international community as a whole, but that does not mean that each individual State (other than the author State which also belongs to that international community) is an injured State. It may be that in case of such conduct some other States, or even all other States, are entitled, or even obliged, to take measures or to accept burdens resulting from such measures, but this is a matter of international enforcement. The use of the term "obligation" tends to hide the concomitant rights and to blur the distinction between a right to a certain conduct or action which is the consequence of (the breach of) that obligation, and the right which is the origin of the obligation in the sense of being protected by it; those two rights do not necessarily

(Continued on next page.)

taken place, the circuit is closed. This does not necessarily mean that, in the meantime, no other measures of enforcement may be taken, in particular measures of the second parameter. The same goes for the relationship between the second and third parameter measures.⁶⁹

88. The catalogue of degrees of second parameter measures is similarly structured as that of the first parameter measures. One can distinguish here: (a) the mere non-recognition of the situation resulting from the breach; (b) the unilateral termination of the relationship;⁷⁰ (c) the "balancing" countermeasure;⁷¹ (d) the countermeasure in another field of relationship; (e) measures of self-help; and, finally, (f) the ultimate measure of self-defence.⁷²

89. As already remarked in paragraph 87 above, the first and second parameter measures may overlap in time. Though, generally, the author State must be given an opportunity for self-enforcement,⁷³ there is no rule excluding all second parameter measures pending such self-enforcement.

90. Second and third parameter measures also overlap, be it in a different way. Actually, it is here that we encounter the problem of determining the "injured" State or States.⁷⁴ This is, clearly, primarily a matter of the primary rules involved. Indeed, the degree of involvement of States parties in a breach of an international obligation imposed by a multilateral treaty is the problem which article 60, paragraph 2, of the Vienna Convention attempts to solve by distinguishing (a) the "defaulting" party; (b) the "party specially affected by

the breach", and (c) other parties to the treaty. The provision thereby recognizes that the mere fact that a State is a party to a treaty does not necessarily make it an injured State in the case of a breach of an obligation imposed by that treaty. On the other hand, the fact that a State is not a (formal) party to a treaty does not necessarily exclude it from being injured by such a breach.⁷⁵ The same question arises in respect of rules of international law established by other sources than treaties.⁷⁶ In particular, there may well exist regional customary law.

91. Furthermore, it cannot be *a priori* excluded that a breach of an international obligation laid down in a bilateral treaty in reality is committed in order to injure a third State.⁷⁷ Actually, the relationship breach/injury is primarily a factual relationship and the question is under what circumstances this factual relationship is, by law, translated into a legal relationship between author State and injured i.e., "non-third" State. Traditionally, international law is rather reluctant to perform such translation,⁷⁸ being essentially bilateral-minded.⁷⁹ Of course, even traditional international law, in respect of a breach of an international obligation imposed by a rule of customary law, recognizes the factual possibility of more than one State being injured by one and the same conduct of another State.⁸⁰

92. Modern international law seems to admit increasingly a "constructive injury" to a State, either as a

(Footnote 68 continued.)

appertain to, and appertain only to, the same subject of international law, under the same conditions.

⁶⁹ Actually, the three parameters are—as the word "parameter" already indicates—interrelated parts of a total system of "closing the circuit" (see para. 36 above). This interrelationship also appears in the possible fallback on another subsystem if the original subsystem as a whole fails. Thus, while some international obligations in the field of respect for human rights may, in individual cases, be left to self-enforcement by the State concerned, a gross, persistent and widespread violation may call for other measures of enforcement.

⁷⁰ This applies to the future (see art. 70, para. 1 (b), of the Vienna Convention). It should be recalled that, in the case of suspension of the relationship, there even remains some obligation as regards the future: article 72, para. 2, of the Vienna Convention provides the obligation to refrain from acts tending to obstruct the resumption of the operation of the treaty, an obligation to some extent comparable with the one laid down in article 18 of the convention.

⁷¹ In the same field of relationship, such a measure goes further than a termination or suspension of the relationship, which does also release the other party or parties from any obligation further to perform the treaty. In this connection one has to distinguish the balancing countermeasure from the situation, described in article 65, para. 5, of the Vienna Convention.

⁷² Which may comprise measures in order to guarantee a non-repetition of the breach. In the present context it does not seem necessary to enter into the question of the possible legality or illegality, according to the circumstances, of measures designed to prevent an imminent breach, though the prohibition of the threat of force in Article 2, para. 4, of the United Nations Charter and the fact that article 2 of the Definition of Aggression (see footnote 23 above) considers the "first use of armed force" as constituting only "*prima facie* evidence of an act of aggression" have some puzzling aspects. But perhaps we are here rather in the field of the "immediate" appreciation referred to above (paras. 64 and 68).

⁷³ Cf. also the general duty of prior notification in article 65 of the Vienna Convention—to which provision para. 5 of the article does not seem to intend to stipulate a real exception—and article 45 of the same convention: a belated consent.

⁷⁴ Cf. the preliminary report, paras. 62 *et seq.*, and in particular the last sentence of para. 62 (*Yearbook . . . 1980*, vol. II (Part One), p. 119, document A/CN.4/330).

⁷⁵ Cf. the preliminary report, para. 96 (*ibid.*, p. 128). Cf. also the position of third States for which a right arises under article 36 of the Vienna Convention.

⁷⁶ Thus one could regard the inherent right of collective self-defence both as a recognition that a State not attacked may have the status of injured State, and as a substitute for collective enforcement by the organized community of States as a whole.

⁷⁷ This is the inverse of the situation dealt with in article 27 of part I of the draft. An example might be a bilateral treaty on trade between States A and B, in which the origin of products of the States concerned is determined taking into account the economic relations of either State with a third State or States. A related question in this connection is whether the actual treatment given by a State A to another State B, in breach of a treaty between those two States, is relevant for the rights of a third State which is a beneficiary State under a most-favoured-nation clause in a treaty it has concluded with State A. In short, relationships between different sets of States may be interlocked either only in fact or also in law, just as they may be interlocked in law—through a multilateral treaty—but not in fact.

⁷⁸ Also in the inverse situation of responsibility of a State in connection with a wrongful act of another State; see articles 27 and 28 in part I of the draft.

⁷⁹ See the Judgment of 18 November 1953 in the *Nottebohm* case, *I.C.J. Reports 1953*, p. 111, and the Judgment of 5 February 1970 in *Barcelona Traction, Light and Power Company, Limited, I.C.J. Reports 1970*, p. 3. See also the much criticized Judgment of 18 July 1966 in the case which opposed Ethiopia and Liberia and the Union of South Africa (*South West Africa, Second Phase, I.C.J. Reports 1966*, p. 6). See also the preliminary report, para. 62 (see footnote 74 above): link with the principle of non-intervention in the external affairs of another State; in the debate in the Sixth Committee in 1981 on the Commission's report, the representative of China referred to the relevance of this principle in the present context (*Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee, 45th meeting*, para. 37).

⁸⁰ Cf. the preliminary report, para. 63 (see footnote 74 above). The tendency to avoid the actual existence of "parallel rights of protection" is to be noted, particularly where it is possible to consider the injury of a State as only derived from the injury of another State. The inverse case of joint responsibility of a member State of an international organization and that organization itself seems to be envisaged by the Third United Nations Conference on the Law of the Sea (annex IX, art. 6) (see footnote 82 below); the division of competences as to the various stages of jurisdiction in the same field of activities seems to inspire this particular provision.

result of its participation in multilateral rule-making, or as a result of the recognition of extra-State interests being protected by the primary rule of international law.⁸¹ In both cases the primary rule of international law itself has to create the constructive injury, either explicitly or implicitly. The mere fact of being a party to a multilateral treaty, and the mere mentioning, in the rule, of non-State "entities", do not in themselves suffice to create that effect in respect of second parameter rights, let alone third parameter obligations. Indeed, there are many multilateral treaties—and rules of customary international law—which create only bilateral legal relationships, be it of uniform content. Thus, for example, the recent Convention on the Law of the Sea⁸²—and the rules of customary international law it codifies—does regulate a number of legal relationships between coastal States and flag States, between coastal States *inter se* and flag States *inter se*, but this in itself does not mean that any State party to that convention is injured by a breach of an obligation under that convention by another coastal State (or flag State) vis-à-vis another flag State (or coastal State). The possibility of splitting up a multilateral treaty into a number of bilateral relationships is recognized—be it also limited—in the Vienna Convention on the Law of Treaties' articles on reservations⁸³ and on modification of multilateral treaties between certain of the parties only (art. 41). No modification *inter se* is, of course, allowed in respect of rules of *ius cogens*, in view of the extra-State interests involved.

93. On the other hand, to keep to examples drawn from the law of the sea, coastal States' rights and flag States' rights cannot, in principle, be transferred to another State nor exercised for the benefit of another State. However, a "regionalization" of such rights may be allowed.⁸⁴ Furthermore, nothing seems to prevent

⁸¹ The factual effect of a breach of an international obligation imposed by a multilateral treaty is underlined by the formula, in article 60, para. 2 (c), of the Vienna Convention on the Law of Treaties, that "a material breach of its provisions by one party radically changes the position" of every other party with respect to the further performance" of its obligations under the treaty"—a formula similar to that contained in article 62, para. 1 (b), of the same convention, dealing with "fundamental change of circumstances". A similar approach can be found in several provisions of the Vienna Convention on Succession of States in Respect of Treaties: cf. "would radically change the conditions for its operation" (arts. 15, subpara. (b); 17, para. 2; 18, para. 3; 19, para. 3; 27, para. 5; 30, para. 2 (a), etc.). But article 60, para. 2 (c) of the Convention on the Law of Treaties also refers to the "character" of the treaty itself, and the character of particular treaties is also relevant in some of the provisions, just mentioned, of the Convention on Succession of States, as well as in other provisions of that convention, such as article 17, para. 3.

⁸² Signed at Montego Bay (Jamaica) on 10 December 1982 (*Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII, document A/CONF.60/122).

⁸³ A reservation formulated by State A and accepted by State B, but objected to—in the manner described at the end of article 20, para. 4 (b), of the Vienna Convention—by State C, entails the result that between State A and State B the treaty applies to the extent modified by the reservation (art. 21, para. 1), between State A and State C the treaty provisions apply not at all, and between State B and State C the treaty applies in its unmodified form (art. 21, para. 2).

⁸⁴ Cf. the effect of "co-operative arrangements" on third States in article 211, para. 3, of the Convention on the Law of the Sea. Article 199 of the Convention obliges States "in the area affected" to co-operate "in eliminating the effects of pollution and preventing or minimizing the damage" and to "jointly develop and promote contingency plans"; it is not quite clear, however, whether such regional co-operation also has an effect on the application of article

the creation in the relationships between the parties to a multilateral treaty of solidarity of the other parties vis-à-vis a breach of an obligation under the multilateral treaty by one of them.⁸⁵

94. It would seem that a constructive injury may also result from the object and purpose of the primary rule or set of rules. Actually, the introduction of extra-State interests as the object of protection by rules of international law tends towards the recognition of an *actio popularis* of every State having participated in the creation of such extra-State interest, the other possibilities of enforcement being either only self-enforcement, or enforcement by the subject to which this extra-State interest is allocated for this purpose.⁸⁶

95. The existence of a "derived" or a "constructive" injury does not necessarily mean that the injured State is entitled to take all the measures of the second parameter catalogue.⁸⁷ In particular, self-defence, self-help and countermeasures outside the field of the relationship involved in the breach are probably not allowed (at least not without a collective decision to this effect). In other words, there may be a correlation between the degree of involvement in the injury and the degree of second parameter measure allowed.

96. Obviously, if one and the same conduct of State A is internationally wrongful both in respect of State B

221, in the sense that the proportionality of the measure in relation to the actual or threatened damage is applied for each of the co-operating States *individually* rather than in respect to the area as a whole and the sum total of the measures taken by each co-operating State. One might well see here an analogy with collective self-defence.

⁸⁵ A draft convention on investments abroad, proposed in 1959 and at some time under consideration by the Organisation for European Economic Co-operation (OEEC; since become OECD), contained an article IV, the second sentence of which read as follows: "The Parties shall not recognise or enforce within their territories any measures conflicting with the principles of this Convention and affecting the property of nationals of any of the Parties until reparation is made or secured". Such provision would go further than what is mentioned in the present paragraph, inasmuch as it deals also with measures taken by *non-parties* to the convention. Whether this is admissible or not is not the point here. In any case the clause is valid as between the States parties to the convention and creates a "constructive injury" of the State party whose national is not a victim of the measure. A similar clause—this time limited to the parties to the convention—is contained in article VIII of the above-mentioned draft, which reads: "If a Party against which a judgment or award is given fails to comply with the terms thereof, the other Parties shall be entitled, individually or collectively, to take such measures as are strictly required to give effect to that judgment or award." (See "The proposed convention to protect private foreign investment: A round table", *Journal of Public Law* (Atlanta, Ga.), vol. 9, No. 1 (Spring 1960), p. 115). See also article 64 of the Washington Convention on the Settlement of Investment Disputes (see footnote 38 above), as interpreted by A. Broches in *Recueil des cours de l'Académie de droit international de la Haye, 1972-II* (Leyden, Sijthoff, 1973), pp. 379-380.

⁸⁶ This subject may be an individual human person (compare the individual complaints to the European Commission of Human Rights under the European Convention on Human Rights) or an international organization. An interesting example of a combination of self-enforcement—including a duty to provide for special local remedies—and a "declaratory" enforcement through an international tribunal is found in the European Convention on State Immunity and its Additional Protocol; under the convention, a State party is under an international obligation to give effect to a judgment of a foreign national court in a case in which it cannot claim State immunity in respect of the jurisdiction of that Court. See articles 20 and 21 of the convention and articles 1, 4 and 6 of the Protocol (Council of Europe, European Treaty Series, No. 74 (Strasbourg, 1972)).

⁸⁷ Indeed, as noted above in para. 91, the traditional tendency towards bilateralism limits even the mere recognition of a "derived" injury.

and of State C and causes separable injuries to both States, there is no reason why State B and State C would not both be entitled to take all second parameter measures independently, to the extent that such measures are allowed at all. The situation is less clear when State C's injury is a "derived", a "constructive" or an "extra-State" injury. Actually, it is the primary rule which determines not only the international obligation, but also the right which it intends to protect, in other words, the injury caused by the breach of this obligation. By the same token, it is the primary rule which should determine to what extent State C is entitled to national enforcement (second parameter measures) or, for that matter, entitled to claim self-enforcement by the author State, particularly the various types of substitute performance (first parameter).⁸⁸

97. As already remarked, traditional international law is "bilateral minded". This goes for all the three stages of the process of international law. Being a party to a primary legal relationship, being a "party" to the breach of an international obligation, and having a *persona standi* for the purpose of activating an international procedure of remedy⁸⁹ are different stages, the first not necessarily entailing the second, let alone the third. Consequently, while the possibility of a purely factual situation, where one act of a State causes injury to more than one other State, has always been recognized, traditional international law has been hesitant to admit "derived", "constructive" or "extra-State" injury.⁹⁰

98. Thus, as we have seen, obligations imposed by the rules of general customary law are "bilateralized", and the same goes, in principle, for obligations imposed by treaties: *pacta tertiis nec nocent nec prosunt*. Even being a formal party to a multilateral treaty does not necessarily make a State a (full) "party" to any (even material) breach of an international obligation under that treaty. On the other hand, it is admitted that a treaty (particularly a treaty establishing an "objective regime") may create rights for a State which is not a (formal) party to it, and, though these rights may be taken away by the formal parties to the treaty through modification of the treaty without the consent of the third State (a sharp contrast with the position of the formal party to the treaty, as determined by article 41

⁸⁸In this connection the question arises as to whether State C can claim reparation if State B has settled its claim against State A, possibly by a waiver of that claim. In the *Barcelona Traction* case (see footnote 79 above), this complication was one of the reasons for the ICJ not to admit the existence of a "derived" injury to Belgium; in the Advisory Opinion on *Reparation for Injuries Suffered in the Service of the United Nations* (*I.C.J. Reports, 1949*, p. 174), however, the independent claim of the United Nations was considered by the ICJ as a corollary of the independence of the United Nations itself, and the complication of parallel claims was taken lightly. The difference between the two cases is, of course, that in the latter case there was a *concursum* of two separable wrongs, flowing from the breach by one and the same conduct of two distinct rules of international law, one analogous to a rule of diplomatic law and the other relating to the treatment of (private) aliens. But then it would perhaps have been more logical to consider the second claim as being only subsidiary to the first, or what amounts to the same as "pre-empted" by the first claim, if actually brought and honoured.

⁸⁹Cf. also the preliminary report, paras. 39-42 (*Yearbook . . . 1980*, vol. II (Part One), pp. 114-115, document A/CN.4/330).

⁹⁰Indeed, the notion of sovereignty of each individual State implies a separation between foreign sovereign States as regards legal relationships in any of the three stages, even to the extent of not admitting the third State to obtain a purely declaratory judgment of an international court.

of the Vienna Convention), one may assume that the third State may be injured by a breach of an obligation under the treaty.⁹¹

99. The degree of being a "third" State in respect of a primary legal relationship necessarily influences the degree of being a party to a breach of the international obligation, which is only an element of that legal relationship. While, in modern international law, it is certainly not generally correct to state that "an 'obligation' to perform specific acts, by way of reparation for the damage or otherwise, can only derive from an agreement between the State committing the breach and the injured State",⁹² neither can the statement of Grotius "that kings . . . have the right of demanding punishments . . . on account of injuries which . . . excessively violate the law of nature or of nations in regard to any persons whatsoever . . ." be accepted without qualification as a description of present-day international law. Nevertheless, the latter statement comes closer to the truth, be it that the response to such "excessive violations" is nowadays generally made subject to the control of the organized community of States.

100. At the same time, the obligation of a third State to react to a given violation makes its appearance in international law. Here again there are various degrees of such obligation. One may distinguish between (a) an obligation not to recognize as legal the result of such violation by the author State; (b) an obligation to accept for oneself some injurious consequences of measures lawfully taken by the injured State in response to the violation; and (c) an obligation to take (positive) measures in order to restore the situation as it existed before the breach, and possibly even in order to prevent a repetition of the breach.⁹⁴

⁹¹In principle, however, no rights of State C as regards State A under a treaty between States A and B may be created by a treaty between States B and C. But, here again, the *pacta tertiis* rule may be set aside in a treaty between State B and State C inasmuch as State C may invoke, as regards State B, a (legal) relationship between State B and State A (most-favoured-nation clause); even there the rule is not without exceptions. The *pacta tertiis* rule may also be set aside through "regionalization" (see para. 93 above). Actually, while the "bilateralism" inherent in the (functional) rule of reciprocity is only relevant for the application of the most-favoured-nation clause if expressly so provided, and the fact that the beneficiary State could get the "favour" requested by becoming a party to the treaty, to which the granting State and the most-favoured nation are parties, is not considered relevant, there are objective régimes of a territorial kind (frontier traffic, land-locked States) and of a "personal" kind (generalized system of preferences; according to many, also regional integration régimes including a measure of common jurisdiction) to which the most-favoured-nation clause does not apply. In short, the notion of "third State" is far from being self-evident.

⁹²H. Kelsen, as quoted in the second report, footnote 24 (*Yearbook . . . 1981*, vol. II (Part One), p. 85, document A/CN.4/344). There may, however, exist international obligations the breach of which does not entail any duty of substitute performance.

⁹³Quoted in the second report (*ibid.*).

⁹⁴There is here a certain analogy with the distinction between *ex nunc*, *ex tunc* and *ex ante*, made earlier in the preliminary and second reports. The obligation under (a) is in reality an obligation not to support a *posteriori* the breach committed by the author State, while the obligation under (b) may, e.g., include a suspension of obligations of the injured State as regards freedom of movement of persons and goods towards the third State, and possibly even an obligation of the third State not to substitute the movement of its persons and goods towards the author State for that from the injured State towards the author State. Obviously, in a situation of conflict between State A and State B, the distinction between C's attitude as non-support of B, neutrality, or support of A may be gradual indeed.

101. Such obligations to react of a third State are obviously an element of international enforcement which presupposes an organized community of States which, as such, reacts against a violation of a rule of international law which it considers as essential for the protection of its fundamental interests.⁹⁵ The existence

⁹⁵ This organized international community need not be a universal one (cf. para. 93 above). But the obligation cannot, in principle, affect the rights of a State which does not belong to that community.

of obligations of this kind is, so to speak, a prelude to part 3 of the draft articles on State responsibility.⁹⁶

Of course, here also there may be *concursum*: compare collective, as distinguished from individual, self-defence.

⁹⁶ At the same time, they underline the particular position of primary obligations imposed by a decision of a competent international organization, including judicial decisions. Cf. also the preliminary report, paras. 69–78 (*Yearbook . . . 1980*, vol. II (Part One), pp. 121–123, document A/CN.4/330).

CHAPTER V

The link between a breach of an international obligation and the legal consequences thereof

102. As may have appeared from the preceding paragraphs, the process of international law, from the formation of its rules to their enforcement, is determined by its structure, or rather by the structure or character of its subsystems and the relationships between those subsystems. “State responsibility” is only one phase in this total process of international law; it cannot but take into account the earlier and later phases of the process. In this connection it should be pointed out once again that there are subsystems of international law which govern a particular substratum of international situations, without necessarily creating “primary” rights and obligations in the strict sense of the word.⁹⁷

103. It would seem, therefore, that any meaningful and acceptable codification of rules of international law on State responsibility should be placed within the framework of, on the one hand, a general clause admitting explicit or implicit deviation from those rules in a particular subsystem of rules of international law and, on the other hand, of a general clause on the procedure of settlement of disputes relating to the interpretation of those rules. Even within such a framework it should be made clear that the rules are not exhaustive in the sense that they purport to describe automatic legal consequences entailed by an internationally wrongful act, whatever the circumstances of the particular case. Only with those three “safeguards” could one—in the opinion of the Special Rapporteur—venture to draw up abstract rules in this field.⁹⁸

104. Every one of the many different régimes (or

⁹⁷ Thus, for example, the GATT provisions (see footnote 53 above) concerning “nullification or impairment” of “advantages” (art. XXIII), and the ICAO provisions relating to “hardships” caused by one member State to another (see art. II, sect. 2, of the International Air Transport Agreement, Chicago, 7 December 1944 (*United Nations, Treaty Series*, vol. 171, p. 396)). Other subsystems—notably in the field of international environmental law—avoid the “State responsibility” phase altogether.

⁹⁸ As was pointed out above (see footnote 19), this approach has much in common with the approach the Commission adopted in respect of chapter V of part I of the draft articles, dealing with “circumstances precluding wrongfulness” (the “zero parameter”). Indeed, in articles 30, 34 and 35—and to a certain extent, even in article 33—there is a certain overlap with part 2. Furthermore, article 29 may even be regarded as a “deviation *ad hoc*”; a real deviation is taken into account in article 33, para. 2 (b). In this connection, it should be recalled that another “circumstance precluding wrongfulness” is dealt with in article 18, para. 2, of part I of the draft articles; cf. the preliminary report, para. 79 (*Yearbook . . . 1980*, vol. II (Part One), pp. 123–124, document A/CN.4/330).

subsystems) of State responsibility (see para. 27 above) is in present-day international law subject to the universal system of the United Nations Charter, including its elaboration in unanimously adopted declarations such as the Declaration of Principles of International Law⁹⁹ and the Definition of Aggression¹⁰⁰ and including also its built-in provisions on collective and individual self-defence. Surely, there is no consensus on the exact scope and content of this universal system. The Special Rapporteur submits, however, that the Commission is not called upon to elaborate, let alone try to improve this system. One simply has to accept its “deviations”, its “non-exhaustiveness” and its “interpretation-mechanism” as overruling any of the draft articles on State responsibility which the Commission has adopted and will adopt in the future.

105. Another legal phenomenon—one could call it a system or subsystem—which the Commission has to accept as axiomatic, is the open-ended body of rules called *jus cogens*.¹⁰¹ Again, there is no consensus on the exact scope—including its possibly graduated force¹⁰²—and content of this legal phenomenon. But its existence is accepted in present-day international law, and the future development of its content is unforeseeable and, indeed, by definition left to the international community as a whole. In principle, that “international community as a whole” would also have to develop the “content, forms and degrees of State responsibility” resulting from any breach of an international obligation, imposed by a rule of *jus cogens*. In this field, however, the Commission, by provisionally adopting article 19 of part 1 of the draft articles on State responsibility, would seem to be, equally provisionally, bound to indicate at least some possible legal consequences of the distinction it made between international crimes and other internationally wrongful acts, subject, of course, to what has been stated in paragraph 104 above and to the general safeguards indicated in paragraph 103.¹⁰³ This point will be dealt with later in the present report.

⁹⁹ See footnote 24 above.

¹⁰⁰ See footnote 23 above.

¹⁰¹ The original text of this sentence was corrected orally by the Special Rapporteur during the Commission’s discussion of the topic at its thirty-fourth session (*Yearbook . . . 1982*, vol. I, p. 203, 1731st meeting, para. 23).

¹⁰² Reference may again be made to para. 79 of the preliminary report (see footnote 98 above).

¹⁰³ These two provisos are particularly important in respect of article 19, 3 (a), of part 1 of the draft.

106. For the purposes of drafting rules relating to the legal consequences of internationally wrongful acts, it would seem useful to distinguish—at least as a start—international obligations imposed by (a) general customary international law; (b) conventional international law (i.e., treaties); and (c) international judicial, quasi-judicial, and other decisions of international organizations.¹⁰⁴

107. Apart from the general legal system embodied in the United Nations Charter (see para. 104 above) and *jus cogens* (para. 105 above), general customary international law creates legal relationships of a bilateral character between States. To an internationally wrongful act of one State corresponds the injury of one other State. In principle, therefore, the whole range of first parameter and second parameter legal consequences apply.¹⁰⁵ Now the question arises whether one can distinguish between obligations under general customary international law according to their character, and draw from such distinction conclusions as to an *a priori* exclusion of certain degrees of legal consequences in the first and second parameters.¹⁰⁶

108. Generally, the international obligations of one State vis-à-vis another State under the rules of customary international law, dealt with here, are limitations on the sovereignty of one State in view of the equal sovereignty of another State. It does not follow, however, that the breach of any such obligation infringes in the same way the sovereignty of the other State. As a matter of fact, customary international law differentiates between the various “emanations” of the sovereignty of the States involved. In particular, it distinguishes between sovereignty *stricto sensu*, jurisdiction *stricto sensu*, and exclusive right of use of territory.¹⁰⁷ Accordingly, the obligations under general

¹⁰⁴ Indeed, the increasing organizational elements in those three legal phenomena cannot but influence the modalities of the legal consequences (and implementation thereof) of a breach of an international obligation imposed by the primary rule.

¹⁰⁵ Subject to the exclusion of particular legal consequences by virtue of other rules of international law; these limitations will be discussed separately. Obviously, *a priori* exclusion of some legal consequences and limitations resulting from other rules of international law tend to meet in a point where no distinction between the two can be made.

¹⁰⁶ Another question is whether there is always a perfect correlation between the breach of an international obligation and the infringement of a right. A negative answer to this question seems to be implied by the existence of “circumstances precluding wrongfulness”. In any case, beyond the absence of legal consequences—except possibly by virtue of article 35 of part 1 of the draft—stipulated in principle by a circumstance precluding wrongfulness, and all legal consequences stipulated in principle in the present paragraph, there may be room for other *a priori* exclusions of some legal consequences. Thus, while in general a specific primary rule of international law (particularly a rule of customary international law) can be considered as having fully balanced the interests of the States concerned for all circumstances in imposing a specific obligation on one of them, it may also be that such specific rule of international law in reality leaves room for a distinction between conduct of a State which is “inherently”, conduct which is “fortuitously”, and conduct which is “incidentally” in conflict with that primary rule, at least for the determination of the legal consequences of such conduct. In other words: it may not be easy to establish what, for the purposes of the legal consequences of an act of a State is, in the terms of article 16 of part 1 of the draft articles, “required of it by that obligation”. The non-exhaustive list of circumstances precluding wrongfulness—in particular articles 31–33—confirms this analysis. If one wants to keep a sharp distinction between primary and secondary rules, the articles just mentioned definitely belong to the first category.

¹⁰⁷ Admittedly, this distinction is not always clear in international doctrine and practice. In particular, the terms “sovereignty” and

international customary law to respect the sovereignty of other States relate respectively to sovereignty *stricto sensu* (compare the terms “territorial integrity and political independence”), to jurisdiction *stricto sensu* (compare the various immunities) and to use of territory (compare the obligations concerning the treatment of aliens admitted to the territory). To these obligations are added—in view of the particular international status of their environment—obligations relating to foreign ships (and similar means of transport).

109. Is this differentiation of obligations relevant to the determination of the legal consequences of a breach of such obligations? The Special Rapporteur is inclined to give an affirmative answer to this question.¹⁰⁸ At any rate—taking into account the non-exhaustiveness of the articles to be drafted in part 2—a differentiation as regards obligations relating to the treatment of aliens,¹⁰⁹ as distinguished from obligations to respect the sovereignty *stricto sensu* of a foreign State, is at the basis of article 5 (see para. 11 above) as proposed in the second report. The main point of difference in (first parameter) legal consequences of the breach of an obligation is here that, in principle, a *restitutio in integrum stricto sensu* is not required and can be replaced by a substitute performance.¹¹⁰

110. While it is relatively easy to distinguish between obligations under general customary international law as regards respect of foreign sovereignty *stricto sensu* and obligations as regards the treatment of aliens within the territory, other obligations under general customary international law are less easy to classify.¹¹¹ Actually, as regards jurisdiction *stricto sensu*, it is even controversial whether there are any real obligations and rights under general customary law, except in respect of the enforcement phase of jurisdiction.¹¹² Real obligations and rights are, however, provided for in the rules of general customary international law relating

“jurisdiction” are often used as indicating the same notion, while exclusive right of use of territory is often not distinguished from either (except in the relatively novel term of “permanent sovereignty over natural resources”). No doubt the personification of the State is responsible for this confusion of the functional, personal and territorial aspects of the State, corresponding to its separate responsibilities of self-maintenance (political), of maintenance of law and order (legal), and of providing for the well-being of its nationals (socio-economic). However that may be, what interests us here is not so much the terminology, but rather the essence.

¹⁰⁸ Particularly in connection with the distinctions made in footnote 106 above. Actually those distinctions are analogous ones, this time in relation to the author State’s conduct as an exercise of its sovereignty *stricto sensu* in its external relations (“inherent” conflict), its exclusive right of use of its territory (“fortuitous” conflict), and its jurisdiction *stricto sensu* (“incidental” conflict).

¹⁰⁹ As to the scope of the category of obligations “concerning the treatment to be accorded by a State [within its jurisdiction] to aliens” (art. 5), it should be noted that (a) it does not cover diplomatic law; (b) it does not cover the treatment of foreign ships under the customary law of the sea; (c) it does not cover obligations to respect human rights, even if within the framework of such obligations a distinction is made between human persons who are, and those who are not nationals of the State concerned.

¹¹⁰ Compare the three international arbitral awards in the Libyan nationalization cases, discussed *inter alia* in R. B. von Mehren and P. N. Kourides, “International arbitrations between States and foreign private parties: The Libyan nationalization cases”, *American Journal of International Law* (Washington, D.C.), vol. 75, No. 3 (July 1981), p. 476.

¹¹¹ Even in respect of the first mentioned distinction there is, of course, always the possibility of a *concursum* in fact; article 5, para. 2, as proposed in the second report attempts to take account of this fact (cf. para. 11 above).

to, on the one hand, immunities, diplomatic and other, and on the other, foreign ships.¹¹³

111. It is typical for the structure of customary international law relating to immunities and to the legal status of ships—both in older doctrine often expressed in terms of territory: e.g., “extritoriality” of foreign diplomatic missions, or “a ship is territory of the flag-State”—that the obligations of a State to grant immunity and to respect the special status of foreign ships are matched by obligations of the State enjoying this immunity or special status. Thus the activities of foreign diplomatic missions must remain within certain limits, and foreign ships should act “innocently”.¹¹⁴ If these obligations of the sending State or of the flag-State are real obligations, the question arises of the legal consequences of a breach of such obligations.¹¹⁵

112. The answer to this question is not entirely clear in all cases. In its judgment of 24 May 1980 in the case *United States Diplomatic and Consular Staff in Teheran*,¹¹⁶ the ICJ held that an abuse of diplomatic functions could never justify a violation of diplomatic immunity. In a recent incident concerning the presence of a USSR warship in Swedish waters the Government of Sweden apparently held that article 23 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone did not prevent Sweden from retaining the foreign warship in its waters for the purpose of

fact-finding.¹¹⁷ The recent Convention on the Law of the Sea contains various provisions regarding the prompt release of foreign (merchant) vessels and their crews, in case they have been arrested on the ground of violation of regulations, upon the posting of a reasonable bond or other financial security.¹¹⁸ It is controversial whether the rule of exhaustion of local remedies applies in the case of wrongful interference of a State with international communications serviced by an alien ship or aircraft.¹¹⁹ In the matter of jurisdictional immunity there is a tendency to limit such immunity *a priori* to *acta jure imperii*, and a tendency not to grant immunity in case of acts of the foreign State which are contrary to its obligations under a rule of international law.

113. All this seems to show that there are certain international activities, both of Governments and of private persons, which have a special status under the rules of customary international law. Whether an abuse of such status may entail a breach of that status and, if so, to what extent, is not always clear. A suspension (for the future) of the relationship itself¹²⁰ usually is allowed.¹²¹

114. On the other hand, the protection of the special status even in the case of abuse seems to suggest the conclusion that a breach of the corresponding obligation without any possible justification by virtue of the abuse, may be regarded as an infringement of the sovereignty *stricto sensu* of the other State for the purpose of the legal consequences of the breach. However, this conclusion may amount to “swinging the pendulum” too far, or, to use a cybernetic metaphor, to exaggerate the “feedback”. Actually, in customary international law a distinction between *a priori* exclusion of certain legal consequences of a breach, limitation of legal consequences by virtue of other rules of customary international law, and the content of primary rules, necessarily tends to become blurred.¹²²

115. In view of the variety of obligations under rules

¹¹² Cf. the “*Lotus*” case (Judgment No. 9 of 7 September 1927, *P.C.I.J., Series A, No. 10*), in which the Permanent Court, however, seems to have overlooked the particular status of ships; both the 1958 Geneva Convention on the High Seas (United Nations, *Treaty Series*, vol. 450, p. 11) and the 1982 Convention on the Law of the Sea (see footnote 82 above) overrule the “*Lotus*” decision. Apart from the special position of ships, international practice shows that, in matters of jurisdiction *stricto sensu*, reference is made to obligations of comity rather than of law. Nevertheless, these “non-obligations” are treated in a way analogous to the treatment of real obligations, inasmuch as countermeasures are sometimes taken as a response to a foreign exercise of jurisdiction *stricto sensu* considered to be not in conformity with such rules of comity. In this connection it is interesting to note that the British *Protection of Trading Interests Act 1980* (*The Public General Acts 1980* (London), H.M. Stationery Office, part 1, chap. 11, p. 243) provides for a declaration of foreign requirements as “inadmissible”, entailing a prohibition of compliance with such requirements, and even provides for a right of recovery of “multiple damages” paid under a foreign judgment. Note that the Act envisages a declaration of inadmissibility of a foreign requirement, *inter alia*, “(a) if it infringes the jurisdiction of the United Kingdom or is otherwise prejudicial to the sovereignty of the United Kingdom; or (b) if compliance with the requirement would be prejudicial to the security of the United Kingdom or to the relations of the government of the United Kingdom with the government of any other country”.

¹¹³ Significantly, however, as regards foreign ships passing through the territorial waters, both the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone (United Nations, *Treaty Series*, vol. 516, p. 205), and the recent Convention on the Law of the Sea (see footnote 82 above) formulate the limitations of the coastal State’s jurisdiction in criminal and civil matters in terms of “should”.

¹¹⁴ Thus diplomatic status can be abused and foreign ships, even on the high seas, should not engage in certain activities which are prejudicial to other States’ interests, like piracy or, in the territorial waters of another State, activities other than “innocent passage” or—in straits—“transit passage”. Incidentally, the Commission’s commentary to article 32 of part 1 of the draft, entitled “*Distress*”, seems to presuppose that the activities of a (merchant) ship may be considered as an act of the flag-State (*Yearbook . . . 1979*, vol. II (Part Two), pp. 133 *et seq.*).

¹¹⁵ Of course, the question also arises if the obligations are not “real” obligations, but in that case—according to the viewpoint adopted by the Commission throughout the discussions of the topic—the question is not one of State responsibility.

¹¹⁶ *I.C.J. Reports 1980*, p. 3.

¹¹⁷ For reports of aspects of the incident, see, e.g., *The New York Times* of 30 October 1981, p. A3; 2 November 1981, p. A8; and 3 November 1981, p. A1.

¹¹⁸ See article 292 of the convention in conjunction with arts. 73, para. 2; 220, para. 7; and 226, para. 1 (b) (see footnote 82 above).

¹¹⁹ See footnote 66 above.

¹²⁰ Cf. declaration of *persona non grata* and breaking-off of diplomatic relations. In essence, the measure contemplated in article 23 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone is also a suspension of the relationship. Compare also article 228, para. 1, of the Convention on the Law of the Sea, where the suspension of proceedings by the coastal State upon the taking of proceedings by the flag State is provided for “unless . . . the flag State in question has repeatedly disregarded its obligations to enforce effectively the applicable international rules and standards in respect of violations committed by its vessels”. Again it is clear that “primary” and “secondary” rules are closely intertwined.

¹²¹ These cases of special status could just as well be considered as limitations rather than as *a priori* exclusions of certain legal consequences. See footnote 105 above.

¹²² This is also true for the distinction between the three parameters themselves. As already noted above, there is a gradual transition from one parameter to the other, or overlap between those parameters. Indeed, the *restitutio in integrum stricto sensu* and the guarantee against repetition of the breach are legal consequences of the first parameter already verging on the second parameter (just as a state of necessity, contributed to by the State against which it is invoked, verges on the determination of the legal consequences of a breach of an obligation of that other State). Furthermore, as to the second parameter of legal consequences, one is bound to distinguish

of customary international law—in between the categories of rules protecting the sovereignty *stricto sensu* of other States and rules concerning the treatment of aliens—and taking into account the non-exhaustiveness of the rules to be drafted in respect of the legal consequences of internationally wrongful acts, the Special Rapporteur is inclined not to propose other rules excluding *a priori* some legal consequences of a breach of an obligation under customary international law.

116. Contrariwise, it might be useful, in the draft articles, to refer to limitations of second-parameter legal consequences, resulting from the special status accorded by the rules of customary international law to foreign States as juridical persons, to their diplomatic and consular missions and to the ships flying their flags. Such a reference clause would, in fact, serve the same purpose as the general safeguard clause of possible deviation from the rules to be embodied in part 2 of the draft articles on State responsibility, and would reinforce such a clause.

117. Turning now to international obligations under conventional international law (i.e., treaties) it must be noted, first of all, that the general safeguard clause of deviation is of particular importance for treaty régimes. Furthermore, it is perhaps useful to distinguish at the outset various functions of treaties within the structure and process of international law as a whole. A general duty of States to co-operate in matters of mutual or common concern may be considered as a principle of modern general customary international law. Obviously, the breach of such a duty cannot, however, be considered as giving rise to State responsibility in the sense this term has always been understood by the Commission. There are many treaties, both bilateral and multilateral, which affirm this duty for a particular subject matter.¹²³ Unless such a treaty otherwise provides—and this is particularly the case in treaties providing for the establishment of international organizations—the non-fulfilment of such obligations to co-operate will entail no legal consequence whatsoever. Actually, treaty provisions stipulating an obligation to co-operate are not more than a “prelude” to international organization *lato sensu*, an inchoate form of such organization as a (functional) fusion of governmental powers of States.¹²⁴

118. On the other hand, treaties establishing international boundaries do not as such create obligations, but only legal consequences in respect of obligations and rights under very many other rules of international law. It is the breach of those obligations that entails State

(Footnote 122 continued)

between what the injured State can do as a response to a breach (a) within its own jurisdiction *lato sensu* (non-recognition of the result of the breach; balancing that result; see for example the recovery of damages paid under a foreign judgment provided by the British law of 1980 (see footnote 112 above)); (b) in respect of its legal relationship with the author State under a rule of international law (suspension of the legal relationship with the author State under a rule of international law (suspension of the legal relationship for the future; balancing countermeasures in the same field of the breach; countermeasures as regards other fields of relationship); and (c) within the jurisdiction *lato sensu* of the author State (self-help, self-defence). It would also seem clear that the measures under (b) and (c) verge on the third parameter.

¹²³ The recent Convention on the Law of the Sea is full of clauses of this kind.

¹²⁴ One might say that such treaty provisions deal with legal consequences without passing through the phase of obligations.

responsibility; the establishment of the boundary is a “prelude”; it stipulates the (territorial) separation between States.¹²⁵

119. Furthermore, there are treaties the sole function of which is either to unify, in a particular field, the exercise of jurisdiction *stricto sensu* by the States concerned, or to regulate the respective reach of such jurisdictions *stricto sensu*, and, possibly, the legal relevance of such exercise of jurisdiction *stricto sensu* in one State for the exercise of jurisdiction *stricto sensu* in the other State or States, in other words, to lay down rules of conflict of law between the States concerned. Here again, the separation or fusion of national legislations has, in the case of breach of an obligation under such a treaty, in principle no other legal consequence than those provided for in those treaties themselves.¹²⁶

120. Two other types of treaties require a special mention, namely, treaties establishing objective régimes and treaties establishing international organizations. Both types of treaties usually also impose obligations on States (other than those referred to in paragraphs 117–119).¹²⁷

121. As already remarked above, the main special point in relation to treaties establishing objective régimes is the position of third States in respect to such régimes. In principle, to the extent that non-parties to the treaty may become parties to the relationships governed by that treaty, they may also be injured States or “parties to the breach” of an obligation under such treaty.¹²⁸ Actually, such objective régimes also exist by virtue of customary international law.¹²⁹

122. As to treaties establishing international organizations, much the same reasoning applies in reverse. In principle, a breach of an obligation under such a treaty injures every other member State of the organization. But here again, in principle, any response to or legal consequence of such a breach is determined collectively in accordance with the constitution of the international organization involved.¹³⁰

¹²⁵ This does not necessarily apply to sea boundaries. Actually, it would seem that the nature of the coastal States’ sovereign rights as regards the exploration and exploitation of the mineral or non-living resources of the continental shelf—a functional, not a territorial, sovereignty, be it expressed in spatial terms—reflects on the legal rules relating to the delimitation of the continental shelf between adjacent and opposite States. In this connection it is interesting to note the recent Judgment of 24 February 1982 of the ICJ in the case *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, in particular the somewhat diminished reliance on the concept of “natural prolongation” of the land domain (*I.C.J. Reports 1982*, p. 18; see particularly p. 92, para. 133, A.2).

¹²⁶ Cf. footnote 112 above.

¹²⁷ Often the same treaty does establish both an objective régime and an international organization to “administer” such a régime.

¹²⁸ Though not necessarily parties to the modification of the treaty. Nor does the establishment of the objective régime necessarily entail deviation from bilateralism of the breach/injury relationship; under an objective régime of freedom of navigation on an international river, a breach of an obligation of the coastal State in respect to the ship of a flag-State remains a bilateral affair, unless—as is often the case—not only the navigation in the technical sense, but also the communication between riparian, and possibly non-riparian, States and/or the economic integration aspect of freedom of transportation are involved.

¹²⁹ Sea, outer space. Cf. also footnote 84 above on the possibilities of regionalization in this respect, which, incidentally, is not only relevant for the determination of the injured State for the purposes of State responsibility, but also for the determination of the author State or States and the responsibility of international organizations.

¹³⁰ Again, this does not mean that there may not be a *concursum*

123. Though in modern international practice the five types of treaties discussed above together constitute a great part of existing treaties, there are also other treaties, particularly bilateral treaties, which are of the kind of "synallagmatic contracts" between States envisaging an exchange of prestations between those States. Actually, traditional doctrine is inclined to concentrate on these reciprocal treaties as regards the determination of the legal consequences of a breach of an obligation under a treaty. Indeed, the element of barter is seldom quite absent in treaty transactions, though the same goes for the element of rule-making; there is always an interaction between fact and law in any system or subsystem. The focusing on the barter element in traditional international law is in conformity with the concept of individual and separate "sovereignty" of each State.¹³¹

124. As to the legal consequences of a breach of an obligation under such barter treaties, the emphasis lies in the second parameter, in particular in the balancing countermeasures of the injured State, which are, in effect, a return to the pre-treaty relationship. At the same time, such countermeasures, taken together with the breach of the obligation by the other State, necessarily destroy the law element (if any) in the treaty. The result is exactly the contrary of an enforcement of the treaty rule. But then, of course, if the function of the treaty-transaction is nothing else than the exchange of prestations, the treaty has no object and purpose of its own. If countermeasures are to be enforcement measures they must be disproportional to the breach of the obligation in terms of the effects of both. Consequently, such enforcement measures will normally be sought in other fields than that of the breach. This raises the question already referred to in paragraph 72 above.

125. One field of relationship may be covered by the same treaty (in the sense of the same instrument) or by a group of rules of international law flowing from another source.¹³² On the other hand, separate treaty instruments dealing with the relationship between the same States may deal with the same field of relationship.¹³³ In this connection, it may be recalled

in the sense that a bilateral primary relationship is breached by the same conduct and entails a bilateral breach/injury relationship; regionalization is also possible in this respect. Here too, there may be similar régimes under the rules of customary international law inasmuch as, in respect of the breach of certain obligations, a legal consequence may only be drawn through a collective decision.

¹³¹ In this sense, the non-reciprocity underlying treaties giving effect to what is called "a new international economic order" is a shift towards the "law" element, as, for that matter, is the old idea of *jus communicationis*; the difference between these two approaches lies in another dimension.

¹³² In this connection, attention may be drawn to article 44 of the Vienna Convention, dealing with the separability of treaty provisions. Actually, the reference in para. 2 of this article to article 60 seems to imply that, in case of a breach of a treaty provision, another party to the treaty may suspend the operation of another treaty provision even if those provisions are not separable in the sense of article 44, para. 3. But then, of course, article 60 applies only in the case of a material breach, which presupposes a link between the provision violated and other provisions of the same treaty (art. 60, para. 3). Nevertheless, such a link seems to be an objective one, while article 44, para. 3 (b), also takes into account the subjective link resulting from the treaty as a "package deal" between States, i.e., as a barter transaction with respect to rights and obligations lying in—objectively—different fields.

¹³³ Cf. the preliminary report, paras. 60–61 (*Yearbook . . . 1980*, vol. II (Part One), pp. 118–119, document A/CN.4/330).

that a field of relationship may cover matters which are not dealt with in terms of real rights and obligations.¹³⁴ In any case, where different fields of relationship, covered by different sets of rules of international law, are involved, a cumulative application of such sets of rules may result in the precluding of countermeasures outside the field of relationship involved in the breach, either temporarily or permanently.

126. Until now, no specific distinction has been made between bilateral and regional treaties, though some of the types of treaties mentioned before are, in fact, mostly multilateral or regional. Actually, the mere fact that an international obligation is imposed on a State by a multilateral treaty does not necessarily alter the bilateral character of the breach/injury relationship between States.¹³⁵ Nevertheless, the treaty as an instrument remains a multilateral one, and, consequently, the Vienna Convention treats the invoking of the invalidity, the termination, the withdrawal from and the suspension of the operation of a treaty as a matter which concerns all other parties to that treaty (art. 65). But this is a matter of procedure. As to substance, article 60 of the Vienna Convention seems rather to underline the bilateral character of the breach/injury relationship by providing for two exceptions, and those only in respect of a material breach of a multilateral treaty by one of the parties.¹³⁶

127. In this connection, it should be recalled (see above, paras 94 *et seq.*) that a "derived" or "constructive" injury may be "organized" in the multilateral treaty itself. Actually, article 60 of the Vienna Convention seems to approach this situation from three different angles: first, by limiting itself to "material" breaches, it presupposes an "object or purpose" of the multilateral treaty as such (para. 3 (b)); second, it refers to treaties "of such a character 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" (para.

¹³⁴ Compare para. 72 above. Particularly in economic matters, the interaction between economic facts may lead to treaty clauses which, while not creating *per se* rights and obligations in respect to conduct, nevertheless make such conduct relevant for the application of the treaty, sometimes in the form of special procedures in case of such conduct—for example, the GATT "nullification or impairment" and ICAO "hardship" provisions (see footnote 97 above). One might contrast such "good faith" expansions of the field of relationship, or object and purpose, with the "contraction" of the field of relationship implicit in the possibility of making reservations, and other distinctions between provisions essential and those not essential for the object and purpose of a treaty or legal relationship.

¹³⁵ Indeed, the obligation itself may be bilateralized, for example, through the effect of reservations accepted by one or more and rejected by other participants in the multilateral treaty. Furthermore, as noted before, even obligations imposed by rules of customary international law are often bilateral.

¹³⁶ See above, paras. 90 *et seq.* Obviously the Vienna Convention only deals with the legal consequences of a breach in respect of operations relating to the treaty, and not with State responsibility (art. 73). It does not purport to exclude other responses in other cases of breach, even by States other than the directly injured State. Nevertheless, one may well ask why the suspension of the operation of a treaty in whole or in part by a party—particularly under the circumstances described in article 65, para. 5, of the Vienna Convention—should be so limited, if more or less the same effect could be produced by taking a countermeasure under the rules of State responsibility. Indeed, the whole tenor of the Vienna Convention provisions on the legal consequences of a breach of a treaty obligation seems at least to suggest a legal limitation of such countermeasures, in particular as regards States not "specially affected" by the breach.

2 (c)); and third, it presupposes a collective interest of all the parties by permitting the parties, other than the defaulting State, to terminate the treaty or suspend its operation in whole or in part "by unanimous agreement" (para. 2 (a))—that is, by a collective decision.¹³⁷

128. The third angle of approach, in particular, may be further developed in the treaty itself. Thus international procedures for internal remedies may be provided for in respect of alleged breaches, and should then, in principle, be exhausted before at least some of the otherwise possible legal consequences are drawn from the situation.

129. On the other hand, the collective decisions resulting from such procedures may themselves impose or "trigger" new obligations, and create relationships of another type, another field, and even another "organization". Thus, for example, if there has been a breach of an international obligation, and if the ICJ has dealt with the—bilateral—dispute, and if then its judgment is not complied with, the Security Council of the United Nations may deal with the matter.

130. A particular case of the shift from one subsystem to another is, it seems, the qualification of an internationally wrongful act as an "international crime".¹³⁸ The notion of international crime seems to imply that (a) the wrongful act thus qualified can not be made good by any substitute performance (first parameter), and (b) it causes injury to all States (second parameter). Indeed, the notion itself is a typical deviation from the traditional approach of bilateralism and reparation in international affairs.

131. On the other hand, at least in the first instance, the words "international crime" evoke some general principles of municipal law as to penal consequences of conduct, such as the principle that conduct can only be qualified as criminal by previous legislation that also determines the penalty, and the principle that a person is not guilty unless his guilt is established through the appropriate procedures. Of course such principles, being principles of municipal law, are not simply transferable to international law—but the same is true of the notion of "crime" itself.¹³⁹

132. Nevertheless, it may be stated that the notion of "international crime" implies at least a third parameter of legal consequences: some form of international enforcement. One can hardly accept this notion without at the same time providing for its specific legal consequences and the means of "implementation" (*mise en oeuvre*).

133. One such specific legal consequence could be an obligation of all States to contribute to a situation in which the author State of an international crime could be compelled to stop the breach. As a minimum, such contribution would include refraining from support *a posteriori* of the conduct constituting an international crime. A second degree of contribution would be a

support of countermeasures taken by another State or States, and a third degree would be the taking of countermeasures against the author State.

134. In respect of all three degrees of contribution, further distinctions can be made. Thus the support *a posteriori* from which each State should refrain may refer to the conduct constituting the international crime itself, or to the result of such conduct,¹⁴⁰ or even to the author State itself in other fields of relationship. Furthermore, support can be given, and countermeasures taken, by a State within its own jurisdiction, in a field of international legal relationship with the author State, or even within the jurisdiction of the author State itself. Finally, the support by State A of countermeasures taken by another State (or States) B against author State C may range from accepting that State B's measures include devices to prevent evasion through State A, to taking parallel measures in order to prevent substitution, and even to the taking of measures amounting to aid or assistance to State B under article 27 of part 1 of the draft articles.

135. In determining the legal consequences of an international crime in terms of obligations of States other than the author (or defaulting) State, three general points must not be lost sight of. In the first place, it should be noted that in present-day international relations—often characterized as a state of interdependence—the survival of a State may depend not so much on the observance by other States of their legal obligations towards it as on conduct of such other States to which they are not strictly obliged under the rules of international law. Accordingly, an internationally wrongful act, and particularly an international crime committed by a State may entail in fact an attitude of other States which seriously affects its interests to the point of compelling it to mend its ways. The question arises then, whether this category of "political" consequences should be addressed in our draft articles on State responsibility, or at least be taken into account.

136. Secondly, it should not be overlooked that in many, though not all, cases of "international crime" the same conduct also invokes a bilateral internationally wrongful act; in other words in many cases there is, or are, State(s) especially affected by the breach. The legal consequences of the breach in terms of rights of those States remain as determined by the rules concerning other internationally wrongful acts.

137. Thirdly, in modern times there is a strong tendency towards regionalization, the formation of groupings of States with common interests and opinions. This generally results in particular legal relationships between the member States of such groupings. In some cases the grouping even entails legal consequences in the relationship with States outside the grouping, but the extent to which this is the case under general rules of international law is, as yet, far from clear. Again the question arises whether this phenomenon should be taken into account in the draft articles (see also para. 143 below).

¹³⁷ A similar idea of cohesion of bilateral relationships is expressed *inter alia* in article 20, para. 2 of that convention, and in various articles of the Vienna Convention on Succession of States in respect of Treaties (see footnote 81 above).

¹³⁸ Of course, the text of article 19 of part 1 of the draft is not now under discussion; the second reading may lead to its revision, in particular in the light of decisions taken in respect of parts 2 and 3.

¹³⁹ That is to say, the notion of a crime committed by a State; individual criminal responsibility by a physical person is another matter.

¹⁴⁰ See, for example, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625(XXV) of 24 October 1970, annex): "No territorial acquisition resulting from the threat or use of force shall be recognized as legal".

138. Article 19, para. 2, of part 1 of the draft presupposes the existence of international obligations "so essential for the protection of fundamental interests of the international community that [their] breach is recognized as a crime by that community as a whole". Presumably such recognition precedes the breach. Ideally, it would be for that international community as a whole to determine the legal consequences of a breach, including the procedures according to which the existence of a breach is established and the corresponding obligations of all other States are determined. Actually, to the extent that the situation created by the commitment of an international crime also could give rise to action of United Nations organs in application of the relevant provisions of the United Nations Charter, the legal consequences of the international crime and the implementation of those consequences are already provided for. Any improvement of that subsystem of international law would seem beyond the task of the Commission.¹⁴¹

139. Article 19 of part 1 of the draft also seems to presume that an international crime, in the sense of para. 2 of that article, may not be at the same time "a serious breach of an international obligation of essential importance for the maintenance of international peace and security" in the sense of para. 3, under (a). The question arises whether, nevertheless, "the international community as a whole", in recognizing particular conduct as a crime, may at the same time declare applicable—and indeed, unless a contrary intention is clearly established, may be considered to have declared applicable—the procedures of collective decision provided for in the United Nations Charter.¹⁴² The Special Rapporteur is inclined to give a positive answer to this question.

140. Quite apart from the obligation of every State (see para. 133 above), the question arises as to the right of every State to respond to an international crime on its own initiative. Apart from the situation of *concursum* (see para. 136 above), the answer would seem negative in principle.¹⁴³ A single State cannot take upon itself the role of "policeman" of the international community. However, there may be room for an exception to this principle.

141. In this connection, it would seem that some analogies may be drawn with the situation dealt with in the ICJ's advisory opinion at 21 June 1971 on *Legal Consequences for States of the Continued Presence of South Africa in Namibia*.¹⁴⁴ Indeed, in this opinion

¹⁴¹ In particular, in view of the existence of a Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization (see document A/AC.182/L.31 of 2 February 1982).

¹⁴² Such a course of action would not, in the opinion of the Special Rapporteur, require any formal amendment of the United Nations Charter; see W. Riphagen, "Over concentratie en delegatie bij internationale instellingen", *Netherlands International Law Review* (Leyden), vol. VI, Special Issue, July 1959, p. 229 (English summary at pp. 252–253). In all its decisions relating to Namibia, the ICJ has accepted the competence of United Nations bodies to deal with the implementation of the mandate agreements.

¹⁴³ This is without prejudice to the "countermeasures" referred to in para. 134 above.

¹⁴⁴ As stated in the preliminary report, paras. 41, 55–62 and 69–74 (*Yearbook* . . . 1980, vol. II (Part One), pp. 115, 117–119, 121–122, document A/CN.4/330), the case of Namibia is a special one in view of the particular legal status of the territory.

the Court seems to make a distinction between legal consequences flowing from the mere fact of an international wrongful act having been committed and ". . . 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 . . .".¹⁴⁵ Although this case turned on the scope of an obligation of non-recognition of the result of an internationally wrongful act (cf. para. 134 above) and also dealt with "political" measures (in the sense of para. 135), the distinction between the degrees of countermeasures may perhaps be applied also to the question of the right of a State or States to respond to an international crime in the absence of a collective decision to that effect of the competent United Nations body. One could then draw the conclusion that measures amounting to the withdrawal of support *a posteriori* and termination or suspension of treaty relationships with the author State are allowed, at least pending a decision of the competent organ of the United Nations.

142. In the case dealt with in the advisory opinion just mentioned, a decision of the Security Council had already been taken establishing the internationally wrongful act (resolution 276 (1970), of 30 January 1970). Obviously, such prior determination is an important safeguard. It would seem, however, that in view of the limitation of the allowed countermeasures to essentially temporary, or at least not "irreversible" measures, a control *a posteriori* is sufficient. After all, it seems hardly likely that the facts of the case are much in dispute if a State invokes its right to take limited countermeasures as a response to an international crime. On the other hand, the qualification of alleged conduct as an "international crime" under the definition given to that notion in article 19, para. 2, of part 1 of the draft may very well give rise to a dispute. Indeed, such a dispute is quite comparable to the dispute which may arise if and when a State invokes the nullity of a treaty under article 53 or 64 of the Vienna Convention (*jus cogens*). Accordingly, the present draft articles should provide for a similar procedure to that provided for in article 66, subpara. (a), of that convention.

143. One could also imagine another additional safeguard against precipitous action of a State in response to an alleged international crime of another State: that the (still limited) countermeasures could only be taken by a grouping of States collectively. Obviously, the question immediately arises how to qualify such a grouping and the "collective" character of the decision. In itself the idea is not quite without precedent, apart from the fact that even an international crime may affect some parts of the international community more than others.¹⁴⁶ Actually, both the notion of collective self-defence and the provisions of article 60, paragraph 2 (a), of the Vienna Convention seem to point in the direction of "regionalization" (see para.

¹⁴⁵ *I.C.J. Reports 1971*, p. 55, para. 120. It should be recalled that, in its Judgment of 18 July 1966, the Court had decided that Ethiopia and Liberia did not have a "separate self-contained right" to demand performance of the obligations of South Africa in respect of its "sacred trust" (*I.C.J. Reports 1966*, pp. 28–29, para. 33).

¹⁴⁶ At the time the Charter of the United Nations was adopted, a reasoning of this kind may have inspired the "Transitional Security Arrangements" of Articles 106 and 107 in connection with Article 53 of the Charter.

137 above). For the moment, the present Special Rapporteur feels that this aspect should only be analysed further if the Commission so decides, particularly since the scope and terms of article 19 of part 1 of the draft are still to be discussed in second reading.¹⁴⁷

¹⁴⁷ Actually the "philosophy" behind article 19 may bear further

scrutiny. Some might consider that the notion of obligation "essential for the protection of the fundamental interests of the international community . . . as a whole" should be *a priori* limited to such situations as put into question the viability of the system of sovereign States, each having its own and separate power structure, subjects and territory. Indeed, the examples given in article 19, para. 3, may be regarded as pointing to cases in which the notion of the sovereign State itself fails to function, rather than to any particular conduct or protected interest.

CHAPTER VI

Draft articles

144. It would seem *a priori* impossible to translate the analysis given in the foregoing chapters into an exhaustive simple set of articles of parts 2 and 3 of the draft articles on State responsibility. Indeed, that analysis is predicated upon the concept of a continuous process of interaction, which defies a "crystallization" into the fixed and separate forms of source/obligation/breach/consequence/implementation.¹⁴⁸ In a sense this is recognized by the previous *obiter dicta* of the Commission referred to in paragraph 27 above. This does not mean that no articles can be drafted, but only that such articles must be flexible and must contain terms which leave room for a variety of applications. Even then some "Gordian knots" have to be cut, if only in the choice between what is, and what is not registered in those articles.

145. As explained in paragraph 25 above, article 1 could read as follows:

Article 1

An internationally wrongful act of a State entails obligations for that State and rights for other States in conformity with the provisions of the present part 2.

Commentary

(1) The sole purpose of this introductory article is to lay a link between the articles in part 1, defining what is an internationally wrongful act of a State, and the articles of part 2, dealing with the legal consequences of such an internationally wrongful act. The article does not mean to say that any internationally wrongful act of a State automatically entails all the legal consequences mentioned in part 2. In the first place, "automatic", in this field, is contrary to the very idea of justice. The factual conduct of a State which is not in conformity with what is required of it by an international obligation—in other words the breach—may, with respect to one and the same obligation, be more or less serious, and the same goes for the factual effect of that conduct on the interests of another State or States. The same remarks are valid for the legal consequences of the breach, inasmuch as they refer to conduct of the author

¹⁴⁸ Actually, while the rules of State responsibility are concentrated on conduct which is a breach, similar questions arise with respect to conduct which is in conformity with rules of international law, particularly rules of procedure and rules of statutes. The various degrees of validity/invalidity of a legal act, and the various degrees of acquisition/non-acquisition or loss of a legal status are then the legal consequences involved in this type of question. We have noted analogies before. (Cf. the preliminary report, para. 39 (*Yearbook* . . . 1980, vol. II (Part One), p. 114, document A/CN.4/330).)

State and other States, and the effects thereof are also to be taken into account. In short, even where the circumstances of the situation are not "circumstances precluding wrongfulness" in the sense of chapter V of part 1 of the draft articles, such circumstances may be aggravating or extenuating, and this inevitably influences the consequences of the breach in a given situation. A manifest "quantitative disproportionality" between breach and legal consequences should be avoided, but, while this principle can appear in a set of general draft articles on State responsibility (see art. 2), a further elaboration must be left to the States, international organizations or organs for the peaceful settlement of disputes which may be called upon to apply those articles.

(2) Not only the conduct constituting the internationally wrongful act and the conduct constituting a fulfilment of the (new) obligations or the exercise of the (new) rights mentioned in this article may be, as such or in its effects, more or less serious, but also the (primary) obligations to which they refer are not all of the same character. To a certain extent, the draft articles of part 2 may reflect these qualitative differences between primary obligations. But an exhaustive treatment cannot be given to this aspect, in view of the great variety of primary obligations.

(3) In respect of both the matter referred to in paragraph (1) above and the aspect mentioned under paragraph (2), the rules of international law establishing the primary obligation, and possibly other rules of international law, may themselves contain prescriptions relating to the (new) obligations and the (new) rights entailed by a breach of the primary obligation or obligations involved. Such prescriptions would then prevail over the present articles of part 2 (see art. 3).

146. Article 2 could read as follows:

Article 2

The performance of the obligations entailed for a State by its internationally wrongful act and the exercise of the rights for other States entailed by such act should not, in their effects, be manifestly disproportional to the seriousness of the internationally wrongful act.

Commentary

See the commentary to article 1, paragraph (1).

147. As explained in paragraph 31 above, article 3 could read as follows:

Article 3

The provisions of this part apply to every breach by a State of an international obligation, except to the extent that the legal consequences of such a breach are prescribed by the rule or rules of international law establishing the obligation or by other applicable rules of international law.

Commentary

- (1) See the commentary to article 1, paragraph (3).
- (2) Ideally, States and other subjects of international law, in making a rule of international law establishing an obligation, should at the same time envisage the possibility that a State would not act in conformity with what is required of it by that obligation, and prescribe the legal consequences of such a situation. In actual fact, this very often does not happen. Apart from the reason that one is hesitant "to make a last will and testament for a new-born baby", States often consider, at the time of stipulating obligations, that a non-performance of such obligations may create a totally new international situation, the consequences of which they are not willing to describe at that time; governments generally do not like to answer hypothetical questions. Nevertheless there exist rules of international law, in particular conventional rules, which do address the question, often in terms of procedures relating to the "implementation" of the treaty.
- (3) Such rules may also be adopted by States at a later stage and then refer either to specific primary obligations stipulated in an earlier treaty, or to obligations generally or a category or categories of obligations. A typical example are treaties relating to dispute settlement. Such treaties may even contain provisions relevant for the determination of the substantive (new) obligations and (new) rights entailed by an internationally wrongful act of a State.¹⁴⁹
- (4) In a sense, rules of international law establishing a primary obligation and prescribing at the same time the legal consequences of a breach of such an obligation may be compared with the treaties referred to in article 33, 2 (b), of part 1 of the draft articles, inasmuch as they both envisage circumstances beyond the facts directly addressed in the primary obligation.
- (5) Article 3 has the effect of giving the special articles of part 2 the character of rules which apply to the legal consequences of an internationally wrongful act only, *unless otherwise provided for*. Actually, the special provisions are only presumptions as regards the intention of States which establish or accept rights and obligations between them. This not only applies to matters as referred to in paragraphs (1) and (2) of the commentary to article 1 and the matter of "implementation", but also to the question of which State or States are considered to be injured by a breach of an obligation.

148. Article 4 could read as follows (see para. 105 above):

¹⁴⁹ Compare Article 36, para. 2 (a) and Article 41 of the Statute of the International Court of Justice; compare also the second report, paras. 41–43 (*Yearbook . . . 1981*, vol. II (Part One), pp. 83–84, document A/CN.4/344).

Article 4

An internationally wrongful act of a State does not entail an obligation for that State or a right for another State to the extent that the performance of that obligation or the exercise of that right would be incompatible with a peremptory norm of general international law unless the same or another peremptory norm of general international law permits such performance or exercise in that case.

Commentary

- (1) One of the more important elements in the progressive development of international law is the recognition of the existence of peremptory norms of general international law. The legal consequences of such norms, that is, of conduct of States in breach of (or in conformity with) such norms, may take different forms. Thus, under article 53 of the Vienna Convention on the Law of Treaties, States cannot conclude a valid treaty (i.e., a treaty having "legal force")¹⁵⁰ if its provisions provide for conduct contrary to a peremptory norm of general international law. Article 71, paragraph 1, of the convention deals with the legal relationship between the States having in fact concluded such a treaty; it appears from that article (in conjunction with article 69, paragraph 2) that the treaty still has some legal effects. The effect of a new peremptory norm on existing treaties is treated somewhat differently in article 71, paragraph 2, in view of the presumably non-retroactive effect of the peremptory norm. In the different context of article 18 of part 1 of the draft articles, some "retroactive effect" is given to the peremptory norm, but only to the extent such a norm makes an act of a State "compulsory". In the still different context of article 33 of part 1 of the draft articles, the obligation arising out of a peremptory norm is made resistant against state of necessity as a ground for precluding the wrongfulness of an act of a State.
- (2) The present article deals with still another context, namely the context of article 1. It states that no derogation from a peremptory norm is permitted even as a legal consequence of an internationally wrongful act. Obviously, one cannot exclude that the same peremptory norm or a later one permits such derogation, particularly as a legal consequence of conduct of a State which is itself incompatible with a peremptory norm. But this would still be an exception to be provided for by a peremptory norm itself.

149. Article 5 could read as follows (see para. 104 above):

Article 5

The performance of the obligations entailed for a State by its internationally wrongful act, and the exercise of the rights for other States entailed by such act, are subject to the provisions and procedures embodied in the Charter of the United Nations.

¹⁵⁰ See article 69, para. 1.

Commentary

(1) Article 103 of the United Nations Charter stipulates that:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any international agreement, their obligation under the present Charter shall prevail.

(2) The legal principle underlying this provision is valid also in respect of obligations not imposed by "any other international agreement". In particular, the duty of States under the Charter to settle their international disputes by peaceful means in order not to endanger international peace, security and justice, the provisions of the Charter with respect to the functions and powers of the organs of the United Nations, and the inherent right of self-defence as referred to in Article 51 of the Charter, also apply to and prevail over the legal relationships between States resulting from an internationally wrongful act of a State, to the extent that such legal relationships are covered by the scope of the Charter.

(3) In this connection, due account should be taken of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations¹⁵¹ and the Definition of Aggression.¹⁵²

150. Article 6 could read as follows (see paras. 130-143 above):

Article 6

1. An internationally wrongful act of a State, which constitutes an international crime, entails an obligation for every other State:

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

(b) not to render aid or assistance to the author State in maintaining the situation created by such act; and

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

2. Unless otherwise provided for by an applicable rule of international law, the performance of the obligations mentioned in paragraph 1 is subject *mutatis mutandis* to the procedures embodied in the United Nations Charter with respect to the maintenance of international peace and security.

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

Commentary

(1) Draft article 19 of part 1 of the draft articles stipulates the possibility of an internationally wrongful act "which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international commu-

ity that its breach is recognized as a crime by that community as a whole".

(2) Draft article 19 does not and cannot indicate how and when such recognition by that community as a whole takes place. Neither does it specify the special legal consequences entailed by an international crime having been committed by a State. The present article intends, to a certain extent, to fill this gap.

(3) The way in which the international community as a whole determines *in abstracto* which international obligations are "so essential for the protection of fundamental interests of the international community" that their breach justifies special legal consequences falls outside the scope of the draft articles on State responsibility.

(4) The present draft article cannot, however, fail to take account of the possibility that "the international community as a whole" determines the content of those special legal consequences and the procedural conditions under which they shall be applied. Indeed, in respect of the first example of such an international crime, given in part 1 of the draft in article 19, paragraph 3 (a), namely "a serious breach" of the prohibition of "aggression", the international community as a whole must be considered to adhere to the Charter of the United Nations, including the powers and functions of the competent organs of the United Nations and the right recognized in Article 51 of the Charter. Other cases of international crime may well create a situation in which the provisions of the United Nations Charter relating to the maintenance of international peace and security are also directly applicable. But if this is not the case—and such situations cannot be excluded *a priori*—the special legal consequences and the way they are to be "implemented" are as yet unclear.

(5) The definition of "international crime" in article 19, paragraph 3, of part 1 of the draft articles implies that the international community as a whole is injured by such wrongful act. It may therefore be presumed that the organized international community, that is, the United Nations Organization, has a role to play in determining the special legal consequences entailed by such act, even if the maintenance of international peace and security is not considered to be involved. On the other hand, the notion of a right of individual "self-defence", recognized in Article 51 of the United Nations Charter, cannot be held to be directly applicable.

(6) Nevertheless the notion of international crime seems to imply that each individual State has at least an obligation—implying a right—not to act in such a way as to condone such crime. Paragraph 1 of article 6 analyses this obligation.

(7) Paragraph 1 (a) stipulates the obligation not to recognize as legal the situation created by the international crime. The formula is inspired by the rule embodied in the 1970 Declaration on Principles of International Law which states that: "No territorial acquisition resulting from the threat or use of force shall be recognized as legal". Obviously, international crimes other than a serious breach of the prohibition of aggression may not create a situation in which the author State purports to exercise sovereign rights over a given area. Nevertheless, one might well imagine that

¹⁵¹ General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

¹⁵² General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

an international crime creates a legal situation under the municipal law of the author State which, as such, could be recognized by another State within that other State's jurisdiction, possibly by virtue of the application of a treaty between the author State and the other State, which deals in general terms with legal co-operation between the two States.

(8) In this connection, it should be noted that the ICJ, in its Advisory Opinion of 21 June 1971, states, within the context of non-recognition of the continued presence of South Africa in Namibia, that "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".¹⁵³ It would not seem that this statement should be construed as an exception to the duty of non-recognition, but rather as a reminder of the fact that—like any other right or obligation—the obligation not to recognize as legal should not be interpreted blindly, but in its context and in the light of its object and purpose, as a countermeasure against the international crime—that is, an act of a State—itsself.

(9) Paragraph 1 (b) is necessarily drafted in rather vague terms. Its formulation is inspired by, on the one hand, article 27 of part 1 of the draft articles and, on the other hand, by article 71 *in fine* of the Vienna Convention on the Law of Treaties; both articles, of course, deal with a context different from the present one.

(10) While paragraph 1 (a) deals with the result of the international crime—the situation created by such crime—subparagraph (b) refers to the author of the crime. It prohibits international co-operation with the author State to the extent that such co-operation helps the author State to maintain the situation created by the crime. This is much broader than aid or assistance rendered for the commission of an internationally wrongful act (art. 27 of part 1), which in its turn, of course, includes aid or assistance rendered for the continuation of the international crime. On the other hand, it clearly does not cover international co-operation with the author State in fields which have nothing to do with the international crime or the situation created thereby. Obviously a State other than the author State may wish to avoid any type of international co-operation with the author State, and may do so without infringing any legal obligation which is incumbent upon it. But the present article deals with an obligation not to render aid and assistance, an obligation which, under paragraph 3 of the article would prevail over other obligations.

(11) In this connection, it is interesting to note that the ICJ, in its aforementioned Advisory Opinion of 21 June 1971, in respect of the application of existing bilateral treaties with South Africa, stipulates a duty to refrain from such application only to the extent that it "involve[s] *active** intergovernmental co-operation"¹⁵⁴ and, as regards the government entering into economic and other forms of relationships or dealings, prohibits only such transactions and dealings "which may *entrench** its authority over the Territory".¹⁵⁵

¹⁵³ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, I.C.J. Reports 1971, p. 56, para. 125.

¹⁵⁴ *Ibid.*, p. 55, para. 122.

¹⁵⁵ *Ibid.*, p. 56, para. 124.

(12) Furthermore, as will be explained in respect of paragraph 2 of draft article 6, paragraph 1 also covers the possibility that, by analogous application of the United Nations system, obligations going beyond those mentioned in subparagraph (a) may be imposed on a State.

(13) While paragraphs 1 (a) and (b) deal with the two sides of the relationship between the author State and any other State, subparagraph (c) refers to the relationship between those other States. Its formulation is inspired by Article 49 of the United Nations Charter. This subparagraph takes into account the fact that often a measure taken by one State loses its actual effect if it is evaded through or substituted by dealings connected with another State. This may happen even if both States, in their relationship with the author State, take the same measures. A mutual assistance between those other States is then required and justified by the solidarity in the face of an infringement of fundamental interests of the community of States as a whole. Here again, through procedures as referred to in paragraph 2 of the present draft article, the scope and modalities of such mutual assistance may be specified. On the other hand, preservation of existing relationships between two or more of those other States may require particular modalities of such mutual assistance.

(14) As indicated in paragraph (5) of this commentary, it may be presumed that the international community as a whole, in "recognizing" as a crime the breach by a State of certain international obligations, at the same time accepts a role of the organized international community, i.e., of the United Nations system, in the further stages of determining the legal consequences of such a breach and of the "implementation" of State responsibility in that case. Actually, in all the cases mentioned by way of (possible) examples of international crime in article 19, paragraph 3, of part 1 of the draft, the United Nations system has been involved in some way or another.

(15) The foundation of this role of the United Nations is not necessarily to be found only in the text of the United Nations Charter itself. Thus, for example, the ICJ, in all its decisions relating to Namibia, accepted a link between the legal relationships created by the Mandates System and the functions and powers of United Nations organs, even though no "succession" of the United Nations Organization to the League of Nations (in a sense comparable to a succession of States) had taken place.¹⁵⁶

(16) The first part of paragraph 2 of draft article 6 ("Unless otherwise provided for by an applicable rule of international law . . .") underlines the character of a

¹⁵⁶ In this connection, particular reference should be made to the separate opinions of Sir Hersch Lauterpacht, one annexed to the Advisory Opinion of the ICJ of 7 June 1955: *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa*, I.C.J. Reports 1955, p. 67, and the other, to the Advisory Opinion of 1 June 1956: *Admissibility of Hearings of Petitioners by the Committee on South West Africa*, I.C.J. Reports 1956, p. 23. These opinions are based on the notion that the "jurisdiction" of the United Nations organs in this case was a "jurisdiction whose source is of a dual character inasmuch as it emanates both from the Charter and the Mandate" (I.C.J. Reports 1955, p. 112). Cf. Riphagen in *Netherlands International Law Review*, vol. VI, p. 234 (article cited in footnote 142 above) and Riphagen, "The legal consequences of illegal acts under public international law", *ibid.*, vol. XX, No. 1 (1973), p. 27.

presumptio juris tantum. Strictly speaking, that part is redundant in view of the provisions of draft article 3 of part 2, of which it is an application. A reminder, however, does not seem amiss here.

(17) Paragraph 2 of article 6 is, of course, without prejudice to the provisions of draft article 5 of part 2 of the draft. If the United Nations Charter directly applies in a given case, this application prevails.

(18) Paragraph 2 of article 6 accordingly refers to a situation in which the jurisdiction of the United Nations organs is of a dual character and emanates from a combination of Charter provisions with other rules of international law, *in casu* with the rules referred to in article 19, paragraph 2, of part 1 of the draft. The question arises whether such a combination may not require an adaptation of the component elements of the combination. Indeed, one might argue that, normally, if a body of rules of international law is established through one and the same instrument, the contents of the component parts of that instrument are usually adapted. In combining (a part of) such an instrument with (a part of) another instrument, such mutual adaptation is not always guaranteed and may still have to be performed.¹⁵⁷

¹⁵⁷ Thus, for example, in his separate opinion annexed to the ICJ's Advisory Opinion of 7 June 1955 (see footnote 156 above), Sir Hersch Lauterpacht held that "... there is room, as a matter of law,* for the modification of the voting procedure of the General Assembly in respect of a jurisdiction whose source is of a dual character . . .", but that such modifications should not be "inconsistent with the fundamental structure of the Organization" (*I.C.J. Reports 1955*, p. 112). On the other hand, the ICJ itself rather seems to consider, in

(19) In view of the "dual character" of the "jurisdiction" of United Nations organs under paragraph 2, it may be argued that the decisions of those organs do not create "obligations under the present Charter" in the sense of Article 103 of the Charter. In any case, the obligations directly flowing from paragraph 1 of the present article cannot be qualified as such. On the other hand, the performance of the latter obligations, and the exercise of rights implied thereby, may conflict with obligations and rights under other agreements and rules of international law not embodied in agreements—both obligations and rights in the relationships with the State author of the international crime and obligations and rights in the relationships between the other States. Accordingly, paragraph 3 of the present draft article 6 provides for the obligations and rights under paragraphs 1 and 2, a position intermediary between the obligation stipulated in Article 103 of the Charter of the United Nations.¹⁵⁸

the case of the combination of the Mandates System and the United Nations Charter, that the Charter only provides for a "machinery of implementation", to be applied as such and without adaptation (and, for that matter, without requiring the consent of the mandatory power). Compare also the "autonomy" of dispute settlement procedures provided for in treaties dealing primarily with substantive matters, procedures which remain applicable also in case the treaty is unilaterally considered to be terminated. In order not to prejudice this issue, the words "*mutatis mutandis*" have been added in paragraph 2 of the present draft article.

¹⁵⁸ Actually, the hierarchy of Article 103 is sometimes reflected in exceptions to obligations under other agreements. See, for example, article XXI, para. (c) of the General Agreement on Tariffs and Trade (see footnote 53 above).

CHAPTER VII

Articles to be drafted

151. The draft articles presented in chapter VI replace articles 1–3 as proposed in the second report. Articles 4 and 5 as proposed in the second report deal with different matters, and are also withdrawn, since their contents should be adapted to the decisions the Commission may take on articles 1–6, proposed in the present report.

152. As a matter of fact, the text of article 4 as presented in the second report deals with a part of the catalogue of possible legal consequences of internationally wrongful acts. Subject to the decisions the Commission may take at its thirty-fourth session, it would seem preferable to the Special Rapporteur that this catalogue be dealt with exhaustively in a new article or articles to follow the new article 6.

153. Article 5, as proposed in the second report, was

meant to deal with a particular type of (primary) relationships. As explained in earlier chapters of the present report, the Special Rapporteur feels that part 2 of the draft articles on State responsibility should, in a general way, distinguish between various types of legal relationships in connection with the different legal consequences of a breach of an international obligation flowing from such relationship. The precise drafting of an article corresponding to article 5, as presented in the second report, depends, of course, on the drafting of the article or articles relating to the catalogue of such legal consequences.

154. In future reports, the Special Rapporteur intends to elaborate, in the form of draft articles, the approach set out in the present report, as well as to present draft articles for part 3, concerning the "implementation" of State responsibility.