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

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

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CONTENTS

Introduction

1. The present report is the fourth relating to the topic of State responsibility (part 2 of the draft articles), submitted by the Special Rapporteur for consideration by the International Law Commission at its thirty-fifth session. The Special Rapporteur submitted a preliminary report[1] to the Commission at its thirty-second session, in 1980, a second report[2] at its thirty-third session, in 1981, and a third report[3] at its thirty-fourth session, in 1982.

2. The general structure of the draft was described at length in the Commission's report on the work of its twenty-seventh session, in 1975.[4] Under the general plan adopted by the Commission, part 1 of the draft deals with the origin of international responsibility, that is to say, "with determining on what grounds and under what circumstances a State may be held to have committed an internationally wrongful act which, as such, is a source of international responsibility".[5]

3. Part 2 of the draft, according to the general plan, deals with the content, forms and degrees of international responsibility, that is to say, with determining "what consequences an internationally wrongful act of a State may have under international law in different hypothetical cases, in order to arrive at a definition of the content, forms and degrees of international responsibility". More specifically, these questions relate to "the establishment of a distinction between internationally wrongful acts giving rise only to an obligation to make reparation and internationally wrongful acts incurring a penalty; the possible basis for such a distinction; and the relationship between the reparative and the punitive consequences of an internationally wrongful act ...".[6]

* Incorporating document A/CN.4/366/Add.1/Corr.1.

[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 ... 1982*, vol. II (Part One), p. 21, document A/CN.4/354 and Add.1 and 2.

[4] *Yearbook ... 1975*, vol. II, pp. 55-56, document A/10010/Rev.1, paras. 38-44.

[5] *Ibid.*, p. 56, para. 42.

[6] *Ibid.*, para. 43.

4. Under its general plan, the Commission held open the possibility of including in the draft a part 3 concerning the settlement of disputes and the "implementation" (*mise en œuvre*) of international responsibility.[7]

[7] *Ibid.*, para. 44.

CHAPTER I

Status of the work on the topic

A. Part 1 of the draft articles: origin of international responsibility

5. At its thirty-second session, in 1980, the Commission completed its first reading of part 1 of the draft articles.[8] Part 1 consists of 35 draft articles, divided into five chapters. Chapter I (General principles) is devoted to the definition of a set of fundamental principles, including the principle that every internationally wrongful act of a State entails the international responsibility of that State, and the principle that an internationally wrongful act comprises two elements, one subjective, the other objective. Chapter II (The "act of the State" under international law) is concerned with the subjective element of the internationally wrongful act, that is to say, with determination of the conditions in which particular conduct must be considered as an "act of the State" under international law. Chapter III (Breach of an international obligation) deals with the various aspects of the objective element of the internationally wrongful act constituted by the breach of an international obligation. Chapter IV (Implication of a State in the internationally wrongful act of another State) covers cases in which a State participates in the commission by another State of an international offence and cases in which responsibility is placed on a State other than the State which committed the internationally wrongful act. Lastly, chapter V (Circumstances precluding wrongfulness) defines the circumstances which may have the effect of precluding the wrongfulness of an act of a State not in conformity with an international obligation: prior consent of the injured State; legitimate application of countermeasures in respect of an internationally wrongful act; *force majeure* and fortuitous event; distress; state of emergency; and self-defence. Part 1 of the draft articles, which the Commission provisionally adopted in 1980, was discussed in the Sixth Committee of the General Assembly at its thirty-fifth session.[9]

6. The 35 draft articles of part 1 have been referred to Member States for their comments and observations. In paragraph 6 of resolution 35/163 of 15 December 1980, the General Assembly endorsed the decision of the Commission to request observations and comments on the provisions adopted on first reading of the draft articles constituting part 1. Earlier comments on chapters I, II and III were reproduced in documents submitted to the Commission at its thirty-second session[10] and at its thirty-third session.[11] Observations and comments received subsequently, including those on chapters IV and V, were submitted to the Commission at its thirty-fourth session.[12] The Commission hopes to receive further comments and observations from Governments of Member States before proceeding, as recommended in paragraph 4 (*c*) of the aforementioned resolution of the General Assembly, to a second reading of part 1 of the draft articles.

B. Part 2 of the draft articles: content, forms and degrees of international responsibility

7. Pursuant to the recommendation in paragraph 4 (*b*) of General Assembly resolution 34/141 of 17 December 1979, the Commission commenced its consideration of part 2 of the draft articles at its thirty-second session, in 1980.[13]

1. THE SPECIAL RAPPORTEUR'S FIRST REPORT: IDENTIFICATION OF THREE PARAMETERS

8. In his preliminary report,[14] the Special Rapporteur analysed in a general way the various possible new legal relationships (i.e. new rights and corresponding obligations) arising from an internationally wrongful act of a State as determined by part 1 of the draft articles.

9. Having noted at the outset a number of circumstances which were, in principle, irrelevant for the application of part 1 but relevant for part 2, the report made a distinction between three parameters of the new legal relationship that might be established by international law as a consequence of a State's wrongful act. The first parameter was the new obligations of the author State whose act was internationally wrongful, the second parameter was the new rights of the "in-

[8] For the text, see *Yearbook ... 1980*, vol. II (Part Two), pp. 26 *et seq.*

[9] 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. 96-144.

[10] A/CN.4/328 and Add.1-4, reproduced in *Yearbook ... 1980*, vol. II (Part One), p. 87.

[11] A/CN.4/342 and Add.1-4, reproduced in *Yearbook ... 1981*, vol. II, Part One, p. 71.

[12] A/CN.4/351 and Add.1-3, reproduced in *Yearbook ... 1982*, vol. II (Part One).

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

[14] See footnote 1 above.

jured" State and the third parameter was the position of the third State in respect of the situation created by an internationally wrongful act. On that basis, the report drew up a catalogue of possible new legal relationships established by a State's wrongful act, including the duty to make reparation in its various forms (first parameter), non-recognition, *exceptio non adimpleti contractus,* and other countermeasures (second parameter), and the right—possibly even the duty—of third States to take a non-neutral position (third parameter).

10. The report then turned to the problem of "proportionality" between the wrongful act and the response thereto, and in that connection discussed normal limitations of allowable responses: limitations by virtue of the particular protection given by a rule of international law to the object of the response, by virtue of a linkage under a rule of international law between the object of the breach and the object of the response, and by virtue of the existence of a form of international organization *lato sensu.*

11. Finally, the report addressed the question of loss of the right to invoke the new legal relationship established by the rules of international law as a consequence of a wrongful act and suggested that that matter be dealt with rather within the framework of part 3 of the draft articles (implementation of international responsibility).

12. The Special Rapporteur's preliminary report was considered by the Commission at its thirty-second session,[15] and by the Sixth Committee of the General Assembly at its thirty-fifth session.[16] In paragraph 4 (*c*) of its resolution 35/163 of 15 December 1980, the General Assembly recommended that the Commission should "continue its work on State responsibility with the aim of beginning the preparation of draft articles concerning part 2 of the draft on responsibility of States for internationally wrongful acts".

2. The Special Rapporteur's second report: general framework for the three parameters and focus on the first parameter

13. In his second report,[17] the Special Rapporteur discussed a general framework for the three parameters and focused in particular upon the first parameter.

14. In chapter II of the report, the Special Rapporteur proposed five draft articles on content, forms and degrees of international responsibiity. Articles 1 to 3 were intended to deal with the general framework of the three parameters of the legal consequences of an internationally wrongful act, while articles 4 and 5 were intended to deal with the first parameter, i.e. the new obligations of the author State which is held to have committed an internationally wrongful act entailing its international responsibility. The draft articles were consequently divided into two chapters, as set out below.

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

(*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.

15. The report suggested the advisability of starting the draft articles of part 2 with three preliminary rules

[15] *Yearbook ... 1980,* vol. I, pp. 73-98, 1597th to 1601st meetings. A record of the discussion in the Commission appears in the Commission's report on its thirty-second session (*Yearbook ... 1980,* vol. II (Part Two), pp. 62-63, paras. 35-48), and a brief summary in the Special Rapporteur's second report (see footnote 2 above), paras. 11-18.

[16] See "Topical summary ..." (A/CN.4/L.326), paras. 145-154.

[17] See footnote 2 above.

(arts. 1 to 3), providing a general framework for the following chapters of part 2, which would deal separately with each of the three parameters outlined in the preliminary report. By way of introduction to 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 separate items of "primary rules", "rules relating to the origin of international responsibility", "rules relating to the content, forms and degrees of international responsibility" and "rules relating to the implementation of international 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 rather in a negative sense, precluding particular responses to particular breaches.

16. The report then stated the reasons for including the three preliminary rules, namely, articles 1 and 3, dealing with the continuing force, notwithstanding the breach, of the primary obligations and rights of the States concerned, and article 2, referring to possible special, self-contained régimes of legal consequences attached to the non-performance of obligations in a specific field.

17. The report went on to analyse the three steps associated with the first parameter: the obligation to stop the breach, the obligation 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. That analysis, after being confronted with State practice, and with judicial and arbitral decisions and doctrine, led up to the proposed articles 4 and 5.

18. The Special Rapporteur's second report was considered by the Commission at its thirty-third session. At the conclusion of the debate, the Commission decided to send draft articles 1 to 5 to the Drafting Committee, which did not, however, have time to consider them during the session.[18] Part 2 of the draft and the articles proposed by the Special Rapporteur, as a whole, were also discussed in the Sixth Committee of the General Assembly at its thirty-sixth session.[19] Paragraph 3 (*b*) (i) of General Assembly resolution 36/114 of 10 December 1981 recommends that the Commission should continue its work aimed at the preparation of draft articles on part 2 of the draft.

3. The Special Rapporteur's third report: re-evaluation of the approach to part 2

19. In his third report,[20] the Special Rapporteur set out by revising the draft articles submitted in the second report. In case the Commission should wish to confirm the earlier decision to let the Drafting Committee consider those articles, he suggested that the Drafting Committee take as a basis of discussion the following wording:

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 injured States 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 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.

20. Turning to draft articles 4 and 5 as proposed in the second report, and referring to remarks made in both the Commission and the Sixth Committee to the effect that those articles should rather be drafted in the form of what the "injured" State—and possibly "third" States—was or were entitled to require from the "author" State, the Special Rapporteur suggested as possible neutral formulation of the *chapeau* of the articles, as follows:

Article ...

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

...

21. In chapter VI of the third report, the Special Rapporteur proposed a set of six draft articles for inclusion in part 2 of the draft, reading 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.

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.

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.

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

[18] *Yearbook ... 1981*, vol. I, pp. 124-144, 1666th to 1670th meetings, and pp. 206-217, 1682nd to 1684th meetings. The record of the discussion in the Commission appears in the Commission's report on its thirty-third session (*Yearbook ... 1981*, vol. II (Part Two), pp. 143-145, paras. 145-161), and a brief summary in the Special Rapporteur's third report (see footnote 3 above), paras. 17-24.

[19] 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.

[20] See footnote 3 above.

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.

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.

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.

22. Article 1 as proposed in the third report is intended to serve as a formal link between the articles in part 1 and those to be drafted in part 2; article 2 enunciates the requirement of "quantitative proportionality" between breach and legal consequences, but a further elaboration must be left to the States, international organizations or organs for the peaceful settlement of disputes which may be called to apply this principle; article 3 relates to the residual character of the rules of part 2 other than articles 4, 5 and 6 ("the peremptory subsystems"); articles 4, 5 and 6 deal respectively with *jus cogens*, the United Nations system, and international crimes.

23. The Special Rapporteur recalled that the Commission had already, in 1976, recognized that contemporary international law contained a multitude of different régimes of State responsibility. Accordingly, the report noted the link between "primary" rules imposing obligations, "secondary" rules dealing with the determination of the existence of an internationally wrongful act and of its legal consequences, and the rules concerning the implementation of State responsibility, those three sets of rules together forming a "subsystem" of international law for each particular field of relationship between States.

24. The report also indicated that the source (general customary law, multilateral treaties, bilateral treaties, decisions of international organizations, judgments of international tribunals, etc.), the content, and the object and purpose of an obligation could not but influence the legal consequences entailed by its breach ("qualitative proportionality").

25. The report recalled that, within each field of relationship between States, the circumstances of each individual case in which an internationally wrongful act had been committed must be taken into account in determining the reaction thereto ("quantitative proportionality"). In that connection, reference was made to "aggravating" and "extenuating" circumstances and, more generally, to the requirement of a degree of equivalence between the actual effect of the internationally wrongful act and the actual effects of the legal consequences thereof.

26. Furthermore, the report stressed the necessity to provide, in the total set of draft articles on State responsibility, for a general clause on a procedure of settlement of disputes relating to the interpretation of those articles.

27. The third report also analysed various "subsystems" of international law and their interrelationship. On the basis of that analysis a catalogue of legal consequences was discussed. A distinction was made between "self-enforcement by the author State", "enforcement by the injured State" and "international enforcement" (the three parameters). In that connection, the notion of "injured" State was analysed, as well as the "scale of gravity" of the various legal consequences within each parameter.

28. As to the link between an internationally wrongful act and its legal consequences, it was noted that, in the process of international law, from the formation of its rules to their enforcement, State responsibility was only one phase and had to take into account the earlier and later phases of that process. In view of the great variety of situations, it was suggested that part 2 could not contain an exhaustive set of rules, but should concentrate on a number of cases in which one or more legal consequences mentioned in the catalogue were temporarily or definitely excluded, and cases in which the failure of a "subsystem", as a whole, might entail a shift to another "subsystem".

29. The Special Rapporteur's third report was considered by the Commission at its thirty-fourth session. At the end of the debate, the Commission decided to refer articles 1 to 6 as proposed in the third report, and confirm the referral of articles 1 to 3 as proposed in the second report, to the Drafting Committee, on the understanding that the latter would prepare framework provisions and consider whether an article along the lines of the new article 6 should have a place in those provisions.[21] Comments on the draft articles as a whole and on the articles proposed by the Special Rapporteur in his second and third reports were made by the Sixth Committee of the General Assembly at its thirty-seventh

[21] *Yearbook ... 1982*, vol. I, pp. 199-224, 1731st to 1734th meetings, and pp. 230-242, 1736th to 1738th meetings. A record of the discussion in the Commission appears in the Commission's report on its thirty-fourth session (*Yearbook ... 1982*, vol. II (Part Two), pp. 81-82, paras. 88-103).

session.[22] In paragraph 3 of its resolution 37/111 of 16 December 1982, the General Assembly recommended that the Commission "should continue its work aimed at the preparation of drafts on all the topics in its current programme".

[22] See "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-seventh session of the General Assembly" (A/CN.4/L.352), paras. 36-131.

C. Possible part 3 of the draft: settlement of disputes and implementation of international responsibility

30. As stated above (para. 4), the Commission, under its general plan relating to the topic of State responsibility, has held open the possibility of including in the draft a part 3 concerning the settlement of disputes and the implementation of international responsibility.

CHAPTER II

Survey of the possible content of parts 2 and 3 of the draft articles

31. In view of the fact that the draft articles proposed by the Special Rapporteur in his second and third reports were referred to the Drafting Committee for consideration during the thirty-fifth session, the Special Rapporteur does not intend, in the present report, beyond the historical summary contained in chapter I, to return to the matters dealt with in those draft articles, although, of course, in the meetings of the Drafting Committee, he intends to try to adapt those drafts to the criticism voiced during the debate at previous sessions of the Commission.

32. In response to a widespread demand from members of the Commission as well as from representatives in the Sixth Committee of the General Assembly, the present report intends to concentrate on an outline of the possible content of parts 2 and 3 of the draft articles on State responsibility and discuss the admittedly difficult choices with which the Commission is faced.

33. Every single legal rule expresses an "ought to be". As such, it cannot escape the question what should happen in case of non-conformity with the legal rule, nor the question how what should happen in that case is to be realized in actual fact. Without attaching an exaggerated importance to the distinction, one could therefore distinguish "primary" rules of conduct, "secondary" rules concerning the legal consequences of acts or omissions not in conformity with those "primary" rules of conduct, and "tertiary" rules concerning the implementation of the "secondary" rules. Broadly speaking—and that is why no too great importance should be attached to the distinction—the three types of rules have the same object and purpose.

34. The legal consequences of acts or omissions not in conformity with certain legal rules may also appear in a form which is not immediately related to other conduct. Thus certain acts or omissions, quite apart from whether they are as such prohibited or not, may entail the loss or non-acquisition of a "status", and non-conformity with certain rules of procedure may entail the "nullity", in some form, of a legal act. In both cases, of course, the lack of "status" or the "nullity" are normally relevant for other rules of conduct. For the moment, it would seem, we can leave this complication aside.

35. Applying the simple scheme defined in paragraph 33 above to international law, we observe an abundance of primary rules of conduct but a relative scarcity of secondary rules and a virtual absence of tertiary rules. Indeed, the absence of tertiary rules has a distinct influence on the content of such secondary rules as can be found and creates a tendency not to be too specific on the differences, in themselves rather obvious, between the functions of the various primary rules. Hence a certain tendency of States to keep open the option of considering a breach of an international obligation as a violation of their sovereignty, entitling them in principle to any sort of demand and any sort of countermeasure. Even though, in practice, States exert considerable self-restraint, it is difficult to translate this practice into hard and fast legal rules. Nevertheless, this is exactly the task with which the Commission is confronted when trying to elaborate rules concerning State responsibility.

36. Part 1 of the draft articles, concentrating on the author State, i.e. the conditions under which an act of a State exists and constitutes a breach of an international obligation of that State, was relatively—indeed very relatively—easy to elaborate, although one may still have some doubts whether it takes sufficiently into account the differences between the functions of the various primary rules. But that is a matter possibly to be addressed in the second reading of part 1. Part 2 has to concentrate on *injury* (to a particular State, to several States, to the community of States), because it deals with new rights and obligations arising out of the fact that there has been an act or omission not in conformity with the primary rule, and not arising out of the time-honoured basis of the consent of States.

37. Actually, in most cases, a State will deny, on the grounds of the facts or of the interpretation of the applicable primary rules, that there has been on its side a non-conformity with a legal rule, an internationally wrongful act for which it bears responsibility. Obviously other States are not bound to leave the matter there. They can maintain their interpretations of fact

and law and act accordingly. In fact, they can hardly do otherwise. But the point is that the unsettled dispute may give rise to an escalation of the conflict and that each move and countermove cannot be definitively appreciated legally otherwise than on the basis of a settlement of the original dispute of fact and law relating to the primary rules. This uncertainty is a good reason for self-restraint, but here again it is difficult to translate this restraint into hard and fast legal secondary rules if there are no applicable tertiary rules.

38. Obviously, this situation of uncertainty does not preclude secondary rules of the type: "even if such or such an internationally wrongful act is established, it cannot entail more or other than such and such legal consequences". These are rules of quantitative and of qualitative proportionality. But since these legal consequences include, in any case, a deviation from previous legal relationships (new rights and obligations), the question of conduct not in conformity with the new relationship necessarily comes up again. The change —by the force of law—from the "old" to the "new" relationship necessarily presupposes an established and legally appreciated fact.

39. In other words, it is hardly worth while to talk about secondary rules unless one knows the content of the applicable tertiary rules; indeed, the secondary rules are only a transition from the primary to the tertiary rules. No State can accept demands and countermeasures of another State based on the establishment by the other State alone of the existence of an internationally wrongful act of the first-mentioned State. No State can accept either that its demands and countermeasures in relation to another State should be based only on the agreement of the other State as to the existence of an internationally wrongful act of that other State.[23]

40. In his third report,[24] the Special Rapporteur more or less incidentally suggested that part 3 might contain "a meaningful procedure for dispute settlement" limited to a particular legal question, namely, what legal consequences are entailed by an allegedly internationally wrongful act of a State, assuming that the alleged act did in fact occur. Such limited dispute settlement would then refer only to the interpretation of such rules as part 2 might contain relating to quantitative and qualitative proportionality (see para. 38 above). One could envisage extending this still limited procedure for dispute settlement to the interpretation of chapter II of part 1 of the draft articles, i.e. to the question whether the facts, as alleged, establish conduct which is attributable to the State under international law.

41. But, as the Special Rapporteur hinted in this third report,

> 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...[25]

This may now be illustrated by pointing to the interpretation of chapter III of part 1 of the draft articles, which can hardly be performed without the interpretation and application of the primary rules involved. The same is true for the interpretation of chapter IV and, *a fortiori*, chapter V.

42. Still, from the purely legal point of view, the isolation of some legal questions dealt with in the articles on State responsibility is technically feasible and there are precedents in other fields for such limited procedures for the settlement of disputes. But the Special Rapporteur has considerable doubts as to the willingness of States generally to accept, in this particular field of State responsibility, the isolation of questions relating to the interpretation and application of secondary rules from those relating to the interpretation and application of the primary rules concerned.

43. The foregoing applies in the perspective of a general convention on State responsibility comparable with the Vienna Convention on the Law of Treaties of 1969.[26] [27] One might envisage another final outcome of the Commission's work on State responsibility, such as a form of endorsement of the rules on State responsibility as "guidance" for States and international bodies confronted with the questions dealt with in those rules.

44. An intermediary solution would be the acceptance of those rules by States in a convention, but only to the extent that a dispute between them (which necessarily involves the interpretation and application of primary rules) is submitted to an international procedure for settlement of disputes.[28]

45. The Special Rapporteur submits that the Commission should give early consideration to the question of the settlement of disputes, in other words to the possible content of part 3 of the draft articles. It is his view that the prospects for part 3 decisively influence the way in which part 2 is to be elaborated.

46. It cannot be denied that both in judicial decisions and in the teachings of the most highly qualified publicists of the various nations there is little inclination to go into the details of the legal consequences of an internationally wrongful act. Judicial decisions often, by the very nature of the claims made before the inter-

[23] Cf. the situation in respect of *jus cogens* under the Vienna Convention on the Law of Treaties: some States cannot accept that another State should invoke *jus cogens* as a ground for invalidity of the treaty between them unless the other State accepts that, in case of dispute, the International Court of Justice is competent to decide whether there is a rule of *jus cogens* and whether the treaty is incompatible with that rule. *Tertium datur*?

[24] Document A/CN.4/354 and Add.1 and 2 (see footnote 3 above), paras. 57-62.

[25] *Ibid.*, para. 58.

[26] Hereinafter referred to as the "Vienna Convention". For the text, see United Nations, *Juridical Yearbook 1969* (Sales No. E.71.V.4), p. 140.

[27] Actually, it was the draft articles on the invalidity of treaties that prompted the decision of the United Nations Conference on the Law of Treaties to deal with the question of settlement of disputes (cf. para. 34 above).

[28] The convention would then be one of the "international conventions ... establishing rules expressly recognized by the contesting States" in the sense of Article 38, para. 1 *a*, of the Statute of the ICJ.

national court or tribunal involved, concentrate on reparation as a legal consequence.[29]

47. Publicists, if they deal at all with the matter of State responsibility outside the field of breach of an obligation relating to the treatment of aliens, are in general reluctant to relate the catalogue of legal consequences they then enumerate to the variety of internationally wrongful acts, in other words, to elaborate on qualitative proportionality. It is also significant that, in the Covenant of the League of Nations, there was no international legal qualification of the type of dispute that might eventually lead Member States "to take such an action as they shall consider necessary for the maintenance of right and justice" (Art. 15, para. 7).

48. An attempt to relate specific types of legal consequences to specific types of internationally wrongful acts is undertaken by Graefrath and Steiniger in a "draft convention on State responsibility". The authors distinguish three categories of internationally wrongful acts: (*a*) aggression and threat to the peace by forceful maintenance of a racist or a colonial régime (*das Verbrechen der Aggression, dem als Sonderfall ... die Friedensgefährdung durch gewaltsame Aufrechterhaltung eines rassistischen Regimes oder Kolonialregimes zugeordnet ist* (arts. 7 and 8); (*b*) other violations of sovereignty (*Souveranitätsverletzungen die nicht Aggression sind* (art. 9); (*c*) violations of other conventional or customary law obligations (*Verletzungen vertraglicher oder gewohnheitsrechtlicher Verpflichtungen, die nicht unter die Art. 7 bis 9 fallen*) (art. 10).[30]

49. Starting from the assumption that the question which entity or entities are on the other side of the new legal relationships entailed by the internationally wrongful act is an element of the legal consequences of such an act, Graefrath and Steiniger make further distinctions. Thus "aggression" and "forceful maintenance of racist or colonial régimes" are distinguished inasmuch as, in the second case, "the people" is one of the other entities in the new legal relationship. Furthermore, and in conformity with the Vienna Convention, multilateral and bilateral treaties are distinguished in respect of the legal consequences of their termination or suspension. Finally—but only in respect of primary obligations of the third category—the authors recognize the possibility of "measures and legal consequences specifically agreed" (*besonders vereinbarten Rechtsmassnahmen und Rechtsfolgen*) (art. 10). It is to be noted that the draft convention also deals with the tertiary rules, i.e. with the rules on implementation of State responsibility, albeit mostly by reference to "principles and methods of international law" (*entsprechend den Prinzipien and Methoden des Völkerrechts*) (art. 11).

50. A "categorization" of internationally wrongful acts for the purpose of distinguishing between their legal consequences is of course also to be found, in various degrees, in the publications of other writers on international law.[31] In particular, a category of "international crimes" is recognized as having an *erga omnes* character. In itself, this character is a legal ground only for the rights of States other than the author State. The duties of those other States are rather duties as between those other States and as such have another legal ground. Such duties may include the duty not to support the wrongful act *ex post,* by recognizing its result as legal or rendering aid or assistance in maintaining such result; the duty to support measures taken by the State or States "specially affected by the breach" (art. 60, para. 2 (*b*) of the Vienna Convention), and the duty to participate in collective action for the protection of the fundamental interests of the international community as a whole (cf. Articles 48, para. 1, 49 and 50 of the United Nations Charter).

51. The *erga omnes* character of international crimes does not in itself determine the other elements of the legal consequences of such crimes, as distinguished from the legal consequences of an international delict. Indeed, the Commission, in 1976, already considered it very unlikely that all international crimes would entail the same legal consequences. But perhaps one might at least establish a minimum common element in those legal consequences, applicable to all crimes and based on the ground of the mutual solidarity of all States other than the author State. This is the thought underlying draft article 6 as proposed by the Special Rapporteur in his third report (see para. 21 above).

52. The legal consequences of one category of international crimes, to wit, aggression, are dealt with in the United Nations Charter, admittedly in a way which leaves room for divergent interpretations. But one legal consequence, the inherent right of individual or collective self-defence, is not disputed. And in any case there is in this field, in part 3 of the draft, a procedure of implementation of State responsibility resulting from aggression. At the previous session, members of the Commission were divided in respect of the question whether the Commission should undertake to elaborate on the notion of self-defence.[32] As to the question which measures the Security Council should take for "the maintenance of international peace and security" and the consequences of failure to take effective measures, no suggestion was made to let the Commission undertake the drafting of rules in that respect. The Special Rapporteur continues to feel that no useful purpose could be served by the Commission taking up any of those points.

[29] Article 36, para. 2 *d*, of the Statute of the ICJ stresses "the nature or extent of the reparation to be made for the breach of an international obligation".

[30] B. Graefrath and P. A. Steiniger, "Kodifikation del völkerrechtlichen Verantwortlichkeit", *Neue Justiz* (Berlin), vol. 27, No. 8, 1973, p. 226; see also, by the same authors and E. Oeser, *Völkerrechtliche Veranwortlichkeit der Staaten* (Berlin, Staatsverlag der Deutschen Demokratischen Republik, 1977), pp. 231 *et seq.* (text of the draft convention).

[31] See the publications cited in the Commission's commentary to article 19 of part 1 of the draft articles on State responsibility (*Yearbook ... 1976,* vol. II (Part Two), pp. 96 *et seq.*).

[32] See *Yearbook ... 1982,* vol. II (Part Two), p. 81, paras. 91 and 92.

53. In their draft convention on State responsibility, Graefrath and Steiniger suggest the codification of other legal consequences of aggression, not dealt with in the United Nations Charter,[33] such as the termination of bilateral treaties concluded between the aggressor State and the victim State; suspension of other bilateral and multilateral treaties; sequestration of property of the aggressor State; internment of its nationals; guarantees against repetition of aggression; reparation of all damage; non-recognition of any result of aggression as legal; permanent and universal penal jurisdiction over persons responsible for the planning or waging of aggression; duty to extradite such persons on request to the victim State.

54. In the opinion of the Special Rapporteur, most of these topics fall outside the scope of the draft articles under consideration. The effect of war on treaties is actually a matter which the Commission has left aside in dealing with the law of treaties. It would seem that the topic is not so much related to the international wrongful act of aggression as to the resulting state of war. The same applies in regard to the sequestration of enemy property and the internment of enemy nationals. Guarantees against repetition of aggression, reparation and non-recognition of the result of an internationally wrongful act as legal, on the other hand, are general topics of State responsibility, not limited to aggression or international crimes in general. Finally, although penal jurisdiction over persons and extradition are matters dealt with by obligations under international law, and acts of State not in conformity with those obligations may be legitimate countermeasures in case of aggression or other internationally wrongful acts, the matter would seem to be so closely connected with another topic under the Commission's consideration, namely, the draft Code of Offences against the Peace and Security of Mankind, as to foreclose their being treated within the framework of the draft articles on State responsibility. There is, of course, also a link with the topic of State immunity.

55. The conclusion to be drawn from the foregoing paragraphs seems to be that there is no place in part 2 for an article or articles on the special legal consequences of the category of internationally wrongful acts called acts of aggression. In fact, the failure of the most fundamental primary rule prohibiting such acts creates a situation which, subject to the application of the United Nations machinery for the maintenance of international peace and security, justifies any demand and any countermeasure; only the rule of quantitative proportionality and the protection of *jus cogens* (particularly provisions of a humanitarian character relating to the protection of the human person in armed conflicts) remain. Those three limitations are already intended to be covered by articles 2, 4 and 5, as proposed by the Special Rapporteur in his third report (see para. 21 above).

56. Aggression is an international crime in the field of the maintenance of international peace and security. Article 19 of part 1 of the draft articles presupposes the existence of other fields of "fundamental interests of the international community" protected by primary rules of international law in such a way that a "serious" breach of an obligation imposed by such rules constitutes an international crime. The *erga omnes* character of such wrongful acts does not, of course, necessarily imply that all other States than the author State have the same rights and duties as a legal consequence of that act. Neither, as noted before (para. 51 above), does the qualification as international crime imply that the other elements of its legal consequences are the same as those of other international crimes, such as aggression.

57. The question arises whether and to what extent the Commission should try to indicate the legal consequences of those other international crimes, in particular to try to define the content of the new rights and obligations of States other than the author State. In article 8 of their draft convention on State responsibility,[34] Graefrath and Steiniger assimilate to a large extent the forceful maintenance of a racist régime (such as *apartheid*) or of a colonial régime to aggression, in particular by declaring Chapter VII of the United Nations Charter (including Article 51) applicable to such a situation.

58. The difficulty here is that, while the international community as a whole may well recognize certain acts of a State as international crimes, there seems to be less consensus as regards the punishment to be meted out. Indeed, in fields of "fundamental interests of the international community", such as "the safeguarding and preservation of the human environment" or "safeguarding the human being" or, for that matter, "safeguarding the right of self-determination of peoples", the progressive development of international law has brought about primary rules, and even sometimes tertiary rules, at least some machinery of implementation; but as to special secondary rules, different from those applying to internationally wrongful acts in general, there is little evidence of generally accepted legal consequences of serious breaches. This, no doubt, is connected with the fact that in those fields the primary rules involve entities other than States, whereas the secondary rules, by definition, involve States as such. Nevertheless, as previously indicated (para. 51 above), there are elements of special legal consequences common to all international crimes.

59. One such element, already mentioned, is the *erga omnes* character of the breach. Every other State has the right to require from the author State its "self-enforcement" of the obligation breached (reparation *ex nunc, ex tunc* and *ex ante*).

60. Another common element seems to be that the organized international community, i.e. the United Nations, has jurisdiction over the situation. This does

[33] Paras. 1 and 2 of article 7 of that draft deal with self-defence, the powers of the Security Council and possible expulsion from the Organization under Article 6 of the Charter (see footnote 30 above).

[34] See footnote 30 above.

not mean that an international crime is necessarily a "threat to the peace, breach of the peace, or act of aggression" in the sense of Article 39 of the Charter. Which organ of the United Nations can take what action remains a matter of Charter interpretation and application. In essence it means that, in case an international crime has been committed, this cannot be a matter which is "essentially within the jurisdiction of any State" in the sense of Article 2, paragraph 7, of the Charter. Furthermore, it is conceivable that "the international community ... as a whole", in qualifying certain internationally wrongful acts as international crimes, by means of establishing a primary rule at the same time, establishes the corresponding secondary and tertiary rules.

61. A third common element would be that the principle of international law "concerning the duty not to intervene in matters within the domestic jurisdiction of any State", as formulated in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, [35] does not apply in a case in which an international crime has been committed. This would mean that every State or group of States other than the author State has the right to take countermeasures against the author State which would otherwise be prohibited by the aforementioned principle. It does not mean, however, that every other State or group of States would have the right to take measures which are specifically prohibited by other rules of international law, either general rules of customary law, or treaties governing the relationship between the author State and the other State or group of States.

62. A fourth common element already referred to (paras. 50 and 51 above), deals with the relationships between States other than the author State. A legal consequence of an international crime is that it creates duties of solidarity for and between all other States. The duty not to lend support *ex post facto* to the crime of the author State seems to be self-evident. The duty to lend support to legitimate countermeasures of other States is less clearly defined. Indeed, this duty cannot in itself entail for the supporting State a right vis-à-vis the author State to which the supporting State was not already entitled by the third common element of legal consequences as mentioned in paragraph 61 above. What is meant by "support" here concerns the relationship between the other States and as such presupposes a form of common appreciation of the existence of a right to take countermeasures and of the usefulness of its exercise.[36] This is even more the case as regards the duty to participate in collective countermeasures against the author State. After all, in the other field of maintenance of international peace and security, Article 48 of the United Nations Charter empowers the Security Council to designate some of the United Nations Members to take action, while Article 49 obliges to "mutual assistance" only in respect of carrying out the measures decided upon by the Security Council, and Article 50 envisages a "solution" of "special economic problems arising from the carrying out of those measures" of any State. In short, the duty to support countermeasures is valid only within the framework of some form of international decision-making machinery.

63. It has already been noted (para. 60 above) that the United Nations has jurisdiction if an international crime has been committed and that it is conceivable that the international community as a whole, when it establishes a primary rule qualifying certain acts as international crimes, at the same time empowers specific organs of the United Nations to decide on specific countermeasures against the author State of such a crime. It is of course also conceivable that such countermeasures might then go beyond those already mentioned (para. 61 above) and encompass measures otherwise specifically prohibited by other rules of international law, and impose duties for all States to support the measures decided upon and even to participate in collective measures; in such cases those duties would have to prevail over the duties under the other rules of international law.[37]

64. But are there actually such secondary and tertiary rules in force at the present stage of international law (apart from Chapter VII of the Charter)? Would it, within the framework of progressive development of international law, be appropriate for the Commission to draft, for example, a proposal stating that the General Assembly of the United Nations, by a two-thirds majority, may decide what measures not involving the use of armed force are to be employed (cf. Article 41 of the Charter) if the International Court of Justice has established, on request of any State, that an international crime was committed by another State?

65. The Special Rapporteur is of the opinion that there is little chance that States generally will accept a legal rule along the lines of article 19 of part 1 of the draft articles without a legal guarantee that they will not be charged by any or all other States with having committed an international crime, and be faced with demands and countermeasures by any or all other States without an independent and authoritative establishment of the facts and the applicable law. In this respect there is a clear analogy with what happened in respect of the *jus cogens* clause in the Vienna Convention.

66. On the other hand, the international community of States will not accept, if there is such an independent and authoritative establishment of the facts and the ap-

[35] General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

[36] If the countermeasure taken by a State A against the author State B is a boycott, other States may well have objections to extending a primary boycott (refusal of direct economic relations between State A and State B) to a secondary boycott (refusal of economic relations between State A and State C, which maintains economic relations with State B) or even a tertiary boycott (refusal of economic relations with State D, which maintains economic relations with State C).

[37] Cf. paras. (17)-(19) of the commentary to article 6 submitted in the Special Rapporteur's third report (document A/CN.4/354 and Add.1 and 2 (see footnote 3 above), para. 150).

plicable law and if the conclusion thereof is that an international crime was committed, that the matter of sanctions be left to the willingness of each individual State to make the sacrifices inevitably involved. And, finally, the individual States will not accept a duty to support countermeasures taken by another State, or a duty to participate in collective countermeasures, without such an independent and authoritative statement and a collective discussion and decision on the sharing of the burden of implementation.

67. All this leads the Special Rapporteur to the conclusion that the Commission, having recognized the progressive development of international law by provisionally adopting article 19 of part 1 of the draft, should carry this development to its logical conclusion by proposing secondary and tertiary rules in this respect.

68. In the foregoing paragraphs a first "categorization" of internationally wrongful acts was made with a view to distinguishing their legal consequences; aggression was distinguished from other international crimes, in view of, *inter alia,* the inadmissibility of the use of armed force in self-defence by States in the case of international delicts. We leave aside here the case of *concursus,* i.e. the possibility that an international crime which is not an act of aggression may nevertheless create a "threat to the peace" in the sense of Article 39 of the United Nations Charter.

69. Admittedly, this distinction conceals two important controversies. The first relates to the implications of the right of self-determination of peoples; the second refers to the meaning of "the use of armed force" within the context of a response to an internationally wrongful act. Actually, both controversies relate clearly to the scope and interpretation of primary rules of international law. Thus, for example, the following questions arise. Does the right of self-determination of peoples imply a right, and possibly even a duty, of every individual State to render assistance to a people which is the victim of the maintenance by force of colonial domination, even to the extent of the threat or use of armed force against the territorial integrity and political independence of another State? Is the temporary use of armed force by a State within the territory of another State, for the sole purpose of liberating its nationals brought into or held in that territory by an internationally wrongful act, to be assimilated to the use of armed force against the territorial integrity and political independence of that other State?

70. The Special Rapporteur submits that these and other "borderline" questions inevitably arise in any attempt at categorization of internationally wrongful acts for the purpose of differentiating their legal consequences. The whole idea underlying State responsibility is the change in legal relationships between States brought about by the internationally wrongful act of a State. Defining that change inevitably involves a determination of what the legal relationship was in the first place. Nevertheless, the whole endeavour of the Commission in drafting rules of State responsibility had been to avoid as much as possible prejudging the scope and interpretation of primary rules, in particular where international experience shows controversies which cannot at present be resolved by consensus. In the present case, it would seem that the Commission can hardly expect to improve on the Declaration on Principles of International Law, adopted in 1970, or on the Definition of Aggression, adopted in 1974, by answering questions deliberately left open in those texts.[38]

71. Passing now to the legal consequences of internationally wrongful acts which are neither acts of aggression nor other international crimes, the question arises what further categorizations of wrongful acts and of legal consequences (the "catalogue") can be made.

72. As to the legal consequences of an international delict, one may distinguish three elements or aspects:

(*a*) As to the delict creating new legal relationships between the author State and the injured State, the question arises, which State or States can be considered injured by the delict;

(*b*) The content of the new legal relationships;

(*c*) The question of a possible "phasing" in the content of the new legal relationships.

This question includes *inter alia* the question whether immediate countermeasures are allowed before any attempt is made to settle the original dispute.

73. Normally, international obligations—whether "requiring the adoption of a particular course of conduct" or "requiring the achievement of a specified result" or "to prevent a given event"—are obligations towards a specific State. Even if more than one other specific State is involved, the bilateral relationships created by a rule of international law can normally be treated separately. The same applies to the new legal relationships created by a breach of an obligation, i.e. the relationships between the author State and the injured State or States. In principle, it makes no difference whether the obligation is one of customary law or one resulting from a treaty.[39] There are, however, exceptions to the separability of the bilateral relationships.[40] But it would seem that, beyond the case of international crimes, there are no internationally wrongful acts having an *erga omnes* character. This does not exclude the possibility that a State or States which have an interest in the matter may, through diplomatic or other official channels, indicate that interest to the author State of an internationally wrongful act. Such *démarches* or appeals may be made even before the internationally wrongful act has actually been committed. The admissibility of such

[38] See, in particular, paragraph 2 "General part", of the Declaration of Principles of International Law (see footnote 35 above); and articles 7 and 8 of the Definition of Aggression (General Assembly resolution 3314 (XXIX) of 14 December 1974, annex).

[39] If a particular coastal State denies a vessel of a particular flag State innocent passage through its territorial sea, this is an internationally wrongful act which creates a new legal relationship as between that coastal and that flag State only.

[40] Cf. the Special Rapporteur's preliminary report, document A/CN.4/330 (see footnote 1 above), paras. 62 *et seq.*

steps is not a legal consequence of the internationally wrongful act.[41] This is, of course, without prejudice to the duty not to intervene in the internal or external affairs of another State.

74. Whether the interest of a State is adversely affected by the act of another State is a matter of fact. For State responsibility—i.e. new legal relationships between States—to arise, it is obviously necessary to qualify both the act and the interest; in other words, to determine the parties to the breach. Parties to the breach can only be those States between which the primary relationship exists. The question therefore is a matter of interpretation of primary rules: whose interests a given primary rule is intended to protect? But even if it is established that a given primary rule is—possibly also—intended to protect the interests of a given State, that State is not necessarily a party to the breach.[42]

75. In many cases of internationally wrongful acts there is no problem in legally identifying the injured State. The States which are parties to the creation of the rule of international law (or, in the terminology of part 1, of the "obligation") are also parties to the primary legal relationships under that rule and, at the same time, parties to the breach, i.e. parties to the new, secondary, legal relationships; the three "levels" coincide. This is normally the case with obligations imposed in a bilateral treaty. It should be noted here, however, that even in such a case a similar problem may arise as to the identification of the "passive" side of the new legal relationship, as indeed of the "active" side. Actually, if the direct victim of the act is not a State but another entity, one still has to establish a link between that entity and a State in order to identify the injured State. Such a link may be established by another (primary) rule of international law, such as the rules relating to what is often called "the nationality of claims". Indeed, one might consider the rule of international law qualifying an internationally wrongful act as an international crime as being also such another primary rule, inasmuch as and to the extent that it links the fundamental interests of the community of States as a whole to each individual State (which thereby becomes an injured State).

76. In fact, by another rule of international law, the same phenomenon of linkage exists on the active side, where the author of the act (cf. art. 32, para. 1, of part 1 of the draft articles on State responsibility) is not a person or a group of persons "acting on behalf of the State", in the sense of article 11, paragraph 1, of part 1 of the draft; according to paragraph 2 of that article, there may then be related conduct of the State which may entail State responsibility. (In a sense, the rule of exhaustion of local remedies also serves to "identify" the author State.) Articles 27 and 28 of part 1 of the draft are also such other rules of international law, this time identifying a third State as a party to the breach. Incidentally, the problem of identifying another State as an injured State also arises within the context of liability for the injurious consequences of acts not prohibited by international law.[43]

77. Of course, if, in a bilateral treaty, the only obligations imposed are obligations relating to a specific conduct at a specified time (such as paying an amount of money at a specific date), there can be no problem at all in identifying the injured State in the case of non-performance. The physical act of (non-)performance, the concrete legal relationship and the rule of international law created by the treaty coincide completely. The same applies, normally, to obligations arising for States out of a decision in settlement of a dispute. But, as already remarked in the third report,[44] the bulk of international obligations are formulated in abstract terms, and then the question of identifying the injured State arises. This is particularly the case if a multilateral treaty is the source of the obligation breached. In between the case of a bilateral treaty and a multilateral treaty lies the case of the position of third States vis-à-vis a treaty under articles 35 and 36 of the Vienna Convention . In reality, this is rather a case of primary legal relationships, arising out of a treaty to which the third State is not a party, as between those parties and the third State. As already remarked in the preliminary report,[45] there does not seem to be any reason to treat—for the purposes of determining the legal consequences of a breach—this primary legal relationship differently from the legal relationship between the parties to the treaty. This seems also to be valid for the case dealt with in article 36 *bis*[46] of the draft articles on the law of treaties between States and international organizations or between international organizations.[47] In both cases, however, the third States are not parties to the treaty; therefore the question arises whether they

[41] Cf. the Judgment of the ICJ of 5 February 1970 in the *Barcelona Traction, Light and Power Company Limited* case, second phase (*I.C.J. Reports 1970*, p. 46, paras. 86-87).

[42] It is certainly also in the interests of the States to, from, or on behalf of which cargoes are carried by ships that the innocent passage of ships should not be hampered by a coastal State, in accordance with article 24, paragraph 1 *b*, of the United Nations Convention on the Law of the Sea (*Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), document A/CONF.62/122); nevertheless, such hampering is an internationally wrongful act only as against the flag State. If, according to the same Convention, the interests of the "the international community as a whole" are involved in the resolution of a conflict between a coastal State and a flag State as regards their respective rights in an exclusive economic zone, this does not of course mean that an internationally wrongful act of a coastal State in this field is a breach *erga omnes*. Cf. also the preliminary report, document A/CN.4/330 (see footnote 1 above), paras. 41, 70 and 96.

[43] See in this connection the statement made on 16 November 1982 by the representative of the Netherlands in the Sixth Committee of the General Assembly (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 46th meeting, paras. 44-50).

[44] Document A/CN.4/354 and Add.1 and 2 (see footnote 3 above), para. 32, footnotes 15 and 16; cf. also paras. 123-124.

[45] Document A/CN.4/330 (see footnote 1 above), para. 38.

[46] For the text, see *Yearbook ... 1982*, vol. II (Part Two), p. 43.

[47] Cf. the comments made on 9 November 1982 by the representative of the Netherlands in the Sixth Committee of the General Assembly (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 40th meeting, paras. 52-59).

can invoke a material breach as a ground for a termination or suspension of the treaty, a matter which will be dealt with later in the present report.

78. The identification of the injured state is only one element of the determination of the legal consequences of an internationally wrongful act. As such, it is closely related to the other two elements mentioned above (para. 72). Indeed, the three "parameters" of the legal consequences may involve different States[48] and may correspond to different "phases". Thus, for example, the question whether, in respect of an internationally wrongful act of a State, another State has a "separate self-contained right"[49] to claim reparation is not necessarily answered in the same way as the question whether a State is entitled to take countermeasures; application of Article 94 of the United Nations Charter may involve still other States in the legal consequences of an international delict. Incidentally, other legal consequences of "status" and "procedure" may also involve other States than those entitled to reparation (cf. art. 61, para. 2, and art. 62, para. 2 (*b*), of the Vienna Convention); which State can invoke the nullity of a legal act is also a question separate from the direct injury suffered. Before pursuing the matter of identification of the injured State, an analysis of the two other elements seems indicated.

79. As to the content of the new legal relationships, three types can be distinguished, namely: (*a*) reparation; (*b*) suspension or termination of existing relationships at the international level; and (*c*) measures of self-help to ensure the maintenance of rights. Again, the division between the three types is not a sharp one; they relate roughly to modifications in the three fields of jurisdiction: the jurisdiction of the author State; the international jurisdiction and the jurisdiction of other States. Indeed, the three fields of jurisdiction are interrelated through rules of international law.

80. Within the framework of qualitative proportionality, the admissibility of measures of self-help is obviously the most dubious, since such measures necessarily involve an infringement of rights of the author State. Accordingly, reprisals are generally considered as allowed only in limited forms and in limited cases. The nature of the internationally wrongful act and the nature of the rights of the author State infringed by the reprisal are relevant here.

81. The first limitation of the admissibility of reprisals concerns reprisals involving the use of force. The Declaration on Principles of International Law[50] proclaims that "States have a duty to refrain from acts of reprisal involving the use of force". Article 4 of the resolution on the régime of reprisals in time of peace, adopted by the Institute of International Law in 1934, stipulates that "armed reprisals are prohibited to the same extent as resort to war" (*les représailles armées sont interdites dans les mêmes conditions que le recours à la guerre*).[51] The draft convention of Graefrath and Steiniger[52] excludes reprisals which amount to the threat or use of force against the territorial integrity or political independence of the State (arts. 9 and 10) and military action outside the territory (art. 9, para. 1). However, the Declaration on Principles of International Law also contains the clause:

> Nothing in the foregoing paragraphs [including the one just cited] shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful.

and article 2 of the resolution of the Institute of International Law excludes "self-defence" from the scope of that resolution. In this field, the Commission is then again confronted with the lack of consensus referred to above (paras. 52-54). In any case, to the extent that armed reprisals are prohibited, that prohibition would be covered by articles 4 and 5, as proposed by the Special Rapporteur in his third report (see para. 21 above). Furthermore, in the case of most internationally wrongful acts, "armed reprisals" would be manifestly disproportional in the sense of article 2 as there proposed.

82. The next question is whether in contemporary international law there are other limitations set to the admissibility of reprisals other than "armed reprisals". As stated in paragraph 80 above, the nature of the internationally wrongful act and the nature of the right of the author State, infringed by the reprisal, seem to be relevant here. Neither the resolution of the Institute of International Law, however, nor the draft convention of Graefrath and Steiniger, make any explicit distinctions in this respect. Articles 9 and 10 of that draft convention, dealing with the legal consequences of internationally wrongful acts which are neither military aggression nor forceful maintenance of a racist or colonial régime, have exactly the same provision relating to reprisals: "the character and scope of such reprisals must be limited to what is necessary" (*sie sind nach Art und Umfang auf das Erforderliche zu beschränken*), a clause which seems rather related to the requirement of quantitative proportionality, formulated in article 6 of the resolution of the Institute of International Law, which obliges the State which takes reprisals "to make the coercion applied proportional to the gravity of the act denounced as wrongful and to the extent of the damage suffered". Nevertheless, there are instances of qualitative proportionality, even outside the case of peremptory norms of general international law covered by article 4 as proposed in the third report.

83. The question dealt with here has some analogy with the problem of "state of necessity" dealt with in article 33 of part 1 of the draft articles on State responsibility. Paragraph 2 (*b*) of that article provides that a state of necessity may not be invoked "if the international obligation with which the act of the State is not in conformity is laid down in a treaty which, explicitly or

[48] See the preliminary report, A/CN.4/330 (see footnote 1 above), para. 62 *in fine* and para. 42.

[49] *Ibid.*, para. 41.

[50] See footnote 35 above.

[51] *Annuaire de l'Institut de droit international, 1934*, pp. 708-711.

[52] See footnote 30 above.

implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation". Now the possibility that the legal consequences of a breach (including the exclusion of certain legal consequences such as reprisals) are "prescribed by the rule or rules of international law establishing the obligation or by other applicable rules of international law" is already covered by draft article 3 as proposed in the third report (see para. 21 above). However, in view of the obvious disadvantages of too wide a formulation of this draft article, and without prejudice to the eventual adoption of a general draft article recognizing the—limited—possibility of derogation from the legal consequences to be defined in part 2, there seems to be room for a special draft article dealing with reprisals only.

84. Leaving aside the international crime of aggression, it seems obvious that a reprisal which is in itself another international crime can never be justified even in response to an international crime committed by another State. Conceptually, there are two grounds for this obvious truth. The first is that the protection of the fundamental interests of the international community is involved; the second is that the directly injured entities are not individual States. Both grounds may *mutatis mutandis* be applicable to reprisals which, although by definition breaches of international obligations, are not international crimes. Actually, they apply to other objective régimes as well, which may be universal, regional or even bilateral.

85. The concept of "objective régime" is admittedly somewhat nebulous.[53] This is perhaps due to the fact that the legal relevance of the concept is considered in a wide variety of contexts. In particular, the context of implied acceptance of the objective régime by third States seems to have been the reason why the concept was not as such envisaged in the Vienna Convention. The present context of admissibility of reprisals could, it seems, be separated from that other context. For the moment, the question is not which States, not being parties to the creation of the objective régime, derive rights and obligations from such a régime, but rather whether, given the existence of primary legal relationships between States under such a régime, one of those States may, by way of reprisal, act in a manner not in conformity with its obligations under such regime (which is not necessarily created by a treaty; in so far, the formulation adopted for article 33, paragraph 2 (*b*), of part 1 of the draft—a different context—is too narrow for the present purpose).

86. Two provisions of article 6 of the resolution of the Institute of International Law[54] seem to be relevant here. Point 3 of that article obliges a State which exercises reprisals "to limit the effects of such reprisals to the State against which they are directed and respect, to the extent possible, the rights of private persons and those of third States". Point 4 prohibits "any rigorous measure contrary to the laws of humanity and the dictates of public conscience". The first mentioned provision raises the question of international obligations essential for the protection of interests common to a group of States, to the extent that a breach of such obligation cannot but adversely affect such common interest and, thereby, cannot be limited to the single member of the group which has committed an internationally wrongful act. The other provision evokes the existence of international obligations protecting entities other than individual States, particularly human beings as such.

87. From the point of view of logic, the fact that the existence of common interests makes it impossible to single out the author State may lead to two answers: either the reprisal—action not in conformity with the obligation under the objective régime—is not admissible, or the reprisal is admissible and the members of the group of States other than the author State must accept the adverse consequences for them. Actually, the choice between the two answers should be made by a collective decision, but the difficulty here is that not all objective régimes provide for a machinery for such collective decisions. Accordingly, some writers make a distinction according to the internationally wrongful act to which the reprisal is directed: if the breach is a breach of an obligation under the objective régime, the reprisal is admissible; if the internationally wrongful act is not connected with the objective régime, the reprisal is not admissible.[55] The latter rule is no doubt correct (in the absence of a machinery of collective decision-making as regards the reprisal). The former rule may correspond to the words "to the extent possible" in article 6, point 3, of the aforementioned resolution of the Institute of International Law. Its unfortunate result—the reprisal adds another breach of the objective régime of the one committed by the author State—can be justified only by the absence of a collective decision-making machinery, together with the fact that, even though a common interest of the group of States is affected, a State member of the group is especially affected by the breach which entails the reprisal. All this is, of course, without prejudice to the possibility that the original breach of an international obligation creates a situation in which a fundamental change of circumstances, a state of necessity or the requirement of reciprocity can be invoked as a justification for the non-performance of a primary obligation by an affected State. Indeed, the common interest of the group of States does not preclude the possibility that a breach by one member of the group of an obligation established in the common interest may affect another member more directly. On the other hand, the common interest requires some form of collective management of such interest. It is significant in this respect that article 8 of the resolution of the Institute of International Law declares that "The use of

[53] Cf. E. Klein, *Statusverträge im Völkerrecht. Rechtsfragen territorialer Sonderregime* (Berlin, Springer, 1980).

[54] See footnote 51 above.

[55] See B. Simma "Reflections on article 60 of the Vienna Convention on the Law of Treaties and the background in general international law", *Österreichische Zeitschrift für öffentliches Recht* (Vienna), vol. XX (1970), p. 5; and Klein, *op. cit.*, and the numerous authors there cited.

reprisals is always subject to international surveillance. It can in no case be immune from discussion by other States or, as between Members of the League of Nations, be exempt from appraisal by the organs of the League", while article 9 contains a general clause on the settlement of disputes by the Permanent Court of International Justice.

88. The case of objective régimes protecting entities other than States is somewhat different, indeed rather the opposite. Article 6, point 4, of the resolution of the Institute of International Law obviously refers in particular to what would now be called the rules of international law relating to the protection or respect of human rights in armed conflicts. In this particular field of international law, the relevant rules in general deal specifically with the (in)admissibility of reprisals. Actually, if reprisals are permitted, it is because the State interest involved prevails over humanitarian considerations. It would seem to the Special Rapporteur that this particular field should be left to its own development and that part 2 of the draft articles on State responsibility should not deal with it.

89. But there are other objective régimes which impose on States the respect of human rights, whatever the nationality of the person affected, and whatever the circumstances. Reprisals in breach of such rules are obviously inadmissible, even if they do not amount to an international crime. It would seem, however, that this inadmissibility is already covered by the general article 4 proposed by the Special Rapporteur in his third report (see para. 21 above). A state of necessity and a fundamental change of circumstances are already envisaged in such rules, and the requirement of reciprocity is definitely not part of those rules.

90. Another entity protected by primary rules of international law, and not allocated to a particular State, is the human environment as a shared resource. In this field, again, reprisals consisting in breach of such rules seem to be inadmissible even in response to an earlier breach by another State. But in this field it is particularly necessary to distinguish reprisals from other grounds of non-performance of obligations. The breach of an obligation relating to the protection of the human environment may be of such a kind that the resulting situation constitutes a fundamental change of circumstances in respect of the corresponding obligation of other States. Furthermore, in particular if the primary rule of international law is a bilateral one, or valid only as between the members of a group of States, it may well provide for special obligations of mutual abstention and as such express a requirement of reciprocity. Again, to the extent that the international obligation is a universal and absolute one, the prohibition of its breach by way of reprisal seems to be covered by draft article 4 as proposed in the third report.

91. Apart from the exclusion of specific reprisals by a universal rule of *jus cogens,* and the exclusion of specific reprisals by an objective régime (otherwise than in case of a breach of such objective régime), there may be cases of exclusion of specific reprisals even where no extra-State interests are involved. A typical example is the case of diplomatic immunities. It would seem, however, that this is a case which does not lend itself to generalization within the context of the inadmissibility of specific reprisals. Indeed, the case seems rather within the scope of a deviation from the general rules concerning the legal consequences of internationally wrongful acts, implicitly provided for at the time the primary relationship is established. As such, it would fall under the rule intended to admit such deviation, i.e. article 3 as proposed in the third report.

92. Under the terms of article 30 of part 1 of the draft articles on State responsibility, the reprisal is a legitimate countermeasure which precludes the wrongfulness of the act otherwise not in conformity with an international obligation. As such, it is clearly distinguished from the unilateral termination or suspension of the operation of a treaty as a consequence of its breach, even though some of the considerations leading to a limitation of reprisals are also valid for the limitation of the unilateral termination or suspension of the operation of a treaty under article 60 of the Vienna Convention. Indeed, article 60 is clearly inspired by the wish to keep alive the treaty as such, although it recognizes that the requirement of reciprocity and/or a fundamental change of circumstances may not admit this result.

93. The unilateral termination or suspension of the operation of a treaty does not, of course, necessarily imply that an act in breach of the treaty will actually be committed by the State which has proceeded to such termination or suspension. On the other hand, the termination or suspension of the operation of the treaty necessarily implies that the primary obligations under the treaty of the State which has committed the material breach are also terminated or suspended in respect of the terminating or suspending State.

94. Indeed, there are different stages in the total process of international law: the creation (including modification and termination) of the rule and its enforcement may be separated by primary, secondary and tertiary legal relationships. Self-help, being a measure of enforcement, must be distinguished from the termination of the rule. Of course, some of the stages may be missing or may coincide. Thus, for example, treaties do not necessarily embody abstract rules at all; but their operation always involves other rules of international law outside the treaty, if only for the purpose of their interpretation (art. 31, para. 3 (*c*) of the Vienna Convention). Other rules which may also apply are the rule relating to the effect of a fundamental change of circumstances on obligations and the rule of reciprocity.

95. Reprisals as measures of enforcement must also be distinguished from the operation of two other rules of international law: the rule concerning the effect of a fundamental change of circumstances on international obligations and the rule of reciprocity of obligations. This is not to say that those rules always apply to all international obligations; on the contrary, they may or

may not apply. But the point is that if and to the extent that they apply, the conduct not in conformity with the otherwise existing obligation is not a reprisal.

96. In this connection, one may doubt whether the opinion, referred to in paragraph 87 above, that a reprisal consisting in a breach of an obligation under an objective régime is admissible if it is a response to a breach by another State of that objective régime, is really correct. The main argument seems to be twofold:[56] first, that, at least in treaty relationships, there is always an element of *do ut des*; secondly, that the fear of reprisals is one of the main reasons for voluntary performance of international obligations. Both arguments are realistic in the sense that, no doubt, considerations of this nature may enter into the minds of Governments when they negotiate, when they decide to become or not to become party to a treaty and when they decide on their conduct in concrete circumstances. But the point is that there are other legal means or techniques than the admissibility of individual reprisals which can cover these considerations, to the extent that they are justified. First, reciprocity, in the sense that an obligation is to be performed by a State only if the same or another obligation is performed by another State, is a legal link which can be established by the parties at the time those obligations are negotiated or entered into. Secondly, a situation resulting from the non-performance of an obligation may constitute a fundamental change of circumstances or, for that matter, create a state of necessity for other States. A fundamental change of circumstances and a state of necessity cannot be invoked if they are the result of a breach, by the party invoking them, of an international obligation. On the other hand, a breach of an international obligation by a State may well contribute to a situation involving a fundamental change of circumstances or a state of necessity for another State. Thirdly, account has to be taken of the possible separability of obligations within the same field. Fourthly, there may be other means of enforcement than individual self-help. And, finally, the failure of performance of an obligation is to be distinguished from the total failure of the régime as such.

97. The Special Rapporteur submits that the common or collective interest created by the group of States parties to an objective régime does indeed exclude the admissibility of reprisals consisting in the non-performance of an obligation under that régime, otherwise than in consequence of a collective decision to that effect of such group of States. Actually, this is nothing else than the transposition, at the regional level, of the idea underlying the universal régimes: the United Nations system, *jus cogens* and international crimes. In a way one might even consider the self-contained régime of diplomatic law as a borderline case of a *bilateral* objective régime (however, cf. para. 21 above). There is, of course, a difference from those universal objective régimes inasmuch as the regional objective régime may itself expressly admit specific reprisals in specific circumstances.

98. If a provision to this effect is embodied in part 2 of the draft articles, it will be necessary to include, in some place, a clause stating that the inadmissibility of the reprisal is without prejudice to any question relating to the termination and suspension of the operation of treaties. Such a clause would be the counterpart of article 73 of the Vienna Convention in so far as that article relates to "the international responsibility of a State". This, it would seem, would cover some of the cases of reciprocity of treaty obligations. Non-universal objective régimes not based on a treaty but solely on regional customary law would not be covered, but could be excluded by the definition of objective régimes from the scope of the rule on non-admissibility of reprisals, and are in any case unlikely to occur. It may be recalled here that the resolution of the Institute of International Law[57] also excludes from its scope "measures resulting from the general principles of law in the field of obligations, applicable to international relations" (art. 2, point 2). Since article 60 of the Vienna Convention applies only to material breaches, it would be necessary to cover other cases of reciprocity of the performance of treaty obligations. Indeed, if it appears from the treaty or is otherwise established that the performance of an obligation by a State party is the counterpart (quid pro quo) of the performance of the same or another obligation by another State party, the non-performance by the first mentioned State need not be a material breach in order to justify non-performance by the other State. It is also recalled that article 60, paragraph 2 (*a*) of the Vienna Convention envisages a collective decision of the "other parties" to a multilateral treaty (albeit in combination with individual measures taken by the "party specially affected by the breach". But article 60 is not limited to objective régimes and applies only to "material" breaches, narrowly defined in paragraph 3 of that article.

99. If it is accepted that reprisals consisting in a breach of an obligation under an objective régime are inadmissible, the question of defining objective régime arises. In essence it is the "normative" character—in contradistinction to both the quid pro quo character and the "co-operative procedure" character—of the rule of international law which determines its objectivity in the present context. The parties to the régime create the collective interest which requires that each of them fulfil its obligations irrespective of the fulfilment of the obligations by another party. In this sense the objective régime is the opposite of a *si omnes* clause. Perhaps the simplest way to describe such régimes would be to refer to the "object and purpose" of a treaty as requiring just that. This would also allow for a separation between obligations resulting from one and the same treaty and constitute a counterpart to the definition of a material breach in article 60 of the Vienna Convention. The normative character of the régime may be a consequence of

[56] Cf. Klein, *op. cit.*, pp. 229 *et seq.*; and Simma, *loc. cit.*, pp. 70 *et seq.*

[57] See footnote 51 above.

the fact that the non-fulfilment of an obligation under the régime in respect of the author State does "affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations" (art. 58, para. 1 (*b*) (*i*), of the Vienna Convention). In a sense the presence within the objective régime of machinery for the effective settlement of disputes or, *a fortiori,* of decision-making machinery for the management of the collective interest, underpins the normative character of the objective régime.

100. As stated in paragraph 87 above, the presence of a collective interest in objective régimes should imply a collective decision-making machinery as regards reprisals consisting in a breach of obligations under that régime. The treaty establishing the objective régime may provide for such machinery. In the absence of specific provisions to this effect, there remains the possibility that the other States parties to the treaty, in case of a breach of an obligation under that régime by one of them, take a decision allowing by way of reprisal a conduct, by one or more of them, that is not in conformity with obligations under the régime. Unless otherwise provided for in the treaty, such a decision could be taken only unanimously.

101. Quite apart from the inadmissibility of a reprisal resulting from the content of the rule which would be breached by such reprisal, there are other limitations to self-help. Article 6, point 1, of the resolution of the Institute of International Law[58] requires that the author State of the internationally wrongful act must first be given the opportunity to stop the breach and offer reparation. Articles 9 and 10 of the draft convention of Graefrath and Steiniger require a prior notification (*Ankündigung*) to the author State of the intent to take countermeasures,[59] presumably for the same purpose. It is to be noted that, in respect of termination or suspension of the operation of a treaty, no prior notification is required under article 65, paragraph 5, of the Vienna Convention.

102. Far more important in the matter of phasing (see para. 72 (*c*) above) is the question of the inadmissibility of reprisals if other means of enforcement are available, in particular, procedures for the peaceful settlement of disputes.[60] Actually, means of peaceful settlement of disputes are always available in the sense that the parties to the dispute may at any time agree to such a procedure. But does this mean that the alleged author State of an internationally wrongful act, by offering to submit the dispute to a settlement procedure, can avoid reprisals? Or that the other State can apply reprisals only if it offers at the same time to submit the dispute to a settlement procedure?

103. In itself, there seems to be much merit in the statement that self-help should not be allowed, or at least be suspended, if the alleged author State accepts that the questions of fact and law which underlie the allegation of an internationally wrongful act be decided by an impartial body. Indeed, reprisals are meant to bring about a return to conduct in conformity with an international obligation, including the substitute performance of reparation. If the alleged author State disputes the points of fact and/or law involved in the allegation, it can really not be required to do more than accept third party settlement of the claim. The point is made, however, that, in the mean time, i.e. up to the moment that the author State fulfils its obligation under the award or judgment, the injured State continues to be injured. Now, this may of course be avoided if the court or tribunal is empowered to order interim measures of protection. Furthermore, as stated above (para. 98), the inadmissibility of a reprisal does not exclude a suspension of the operation of a treaty or the non-fulfilment of an obligation by way of reciprocity if the obligations under the treaty are of such a kind that reciprocity applies. In the *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France,* the tribunal noted that:

> The scope of the United States action could be assessed in very different ways according to the object pursued; does it bear on a simple principle of reciprocity measured in economic terms? Was it pressure aiming at achieving a quicker procedure of settlement? Did such action have, beyond the French case, an exemplary character directed at other countries and, if so, did it have to some degree the character of a sanction? It is not certain that those responsible for the measures taken made very refined studies of that point; ...[61]

Neither did the tribunal find it necessary to answer those questions, since in any case it held that

> ... the measures taken by the United States do not appear to be clearly disproportionate when compared to those taken by France.[62]

Actually, State practice in respect of the conclusion of bilateral air services agreements generally rather tends to be based on very detailed quid pro quo considerations.

104. On the other hand, neither the alleged author State nor the alleged injured State can force the other State to accept a third party settlement procedure unless there is a basis of pre-existing consent for such procedure. In other words, the parties to the dispute must, before the dispute arises, have agreed in principle that such disputes shall be settled in this way. Even then, reprisals may be applied in order to arrive at an actual settlement of the dispute which has arisen.

105. Does this imply that reprisals may not be maintained after the moment that the case is *sub judice*? In the *Air Service Agreement* case referred to above, the tribunal stated:

> The situation changes once the tribunal is in a position to act. To the extent that the tribunal has the necessary means to achieve the objectives justifying the countermeasures, it must be admitted that the right of the parties to initiate such measures disappears. In other words, the power of a tribunal to decide on interim measures of pro-

[58] *Idem.*

[59] See footnote 30 above.

[60] Cf. art. 5 of the resolution of the Institute of International Law, and preliminary report, document A/CN.4/330 (see footnote 1 above), paras. 86 *et seq.*

[61] United Nations, *Reports of International Arbitral Awards,* vol. XVIII (Sales No. E/F.80/V.7), p. 442, para. 78.

[62] *Ibid.,* p. 444, para. 83.

tection, regardless of whether this power is expressly mentioned or implied in its statute (at least as the power to formulate recommendations to this effect) leads to the disappearance of the power to initiate countermeasures and may lead to an elimination of existing countermeasures to the extent that the tribunal so provides as an interim measure of protection. As the object and scope of the power of the tribunal to decide on interim measures of protection may be defined quite narrowly, however, the power of the parties to initiate or maintain countermeasures, too, may not disappear completely.[63]

Article 5 of the resolution of the Institute of International Law points in the same direction; it presupposes that reprisals may be applied even if a means of settlement is available, including a power of the court or tribunal to order interim measures, and then leaves the decision on the maintenance of such reprisals to the court or tribunal. It is to be noted that this article starts with the general statement that reprisals are prohibited "if respect for the law can be effectively ensured by procedures of peaceful settlement", and then gives examples of situations in which reprisals are prohibited in particular (*notamment**).

106. The Special Rapporteur submits that, if the Commission, as suggested above (paras. 95-96), makes an express distinction between measures of reciprocity and reprisals, one could go a step further and exclude the initiation or maintenance of reprisals from the moment the dispute is *sub judice,* in accordance with a pre-existing agreement between the parties that such dispute shall be submitted to third party settlement, unless that agreement specifically excludes interim measures of protection to be indicated by the court or tribunal at the request of either party to the dispute. This, of course, would imply that the reprisal could be initiated or again applied if a party to the dispute fails to comply with the decision of the court or tribunal indicating the interim measures of protection.

107. If it is accepted that the pre-existing agreement on settlement of disputes precludes reprisals after the actual submission of the dispute, it should also be admitted that reprisals are not permitted if the claimant State refuses to take the necessary steps for the actual submission of the dispute. Of course, no such refusal is implied in case the actual submission does not take place because the parties fail to agree on the arbitrator(s) they have to appoint in common agreement.

108. It seems arguable that the foregoing also applies if the pre-existing agreement on settlement of disputes does not provide for a binding final decision of a court or tribunal. The point is that unilateral self-help should also be excluded if there is a dispute as to the facts of the case and a pre-existing agreement on recourse to impartial fact-finding in case of such a dispute. Here again, the prior exhaustion of available international remedies would seem to be required.

109. On the other hand, one has to allow for the possibility that an internationally wrongful act is in fact so manifest and at the same time in law so serious as to destroy the object and purpose of the whole body of rules to which the obligation breached by that wrongful act belongs. In such an extreme case, where "reciprocity", "fundamental change of circumstances" and "state of necessity" meet, even the prior exhaustion of available international remedies cannot be required. Actually, in such a case the matter is beyond reprisals and settlement of disputes as a means to obtain a return to legitimacy. This case is to be distinguished from an incidental breach of a rule by the irreversible character of the situation created by the destruction of the object and purpose of the body of rules involved. It has been correctly remarked[64] that, for example, the obligations of States to maintain certain standards of working conditions or to prohibit certain practices in consequence of ILO conventions, even though not dependent on the fulfilment by other States of the same obligation, contain an element of reciprocity, inasmuch as the preamble to the ILO Constitution declares: "Whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries ...". But it seems clear that this kind of reciprocity comes in to play only in case of a "serious and widespread" failure. The same is true of common standards in the field of protection of the environment.

110. Apart from quid pro quo and objective régimes, there are nowadays many international obligations of States to undertake common action in a particular field. Often such obligations leave it entirely to the States concerned to determine together which common action shall be taken. Failure to agree on a common action is, then, certainly not an internationally wrongful act. But failure to negotiate in good faith is, strictly speaking, an internationally wrongful act. Consequently, the question arises whether such failure may be justified as a legal consequence of an internationally wrongful act of another State, either in the same field or in another field of rules of international law. This question is relevant because the failure to negotiate may normally have legal consequences in respect of liability for the injurious consequences of acts not prohibited by international law. It would seem that indeed such "active intergovernmental co-operation" may be suspended as a legal consequence of an internationally wrongful act, subject, of course, to the applicable rules of the international organization—if the duty to co-operate is placed within the framework of such organization—and subject to the rule of proportionality. Although the establishment of diplomatic relations between States takes place "by mutual consent", they may be "broken off" (in view of article 45 of the Vienna Convention on Diplomatic Relations,[65] "suspended" may be a better

[63] *Ibid.*, pp. 445-446, para. 96. It should be noted that in this case the parties, after the dispute had arisen, had concluded a compromise expressly authorizing the tribunal to decide on interim measures, at the request of either party. At the same time, this compromise substituted agreed interim arrangements for both the measures taken by France and the countermeasures taken by the United States of America. In fact, neither party requested the tribunal to decide on interim measures of protection.

[64] Simma, *loc. cit.*, pp. 70-71.

[65] United Nations, *Treaty Series,* vol. 500, p. 122.

word) unilaterally. While the functions of a diplomatic mission comprise—apart from the protection of the interests of the sending State and its nationals in the receiving State and the ascertaining of and reporting on conditions and developments in the receiving State—negotiating with the Government of the receiving State and promoting friendly relations, there is no positive legal duty to co-operate in this way. The suspension of diplomatic relations—like the refusal of *agrément* and the declaration of *persona non grata* by the receiving State—is not an internationally wrongful act and cannot therefore constitute a reprisal or an act otherwise not in conformity with an international obligation. Nevertheless, such action may well be a response to an international wrongful act.

111. As regards the obligation of the author State to make reparation, reference may be made to the second report, and in particular to articles 4 and 5 as proposed therein (see para. 14 above). Since those articles were referred to the Drafting Committee, the Special Rapporteur will suggest improvements of the drafting in that Committee.

112. Returning now to the question, left in abeyance above, of the determination of the "injured" State, i.e. the other State or States involved in the new legal relationships entailed by an internationally wrongful act, it would seem clear *a priori* that distinctions must be made in respect of the various contents of those new legal relationships, which, in their turn, are dependent upon the nature and content of the old or primary relationships, the rights under which have been infringed and the obligations under which have been breached. This is particularly clear where the new legal relationships entailed by the internationally wrongful act comprise an obligation of a State other than the author State.

113. Whether a particular State has an interest in the performance of its international obligations by another State is a matter of fact. In the long run every State has an interest in the observance of any rule of international law, including the rule of *pacta sunt servanda*. But this by no means authorizes—let alone obliges—every State to demand the performance by every other State of its international obligations, let alone to take countermeasures in case of non-performance of those obligations. Actually, as we have seen, there are several stages in the process of international law, and the participation of a State in one of those stages does not necessarily imply its participation (including possibly its duty to participate) in all other stages of the process. As already remarked (para. 73 above), the duty under general international law not to intervene in the internal or external affairs of another State—whatever may be the exact scope of and possible exceptions to this duty—is relevant in this context. On the contrary, while it is possible to construe every single international right and obligation as resulting from rules of international law, in the total process of international law, from the establishment of its rules to their enforcement, a channelling on both the "active" and the "passive" side of the participation of States takes place in the transition from one stage to another.

In the opinion of the Special Rapporteur, both the approach adopted by the Commission in the elaboration of part 1 of the draft articles on State responsibility and the treatment of "liability for the injurious consequences of acts not prohibited by international law" as a separate and distinct topic, exclude the construction of an "international law of tort", analogous to municipal law of tort. The insistence, in international law, even in its present-day stage of development, on the international right of sovereignty of States and on international obligations of a State as resulting, in the final analysis, from the consent of that State, seems to exclude the construction of a (primary) rule of general international law, to the effect that the fault of one State, causing damage to another State, entails a duty of the first State to make reparation to the second. At any rate it is significant that, in municipal law systems which contain such a rule for private law relationships, the courts feel the need for a legal analysis of its three elements—"fault", "cause", and "damage"—which, apart from liability for injurious consequences of acts not prohibited by law, comes close to stipulating rights and obligations.

114. In most cases the question which State is entitled to claim reparation, to invoke reciprocity, to suspend active governmental co-operation or to take reprisals as regards the author State of an internationally wrongful act, is an easy one to answer. While the rule or obligation may be in abstract terms, the breach is always concrete and the injury therefore easily allocated to a particular State. Thus most obligations under general customary international law are simply a reflection of the right of sovereignty of another State, and the breach of an obligation under a bilateral treaty clearly injures the other State party to that treaty. Problems arise, however, when a primary rule of international law is clearly established for the protection of extra-State interests, and where a secondary rule of international law permits or even obliges other States to participate, actively or passively, in the enforcement of a primary rule. Both cases are exceptional.[66] The main rule seems to be that only the State whose sovereign right under general international law has been infringed, or which is a party to a treaty stipulating in its favour the obligation breached, is entitled to claim reparation, to invoke reciprocity, to suspend active governmental co-operation or to take reprisals.

115. Exceptions to this main rule are implied by the United Nations Charter, by the notion of international crimes and by other objective régimes. Indeed, it is precisely because, within such an objective régime, i.e. in respect of the obligations flowing from that régime, a

[66] Akehurst mentions three main categories of circumstances in which third States have claimed a power to take reprisals: (*a*) enforcement of judicial decisions; (*b*) article 60, para. 2 (*b*), of the Vienna Convention; and (*c*) violation of rules prohibiting or regulating the use of force. See M. Akehurst, "Reprisals by third States", *The British Year Book of International Law, 1970* (London), vol. 44, p. 15.

breach cannot be adequately redressed by the bilateral means just mentioned, that collective measures are required for its enforcement, including measures taken by States not "specially affected" by the breach and relating to rights and obligations outside the régime. Neither the rules of general customary international law nor the provisions of multilateral treaties necessarily create objective régimes; on the contrary, in most cases they create bilateral legal relationships (corresponding obligations and rights) between "pairs" of States, the relationships of which are not interconnected. The parallel rights of sovereignty are seldom matched by parallel (i.e. *erga omnes*) obligations.

116. Universal objective régimes are created by the United Nations Charter, by the recognition by the international community as a whole that some internationally wrongful acts constitute international crimes, and by some peremptory norms of general international *jus cogens*. As remarked above (para. 65), it would hardly seem likely that States would accept the international crime régime and the *jus cogens* régime as objective régimes, in the sense used in the present report, without collective machinery for the implementation of those régimes, including machinery for the compulsory settlement of disputes. Regional objective régimes may be created by a multilateral treaty, adding legal consequences to a breach of obligations under the treaty to the otherwise purely bilateral consequences.[67] As noted above (para. 97), one could regard the self-contained régime of diplomatic law as a bilateral objective régime.

117. If it is accepted that, as between the States parties to a treaty, such treaty—or a treaty connected with it—may itself determine the legal consequences of a breach of an obligation stipulated by it, in other words may itself add secondary and tertiary rules to the primary rules it contains, it would be possible not to deal with regional and bilateral objective régimes in parts 2 and 3 of the draft articles. Such an approach would, however, present serious drawbacks. First, there is the drawback already mentioned above that too wide a clause on deviation from the articles to be incorporated in part 2 would take away much of the practical importance of those articles. More important, perhaps, is that deviation, by adding to or excluding normal legal consequences, is often only implied in the objective régime. But, above all, there is the drawback that objective régimes by their very nature tend to exclude deviation. Thus it would seem clear that, for example, two or more States cannot, with legal effect, agree that the breach of a primary obligation under a specific treaty entitles one or more other States to occupy the territory of the author State. Nor can two or more States parties to a multilateral treaty creating an objective régime agree that the legal consequences of a breach of an obligation under that régime will, as between those States, be more restricted than provided for by the objective régime.

[67] Cf. article 60, para. 4, of the Vienna Convention. To a certain extent articles 41 and 58 of that Convention envisage the possibility of "regional" *jus cogens*.

118. While the universal objective régimes are all peremptory, there are various types of regional objective régimes, excluding, or adding, different legal consequences from or to those provided for by the bilateral régimes. The breach of an international obligation under a bilateral legal relationship (other than the bilateral objective régime of diplomatic law) entails such new bilateral legal rights as a claim for reparation (as a substitute performance of the primary obligation), the suspension of bilateral active governmental co-operation, and the application of reciprocity *stricto sensu* (i.e. a non-performance of the same obligation, or directly connected obligation, as in the case of an exchange of different "prestations" on the part of the injured State). Furthermore, the injured State may, by way of reprisal, and subject to the exhaustion of available international remedies, as dealt with above, not perform other obligations towards the author State (subject to the rule of proportionality and without prejudice to the obligations under objective régimes) and, within the framework of article 60 of the Vienna Convention, terminate or suspend the operation of the relevant treaty. This "nullification" of the treaty is actually a "procedural" legal consequence of an internationally wrongful act, just as invoking a fundamental change of circumstances or a state of necessity, on the grounds of the existence of a situation created by an internationally wrongful act, is a "status" legal consequence of such act (cf. para. 34 above).

119. If it is established that the primary bilateral legal relationship involved in the breach is connected with primary legal relationships between other pairs of States through a multilateral treaty, in such a way that the breach of a primary obligation under that treaty by one State party necessarily affects the exercise of the rights or the performance of the obligations of all other States parties under that multilateral treaty, the individual suspension of active governmental co-operation, the individual application of reciprocity *stricto sensu* and the individual non-performance, by way of reprisal, by the injured State of its obligations under that multilateral treaty, are excluded. Bilateral reparations in terms of money made by the author State to all other States parties may remain possible depending on the feasibility of quantifying the damage of each of those States separately. (*Restitutio in integrum stricto sensu* is not bilateral, being by definition a reparation *erga omnes*.) Individual reprisals outside the field of obligations under the multilateral treaty remain allowed for all parties other than the author State. The termination or suspension of the operation of the relevant multilateral treaty itself is governed by article 60 of the Vienna Convention.

120. A second type of objective régime is created by a treaty which provides for parallel obligations of each party to the treaty, either for the protection of collective interests of the group of States involved (such as shared resources) or for the protection of individuals, irrespective of their nationality, within the jurisdiction of such party (such as human rights and fundamental free-

doms). In objective régimes of a "common market" type, the protection of the free trade interests of individuals may be recognized, *inter alia*, in the direct effect of the treaty provisions and their priority over rules of municipal law. In the European Communities, this protection is furthermore implemented by the power of the European Court of Justice to decide on prejudicial questions of the interpretation and application of community law arising in cases brought before municipal courts. Thus, in a sense, a *restitutio in integrum stricto sensu* is also ensured, albeit within the limits of the remedies provided by Community law and, in the absence of such remedies, by domestic law. The consequences of this type of objective régime are the same as those of the first type. In addition, bilateral reparations between States in terms of money are normally not applicable.

121. The third type of objective régime is a régime that combines the first and/or second type of régime with a machinery for the collective management of the interests concerned. In this type of régime individual bilateral measures are excluded (unless the relevant treaty otherwise provides) and the relevant treaty may provide for an obligation of States parties other than the author State to participate actively or passively in the collective enforcement of the régime by measures which may then even deviate from obligations under the régime.

122. Summing up, it would seem that, since the draft articles on State responsibility are intended to cover the legal consequences of all acts or omissions of States not in conformity with what is required of that State by an international obligation, irrespective of the content and source of such obligation, part 2 of the draft articles must take as its starting point the normal situation, i.e. that the internationally wrongful act entails new bilateral legal relationships between the author State and the injured State only.

123. The injured State is: (*a*) the State whose right under a customary rule of international law is infringed by the breach; or (*b*) if the breach is a breach of an obligation imposed by a treaty, the State party to that treaty, if it is established that the obligation was stipulated in its favour; or (*c*) if the breach is a breach of an obligation under a judgment or other binding decision in settlement of a dispute by an international institution, the State party to the dispute. The injured State is entitled: (*a*) to claim reparation; (*b*) to suspend the performance of its obligation towards the author State, which corresponds to or is directly connected with the obligation breached; and (*c*) after exhaustion of the international legal remedies available, to suspend, by way of reprisal, the performance of its other obligations towards the author State (subject to the prohibition of manifestly disproportional measures). It may be noted here in passing that both in the *Naulilaa* case (1928)[68] and in the *Air Service Agreement* case[69] the arbitral tribunal, rather than requiring "proportionality", applied the test of "not clearly disproportionate" (... *hors de toute proportion avec l'acte qui les a motivées*).

124. However, the injured State is not entitled to suspend the performance of its obligations towards the author State to the extent that such obligations are stipulated in a multilateral treaty and it is established that: (*a*) the non-performance of the obligation by one State party necessarily affects the exercise of the rights or the performance of the obligations of all other States parties; or (*b*) the obligation is stipulated for the protection of collective interests of the States parties to the treaty, or for the protection of individual persons irrespective of their nationality; or (*c*) the multilateral treaty imposing the obligation provides for a procedure of collective decisions relating to the enforcement of such obligations. This is without prejudice to the draft articles relating to the United Nations Charter, *jus cogens*, and international crimes.

125. In the case mentioned in the preceding paragraph, all other States parties to the multilateral treaty are considered to be injured States in respect of the breach of those obligations by one of them. In the case mentioned under (*c*) of that paragraph, the multilateral treaty may provide for the obligation of the injured States to participate in the colelctive enforcement. This obligation may go beyond the minimum obligation of non-support of the internationally wrongful act of the author State and of support of the legitimate countermeasures of an injured State, as referred to in article 6 as proposed in the third report (see para. 21 above). Actually, the minimum obligation of non-support is rather in the nature of a "status" legal consequence, while the obligation of support of countermeasures legitimately taken by another State or States is more in the nature of an obligation to cooperate with those other States, or a "procedural" legal consequence.

126. The "procedural" legal consequences of a material breach of a treaty obligation, as regards the termination or suspension of the operation of the treaty itself within the framework of the substantive and procedural provisions of the Vienna Convention, should not be dealt with in the draft articles on State responsibility. The same applies to the "status" legal consequences of the situation, created by the internationally wrongful act, to the extent that such situation may justify an injured State in invoking a fundamental change of circumstances or a state of necessity as a ground for non-performance of its obligations (not necessarily treaty obligations) towards the author State. Both types of legal consequences could be reserved by a clause corresponding to article 73 of the Vienna Convention.

127. It would seem advisable also to reserve the special régimes of (*a*) diplomatic law, and (*b*) belligerent

[68] *Responsabilité de l'Allemagne à raison des dommages causés dans les colonies portugaises du Sud de l'Afrique* (United Nations, *Reports of International Arbitral Awards*, vol. II (Sales No. 1949.V.1), p. 1028, para. 2).

[69] See para. 103 above, *in fine*, and footnotes 61 and 62.

reprisals. Both régimes have special characteristics. Looking at them in one way they are objective régimes, inasmuch as they provide for parallel obligations. On the other hand, they are also reciprocal. In the case of diplomatic law, the availability at all times, to the State injured by the abuse of diplomatic privileges and immunities, of the measures of declaration of *persona non grata* and the breaking off of diplomatic relations, takes away the necessity for determining other legal consequences. In the case of belligerent reprisals, the parallellism of the obligations to respect human rights even in the case of armed conflict is limited by the requirement of "military necessity"

128. The peremptory and universal objective régimes of international crimes and of *jus cogens* may add to or delete some of the legal consequences of internationally wrongful acts, as described in part 2 of the draft articles; that depends on the international community as a whole. The same is valid for the multilateral treaties establishing "regional" objective régimes, provided of course that in doing so their provisions do not deviate from the peremptory universal objective régimes.

129. The general prohibition of manifest disproportionality would seem to be sufficient to cover adequately the influence of aggravating and extenuating circumstances on the admissibility and application of legal consequences. In this connection it should be noted, however, that several publicists require fault to exist on the part of the author State for reprisals to be admissible on the part of the injured State. In view of the—non-exhaustive—list of circumstances precluding wrongfulness in part 1 of the draft articles, and taking into account the inherent difficulties of fact-finding in respect of this subjective element, the Special Rapporteur suggests that no such general requirement should be incorporated in the draft articles.

130. On the other hand, the Special Rapporteur feels inclined to suggest that it might be useful to include in the draft articles a clause providing that, in the case of a manifest violation of an international obligation, which destroys the object and purpose of the objective régime involved, the inadmissibility of certain measures resulting from the existence of such régime no longer applies.