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Sixth report on the content, forms and degrees of international responsibility (part two of the draft articles); and "Implementation" (mise en oeuvre) of international responsibility and the settlement of disputes (part three of the draft articles), by Willem Riphagen, Special Rapporteur

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STATE RESPONSIBILITY

[Agenda item 3]

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**Sixth report on the content, forms and degrees of international responsibility
(part 2 of the draft articles); and “Implementation” (*mise en œuvre*) of international
responsibility and the settlement of disputes (part 3 of the draft articles),
by Mr. Willem Riphagen, Special Rapporteur**

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NOTE

Multilateral conventions cited in the present report:

	<i>Source</i>
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), hereinafter referred to as “1969 Vienna Convention”	United Nations, <i>Juridical Yearbook 1969</i> (Sales No. E.71.V.4), p. 140.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	<i>Official Records of the Third United Nations Conference on the Law of the Sea</i> , vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 151, document A/CONF.62/122.

* Incorporating document A/CN.4/389/Corr.1.

Introduction

1. In his fifth report,¹ submitted to the International Law Commission at its thirty-sixth session, the Special Rapporteur submitted a set of 16 draft articles² intended to constitute part 2 of the draft articles on State responsibility.³ Those draft articles were not accompanied by commentaries, but provisionally by references to the relevant paragraphs of earlier reports. In order to facilitate their further consideration, the Special Rapporteur submits commentaries to those draft articles in section I below.

¹ *Yearbook ... 1984*, vol. II (Part One), p. 1, document A/CN.4/380.

² Four of those draft articles, namely articles 1, 2, 3 and 5, had been provisionally adopted by the Commission at its thirty-fifth session, article 5 subsequently being renumbered as article 4 (*Yearbook ... 1983*, vol. II (Part Two), pp. 42-43). The 12 new draft articles (arts. 5-16) submitted in the fifth report replaced all those submitted earlier by the Special Rapporteur.

³ Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted in first reading, appears in *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

2. Section II of the present report is devoted to what could become part 3 of the draft articles, namely the “implementation” (*mise en œuvre*) of international responsibility and the settlement of disputes. In his fourth report, the Special Rapporteur presented an outline of the possible content of part 3 and suggested that the Commission should give early consideration to this matter, since, in his view, “the prospects for part 3 decisively influence the way in which part 2 is to be elaborated”.⁴ The Commission, however, preferred to discuss the possible content of part 3 only after having considered part 2.⁵ Now that the Commission has referred draft articles 5 and 6 of part 2 to the Drafting Committee⁶ and is about to consider at its thirty-seventh session the remaining articles of part 2 contained in the fifth report, it might be useful to present some proposals as to the possible content of part 3 of the draft.

⁴ *Yearbook ... 1983*, vol. II (Part One), p. 9, document A/CN.4/366 and Add.1, para. 45.

⁵ *Yearbook ... 1984*, vol. II (Part Two), p. 103, para. 366.

⁶ *Ibid.*, p. 104, para. 380.

I. Commentaries to articles 1 to 16 of part 2 of the draft articles

Article 1⁷

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

Commentary

(1) The sole object of this article is to mark the transition, and the link, between part 1, dealing with the conditions under which the international responsibility of a State arises, and part 2, determining the legal consequences of the internationally wrongful act.

(2) As will appear from the provisions of part 2, these legal consequences consist, in the first place, of new *obligations* of the author State, such as the obligation to make reparation. The legal consequences may also include new *rights* of other States, notably the injured State or States, such as the right to take counter-measures.

(3) In respect of particular internationally wrongful acts, another legal consequence may be that every State, other than the author State, is under an *obligation* to respond to the act.

(4) The foregoing refers to legal consequences as regards the legal relationships *between States*. However, article 1 does not exclude that an internationally

wrongful act entails legal consequences in the relationships between States and *other* “subjects” of international law.

Article 2⁸

Without prejudice to the provisions of articles 4 and 12, the provisions of this part govern the legal consequences of any internationally wrongful act of a State, except where and to the extent that those legal consequences have been determined by other rules of international law relating specifically to the internationally wrongful act in question.

Commentary

(1) Article 2 stipulates the *residual* character of the provisions of part 2. Indeed, States, when creating “primary” rights and obligations between them, may well at the same time—or at some later time before the established “primary” obligation is breached—determine the legal consequences, as between them, of the internationally wrongful act involved.

⁷ Text and commentary provisionally adopted by the Commission at its thirty-fifth session (see footnote 2 above), except for the following subsequent changes: (a) since article 5 as provisionally adopted has been renumbered as article 4, the reference to article 5 is replaced by a reference to article 4; (b) since, at its thirty-fifth session, the Commission had not yet taken any decision regarding the formulation of an article concerning peremptory norms, the reference to article 4 in the opening phrase of the provisionally adopted text was placed between square brackets; it is now replaced by a reference to article 12.

⁸ Text and commentary provisionally adopted by the Commission at its thirty-fifth session (see footnote 2 above).

(2) Such predetermined legal consequences may deviate from those to be set out in part 2. Thus, for example, States parties to a multilateral treaty creating a customs union between them may choose another system of ensuring its effectiveness than the normal legal consequences of internationally wrongful acts (obligation of reparation, right to take countermeasures). However, States cannot, *inter se*, provide for legal consequences of a breach of their mutual obligations which would authorize acts contrary to peremptory norms of general international law, nor escape from the supervision of the competent United Nations organs by virtue of their responsibilities relating to the maintenance of international peace and security.

(3) The opening words of article 2 are intended to recall these limitations.

Article 3⁹

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

Commentary

(1) The legal consequences of an internationally wrongful act may include consequences other than those directly relating to new obligations of the author State and new rights, or obligations, of another State or States. Thus, for example, article 52 of the 1969 Vienna Convention on the Law of Treaties declares:

*A treaty is void** if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

Another example is provided by article 62, paragraph 2 (b), of the same Convention, which states:

A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

...
(b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

These types of legal consequences will not be dealt with in part 2 of the present draft articles.

(2) In this connection, it should be recalled that the ICJ, in its advisory opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*,¹⁰ expressed the opinion that most articles of the Vienna Convention were declaratory of already existing customary international law.

* Text and commentary provisionally adopted by the Commission at its thirty-fifth session (see footnote 2 above), except for the subsequent changes referred to in footnote 8 above.

¹⁰ I.C.J. Reports 1971, p. 16.

(3) In any case, part 2 may well not be exhaustive as to the legal consequences of internationally wrongful acts.¹¹

Article 4¹²

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

Commentary

(1) Part 2 will indicate the legal consequences of an internationally wrongful act in terms of new obligations and new rights of States.

(2) It cannot *a priori* be excluded that, under particular circumstances, the performance of such obligations and/or the exercise of such rights might result in a situation relevant to the maintenance of international peace and security. In those particular circumstances, the provisions and procedures of the Charter of the United Nations apply and may result in measures deviating from the general provisions of part 2. In particular, the maintenance of international peace and security *may*¹³ require that countermeasures in response to a particular internationally wrongful act are not to be taken for the time being. In this connection, it is noted that, even under the Definition of Aggression, the Security Council is empowered to conclude:

... that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.¹⁴

Article 5

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

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

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

¹¹ The Special Rapporteur suggests that, if the Commission adopts an article along the lines of article 16 (see p. 15 below), the following paragraph should be added to the commentary to article 3:

"(4) In particular, article 16 reserves certain legal consequences as falling outside the scope of the present part."

¹² Originally article 5, the text of and commentary to which were provisionally adopted by the Commission at its thirty-fifth session (see footnote 2 above).

¹³ In the opinion of the competent United Nations organ.

¹⁴ General Assembly resolution 3314 (XXIX) of 14 December 1974, annex, article 2.

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

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

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

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

(4) Not only rules of customary international law, but also a treaty may create, establish or recognize rights of States, in particular of States which are not parties to that treaty (cf. articles 34 to 38 of the 1969 Vienna Convention). So long as such rights are not validly revoked, the third State is an “injured” State in the case of infringement of those rights by a State party to the treaty.

(5) It should be recalled, in this connection, that article 38 of the 1969 Vienna Convention envisages the possibility that a rule set forth in a treaty becomes binding upon (i.e. creates an obligation of) a third State as a customary rule of international law, recognized as such.

(6) Normally, however, a treaty does not create rights (or, for that matter, obligations) for (or towards) third States, i.e. States which are not parties to the treaty (cf. article 34 of the 1969 Vienna Convention).

(7) On the other hand, a rule of customary international law does not necessarily create or recognize a right of a State, let alone a right of every State, the infringement of which makes that State an “injured” State in the sense of the present articles. It is the primary rule itself which determines, often in connection with what is called its “source”, whether it creates a right of a State to which corresponds an implicit or explicit obligation of another State, or whether it follows the inverse technique of creating an obligation to which may correspond implicitly or explicitly a “status” of another State as the State towards which the obligation exists, and which consequently will be an “injured” State in the case of a breach of that obligation. The present article cannot prejudge the “sources” of primary rules nor their content. While effecting a necessary operation—the determination of the “injured State”—within the context of secondary rules, it can only make rebuttable presumptions as to what States, as creators of the primary rules, intended. Indeed, such a limited function is in accordance with article 2.

(8) For the same reason, the present article, while making no mention of “the general principles of law” or of “resolutions of United Nations organs” as independent “sources” of primary rules, does not thereby either not recognize or recognize such independent sources.

(9) Nor does the present article prejudge whether a given primary rule flows from customary law, a treaty, or any other source. Thus, for example, subparagraph (d) does not imply that obligations, as mentioned therein, could not arise from any other source than a multilateral treaty.

(10) Subparagraph (b) deals with the breach of obligations resulting from a binding dispute-settlement decision of an international court or tribunal. It is meant to cover not only the final award or judgment, but also such orders as the indication of interim measures of protection as may be binding on the parties to the dispute. It corresponds to Article 59 of the Statute of the ICJ and to similar provisions in treaties governing other courts and tribunals.

(11) Again, subparagraph (b) does not prejudge the question whether other international institutions dealing with disputes or situations may be empowered to pro-

¹⁵ The formulation of these examples of primary rules is, of course, purely descriptive and not meant to convey the exact scope and content of such rules.

¹⁶ The breach of such an obligation may, at the same time, be a breach of an obligation towards another State or States; but, at any rate, the State whose right is infringed is an “injured State”.

nounce decisions binding on States not technically parties to the dispute or situation, this being a question of the origin and content of primary rules.

(12) Nor does subparagraph (b) exclude that such institutions or other primary rules expressly provide for other States acquiring the status of being empowered or even obliged to react to the fact that a party to a dispute is in breach of its obligations under a judgment binding upon it. Indeed, within the framework of an international organization of which a court or tribunal is an organ, it may well be that, either generally or in particular circumstances, States members of the organization may be legally affected by a decision of such court or tribunal even if not technically parties to the dispute. This may be based on the ground that the position of the court or tribunal within the organization is such that the authority of its decisions is a concern of all member States, or on the particular powers given to such court or tribunal.¹⁷

(13) Subparagraphs (c) and (d) deal with breaches of obligations imposed by treaties. They are without prejudice to the legal consequences of such internationally wrongful acts as regards the "validity" of the treaty itself (see article 16 (a) below), a matter dealt with in the 1969 Vienna Convention.

(14) Bilateral treaties normally give rise to bilateral legal relationships only, i.e. to reciprocal rights and obligations as between the two States parties to the treaty. Multilateral treaties often have the same effect; i.e. even if the content of the obligations imposed is uniform towards all other States parties, the legal relationships remain bilateral ones as between each pair of States parties, and the legal relationship between one pair is quite separate from the legal relationship between another pair of States parties.¹⁸ This may be the case even if the uniformity of the content of the bilateral legal relationships is itself founded upon an interest common to several States parties which are in the same

¹⁷ Without entering into the interpretation of these provisions, which contain primary rules, and therefore without prejudging whether or not they involve legal consequences as outlined in the above commentary, reference may be made to Article 94, paragraph 2, of the Charter of the United Nations and to articles 174 to 176 of the Treaty Establishing the European Economic Community (United Nations, *Treaty Series*, vol. 298, p. 11; for the official English text, see *Treaties Establishing the European Communities*, (Luxembourg, Office for Official Publications of the European Communities, 1973), p. 163), which provide for the power of the Court of Justice of the European Communities to annul decisions of other institutions of the Community or to declare that decisions have to be taken by those institutions. In the latter case, as in the case where the 1982 United Nations Convention on the Law of the Sea provides in article 290, paragraph 1, that a competent court or tribunal may prescribe "any provisional measures which it considers appropriate under the circumstances ... to prevent serious harm to the marine environment ...", the obligation imposed might be regarded, in view of the common interest involved, as an obligation towards States which are not technically parties to the dispute. See, in this connection, M. Akehurst, "Reprisals by third States", *The British Year Book of International Law*, 1970, vol. 44, pp. 13-15; see also the Special Rapporteur's preliminary report, *Yearbook ... 1980*, vol. II (Part One), p. 107, document A/CN.4/330, and his second report, *Yearbook ... 1981*, vol. II (Part One), p. 79, document A/CN.4/344.

¹⁸ The possibility of such separate bilateral relationships is clearly recognized in the provisions of the 1969 Vienna Convention relating to reservations (articles 19 to 23); in case of reservations, the content of the bilateral legal relationships is obviously not uniform.

position, defined in the multilateral treaty itself,¹⁹ or even common to all States parties.²⁰ Indeed, treaties are often concluded in multilateral form because of the existence of such interests common to several or all States.

(15) A breach of an obligation imposed by a multilateral treaty does not, therefore, necessarily injure each other State party to the treaty individually. Actually, a primary rule may as such leave open the question towards which State or States the performance of the obligation it imposes is due; but that question must be answered within the framework of secondary rules.²¹

(16) The answer is often clear from the text of the treaty itself, taking into account the rules of interpretation laid down in the 1969 Vienna Convention. In this connection, it should be noted that the interest of States parties in the performance of an obligation under the treaty is often "canalized" through the right of a particular party to that treaty to such performance. Thus freedom of navigation is a flag-State right even if the interests of other States may well be affected by any infringement of that right.²² In the same way, one might regard the provision of article 7, paragraph 6, of the United Nations Convention on the Law of the Sea as "canalizing" the prohibition of the application of "the system of straight baselines ... in such a manner as to cut off the territorial sea of another State from the high seas or an exclusive economic zone" as an obligation imposed towards that other coastal State, although interests of other States in maritime communications with that coastal State would no doubt also be affected by a breach of that prohibition.

(17) On the other hand, it may well be that such "canalization" is not effected by a multilateral treaty, and that the fact that a breach of an obligation imposed by that treaty affects the interests of several States, which then happen to have a common interest in the performance of that obligation, is recognized by that treaty. This is a matter of interpretation of the treaty.

(18) There are two cases in which the facts indicate an answer to the question posed in paragraph (15) above. In the first case, reference is made to the *travaux préparatoires*. Indeed, it may be established that a particular obligation imposed by a multilateral treaty was stipulated in favour of a particular other party, or group of other parties (or prospective parties) to the treaty. This case is meant to be covered by subparagraph (d) (i) of article 5.

(19) The other case is meant to be covered by subparagraph (d) (ii). Indeed, if the breach of an obligation by one State necessarily affects the exercise of the rights or the performance of the obligations of all other States

¹⁹ For example, as a coastal State or flag-State.

²⁰ Such as freedom of navigation, which is also an interest of States using ships under a foreign flag for their international trade; cf. also non-discrimination clauses such as article 24, paragraph 1 (b) of the United Nations Convention on the Law of the Sea.

²¹ And, for that matter, within the framework of "tertiary rules", though not necessarily in the same way.

²² In the terms of the preliminary report, those other affected States suffer injury "through" the flag-State (*Yearbook ... 1980*, vol. II (Part One), p. 119, document A/CN.4/330, paras. 62 *et seq.*).

parties, one may safely assume that all other States parties are directly affected by the breach and, therefore, are injured States.²³

(20) In two other cases it is not so much the facts which indicate the answer to the question which is (or are) the injured State (or States), but rather the "law" created by the multilateral treaty. Indeed, modern treaty practice increasingly recognizes the existence²⁴—and provides for the protection—of interests which are not allocated to particular individual States parties.

(21) On the one hand, some multilateral treaties recognize or create, as between the States parties to them, a *collective* (in contradistinction to a merely common or parallel) interest of those States, for the protection or promotion of which those States enter into obligations. A breach of such an obligation then injures the collectivity of such States parties rather than one or more individual States parties. Now it may well be that the same multilateral treaty contains secondary and even tertiary rules, which organize the way in which the promotion and protection of such collective interests are ensured (cf. article 11 below). But the absence of such rules cannot mean that there is no injured State at all in the case of a breach of the obligations entered into by States upon becoming parties to that multilateral treaty. Indeed, in the absence of particular rules in the multilateral treaty which "translate" the recognized collectivity of interests into rules of "action" in defence of such interests, one can only assume that each (other) State party to the treaty is injured by a breach of the obligations imposed by the treaty.²⁵ Obviously, since in such a case each other State party to the multilateral treaty is an "injured State", the very nature of that treaty limits also its individual response to the breach (cf. article 11 below).

(22) The other instance of recognition, or creation, of an interest not allocated to a particular State party to the multilateral treaty is the multilateral treaty providing for obligations of States parties to respect fundamental human rights as such.²⁶ Here again, the absence from such a treaty of specific rules organizing the response to a breach of such obligations cannot mean that that breach is left with no legal consequence whatever.²⁷

²³ On the different plane of validity of the treaty itself, a similar situation is referred to in article 58, paragraph 1 (b) (i), and article 60, paragraph 2 (c) of the 1969 Vienna Convention.

²⁴ Actually *creates*.

²⁵ Again, on the different plane of validity of the multilateral treaty, article 60, paragraph 2 (a), of the 1969 Vienna Convention organizes—in the case of a material breach—a residual procedure of *unanimous agreement* of the other parties "to suspend the operation of the treaty in whole or in part or to terminate it**". It is to be noted in this connection that individual States parties, under paragraph 2 (b) and (c) of article 60, can only *suspend* the operation of the treaty, and that, according to article 72, paragraph 2, of the Convention: "During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty" (an obligation comparable with that stipulated in article 18 of the Convention).

²⁶ Of course, subparagraph (d) (iv) of article 5 as proposed is not meant to imply that obligations to respect fundamental human rights can flow only from multilateral treaties.

²⁷ The European Convention on Human Rights (United Nations, *Treaty Series*, vol. 213, p. 221) illustrates the various ways in which a

(23) Subparagraph (e) of article 5 refers to an internationally wrongful act which constitutes an international crime. Paragraph 2 of article 19 of part 1 of the draft articles provides that "the international community ... as a whole" may recognize the existence of "fundamental interests" of that community, to the effect that breaches of obligations "so essential for the protection" of those interests are recognized as international crimes.. In many cases—such as a breach of the obligation to refrain from aggression—there will also be an injured State (or injured States) by virtue of the *other* provisions of the present article; in other cases, the "injured interest" will (also) be a "non-allocated" one. In fact the whole definition of an international crime in article 19, paragraph 2, seems to presuppose the recognition of a collective interest of all (other) States.

(24) Again, "the international community as a whole", while recognizing a breach as an international crime, may—and indeed probably will—at the same time determine its additional special legal consequences (secondary rules) and, possibly, the applicable tertiary rules (cf. articles 14 and 15 below). Actually, the provisions of the Charter of the United Nations, including Article 51, do just that, in so far as "acts of aggression" are concerned (cf. article 15 below).²⁸

(25) It cannot be concluded, again, from the absence of determination of such particular secondary and/or tertiary rules that, in the case of an international crime having been committed, there is no injured State at all. The alternative is to consider every other State, in principle, an injured State.

(26) Obviously, this does not necessarily imply that, for every other State individually, the commission of an international crime entails the same "new rights".²⁹ (See the commentary to articles 14 and 15 below.)

Article 6

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

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

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

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

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

2. To the extent that it is materially impossible to act in conformity with paragraph 1 (c), the injured State may require the State which has committed the inter-

response to a breach can be organized: individual complaints or a complaint by any other State party before the European Commission of Human Rights; recourse to the European Court of Human Rights or to the Committee of Ministers of the Council of Europe.

²⁸ This is without prejudice to the meaning of the term "armed attack" as employed in Article 51 of the Charter.

²⁹ Nor, for that matter, the same "new obligations" *vis-à-vis* all States other than the author State.

nationally wrongful act to pay to it a sum of money corresponding to the value which a re-establishment of the situation as it existed before the breach would bear.

Commentary

(1) Articles 6 and 7 deal with the “new obligations” of the author State towards the injured State or States.

(2) Generally speaking, the new obligation of the author State is to “undo” its internationally wrongful act. This is often, to a greater or lesser extent, materially impossible, and then a “substitute performance” for the obligation violated has to be indicated.

(3) Paragraph 1 of article 6 analyses this new obligation of the author State in its four elements. Subparagraph (a) describes the first element, i.e. the obligation to stop the breach. Obviously this element refers only to breaches which can be stopped, i.e. acts having continuing effects, such as the arrest of a person, the taking of property or the deprivation of an otherwise existing and continuing right. If such an act, according to applicable primary rules of international law, constitutes an internationally wrongful act, the author State should at least, if required by the injured State to do so, release and return the person or property held through that act and permit the further exercise of that right.³⁰

(4) It is to be noted that normally, under the domestic law of the author State, there is nothing to prevent that State *proprio motu* from taking such measures *ex nunc*. On the other hand, the original internationally wrongful act may well, at the same time, be a “wrongful act” under the domestic law of the author State, which entails legal consequences in the form of “remedies” of an administrative, penal or civil character. Very often such remedies can be applied on the initiative of the authorities of the author State without any action on the part of the person affected by the wrongful act; this is normally the case, for example, with administrative and penal remedies. Subparagraph (b) then obliges the author State to apply such remedies *proprio motu*.

(5) Subparagraph (b) is, of course, without prejudice to article 22 of part I of the draft articles. The “exhaustion of local remedies” is there construed as a condition for the existence of a breach of an international obligation.

(6) Nor do subparagraphs (a) and (b) deviate from the principle underlying, *inter alia*, article 4 of part I of the draft. Surely, even if, under the domestic legal system of the author State, its authorities were not legally entitled to stop the breach,³¹ subparagraph (a) would apply (and

³⁰ This might be called a *restitutio in integrum lato sensu* with reference to the persons, objects and functional rights affected by the internationally wrongful act; the “temporal” element, however—i.e. the fact that, during a certain period of time, the arrest, taking or deprivation has had effects—is not covered by such “undoing” measures *ex nunc*.

³¹ Domestic legal systems, for their part, sometimes permit a deviation from domestic rules in order to fulfil international obligations. There may even exist—but this is a matter beyond the scope of the present draft articles—a rule of international law *prescribing* the admissibility of such deviation. Cf. P. Reuter, *Droit international public*, 5th ed. (Paris, Presses universitaires de France, 1976) (collection “Thémis”), pp. 49 *et seq.*

subparagraph (b) *a fortiori*). The point is that the injured State may at least require that measures *ex nunc* be taken.

(7) It should be noted in this connection that, even where there are some “circumstances precluding wrongfulness” as regards the original act of the author State, such circumstances may not be applicable with regard to the new obligations referred to in subparagraphs (a) and (b).³²

(8) Subparagraph (c) deals with *restitutio in integrum stricto sensu*, i.e. a re-establishment of the situation as it existed before the commission of the internationally wrongful act, in other words measures with retroactive effect (*ex tunc*). Clearly such measures—a full “undoing” of the internationally wrongful act—often raise problems of fact and of (domestic) law, since the effect of that act may be both factual and legal. On the factual plane, the passage of time obviously makes it materially impossible to re-establish fully the previous situation; time reversal is not within human capacity, and pecuniary compensation—the payment of damages or compensation in kind—is the only solution left (cf. article 6, para. 2).

(9) On the legal plane, re-establishment of the legal situation with retroactive effect is, on the contrary, always materially possible, though its translation into fact—i.e. the enjoyment and the exercise of the legal situation—raises the same problem. Nevertheless, in so far as its legal consequences are concerned, again the retroactive re-establishment of the legal situation is not materially impossible. For example, the taking of property, including a transfer of that property (in contradistinction to its physical destruction), may have given rise to legal transactions in relation to that property (or its “product”) which, as such, can be nullified retroactively.³³

(10) It is clear, however, that, to the extent that the legal situation is governed by the domestic law of the author State, the re-establishment of the legal situation with retroactive effect implies a *degree of direct effect* of a rule of international law within that domestic legal system.³⁴

(11) Subparagraph (d) deals with the fourth element of the new obligation to undo the internationally wrongful

³² In this sense, article 35 of part I of the draft articles may be applicable by analogy to such measures *ex nunc*.

³³ And vice versa: legal transactions by the former owner of the property can retroactively be given legal effect.

³⁴ This is true even though the re-establishment itself would have to be effected through legislation of the author State and an act of legislation is in itself a proper “object” of an obligation of conduct under international law. The point is rather that the required retroactive effect of such legislation of necessity interferes with legal relationships existing by virtue of the (previous content of the) domestic legal system and, as such, comes close to the so-called “direct effect” of rules of international law upon legal relationships primarily governed by domestic law. In other words, the obligation of *restitutio in integrum stricto sensu* would go beyond the limits of legal relationships between States. By the same token, no “direct effect” is involved to the extent that the retroactivity is limited to legal relationships between States. Nor, of course, does the foregoing prejudge any question as regards the legal effect of a possible internationally wrongful act of interference with relationships under the domestic law of the author State, within the domestic legal system of another State, a question primarily within the province of the rules of conflict of laws.

act: the provision of appropriate guarantees against repetition of the act (a measure *ex ante*). What is appropriate depends on the circumstances of the case. The mere recognition by the author State that an internationally wrongful act has occurred, usually accompanied or implied by an apology, may be appropriate.³⁵ In some circumstances, where the internationally wrongful act results from a normal application of the domestic law of the author State, a modification of the relevant domestic legislation (or of the standing governmental instructions concerning its application) may be required. Again, where the act of the State and its result are governed solely by rules of international law, the "appropriate guarantees" may take other forms dealing directly with the relationship between the States concerned, such as measures affecting the existence, organization or functioning of the governmental agency through which the internationally wrongful act has been committed.

(12) As noted above (paras. (8) and (9)), article 6, paragraph 2, deals with the "substitute performance" of compensation for the effects of the internationally wrongful act which it is materially impossible to undo.

Article 7

If the internationally wrongful act is a breach of an international obligation concerning the treatment to be accorded by a State, within its jurisdiction, to aliens, whether natural or juridical persons, and the State which has committed the internationally wrongful act does not re-establish the situation as it existed before the breach, the injured State may require that State to pay to it a sum of money corresponding to the value which a re-establishment of the situation as it existed before the breach would bear.

Commentary

(1) As explained in the commentary to article 6 (paras. (9) and (10)), the "new obligation" of the author State to effect a *restitutio in integrum stricto sensu* raises particular problems in cases where the legal situation to be re-established with retroactive effect is governed primarily by the domestic legal system of the author State.

(2) Indeed, while there is no uniformity in the decisions of international courts and tribunals, or in the practice of States and the teachings of the most highly qualified publicists of the various nations, there is a marked tendency not to require such *restitutio in integrum stricto sensu* in the case of an internationally wrongful act consisting in the infringement—within the jurisdiction of the author State—of a right (or, more generally, a legal situation) of a natural or juridical per-

³⁵ And, indeed, does "add" to the previous legal situation an agreement on the applicability of the "old" obligation to the facts of the case. In this connection, it should be recalled that international courts and tribunals have sometimes expressly stated that their dictum on an internationally wrongful act having occurred constitutes satisfaction for the injured State. See the Special Rapporteur's second report, *Yearbook ... 1981*, vol. II (Part One), p. 89, document A/CN.4/344, para. 85.

son belonging to the injured State, or at least to leave to the author State the choice between such *restitutio in integrum stricto sensu* and the substitute performance of compensation and satisfaction (i.e. reparation).

(3) In this connection, it should be recalled that, on a quite different legal plane, article 22 of part I of the draft articles does give legal relevance to the domestic legal system of the author State by making the existence of a breach of particular primary obligations under international law dependent upon the exhaustion of local remedies. Even more important, that article presumes that "an equivalent* treatment" is allowed by the international obligation "concerning the treatment to be accorded to aliens" and that such equivalent treatment may result from the application of local remedies (cf. article 6, para. 1 (b), above).

(4) Actually, even though a treaty between the author State and the injured State may provide for a different régime, it cannot be presumed that aliens within the jurisdiction of the other State enjoy extraterritorial status.³⁶

Article 8

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

Commentary

(1) While articles 6 and 7 deal with the new obligations of the author State ("reparation" in the larger sense of the word), articles 8 and 9 concern the "new rights" of the injured State.

(2) The injured State is entitled to suspend the performance of its obligations towards the author State. Obviously this right to take countermeasures is not unlimited. In this connection, a first distinction must be made between countermeasures having the purpose of restoring the balance in the positions of the author State and the injured State (reciprocity), and countermeasures having the purpose of influencing a decision of the author State to perform its (new) obligations (reprisal).

(3) In fact, it may not always be easy to distinguish between the two purposes and their intended effects. Indeed, the justification for the "weaker" countermeasure by way of reciprocity, or for the "stronger" countermeasure by way of reprisal, is connected with the intention and effect of the internationally wrongful act to which it is a response. Accordingly, while article 9, paragraph 2, and article 10 contain special conditions for the taking of reprisals only, the object and purpose of those conditions is also relevant for the qualification

³⁶ This is, of course, without prejudice to the status of diplomats of, and of ships under the flag of, foreign States. Also, within the framework of international arbitration by virtue of an agreement between a State and a foreign investor, special considerations may apply.

of the measures taken as measures by way of reciprocity. After all, the ultimate purpose of both types of measures must be a restoration in effect of the "old" primary legal relationship. In other words, elements of "proportionality" and of "interim protection" are inherent in measures by way of reciprocity.

(4) By its nature, a suspension of the performance of obligations by way of reciprocity presupposes reciprocal primary rights and obligations, i.e. a *quid pro quo* relationship or an exchange of performances as the sole object and purpose of the primary relationship. Whether or not—and to what extent—such a situation exists is a matter of interpretation of the primary legal relationship in the light of the circumstances which led to its creation. In many cases, particularly if the relationship is created by a bilateral treaty, the connection between the obligation breached by the author State and the obligation whose performance is suspended by the injured State is clear enough, either because the content of the obligation is the same for both parties or because it is established that the parties intended that one performance would be the counterpart of another. Even if in actual fact, at a particular moment, the balance between the performance and non-performance of respective obligations is not completely equal, the measure by way of reciprocity could still be justified as such.³⁷

(5) There is no reciprocity in the primary relationship, and therefore no justification for the suspension of the performance of obligations by way of reciprocity if the latter are obligations by virtue of a peremptory norm of general international law (see article 12 (b) below).³⁸

(6) The essence of reciprocity is that the countermeasure is limited in its effect to the (alleged) author State (see article 11 and the exception thereto in article 13 below).

(7) The obligations of a receiving State regarding the immunities to be accorded to diplomatic and consular missions and staff are not a counterpart of the fulfilment of the obligations of the sending State, its missions and their staffs relating to the proper exercise of their functions. While declarations of *persona non grata* and severance of diplomatic and/or consular relations are a legitimate response to breaches of those obligations, the immunities themselves must be respected (see article 12 (a) below.)

Article 9

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

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

³⁷ Cf. paragraph 83 of the arbitral award of 9 December 1978 in the *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France* (United Nations, *Reports of International Arbitral Awards*, vol. XVIII (Sales No. E/F.80.V.7), pp. 443-444).

³⁸ Unless, of course, the same peremptory norm permits non-performance of the obligation in the case of a breach of the same obligation by another State.

the seriousness of the internationally wrongful act committed.

Commentary

(1) In the case of a countermeasure by way of reprisal, there is no *legal* connection between the obligation breached by the author State and the obligation whose performance is suspended by the injured State. Accordingly, some of the limitations on the entitlement to countermeasures, essentially applicable to both types, must be made explicit here.

(2) The element of "proportionality" is laid down in paragraph 2 of article 9, taking into account the purpose of a measure by way of reprisal, which goes further than the mere restoring of the balance in the relationship between the author State and the injured State. There must not be manifest disproportion between the effects of the reprisal and the seriousness of the internationally wrongful act to which it is a response. Indeed, the reprisal is a deliberate non-performance of an international obligation with intended effects on the author State. Accordingly, its justification should also be measured against the intention and/or effects—in short, the seriousness—of the internationally wrongful act with regard to the injured State.

Article 10

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

2. Paragraph 1 does not apply to:

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

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

Commentary

(1) A measure of reprisal, even if not manifestly disproportional, remains by its very purpose at least "a wager on the wisdom ... of the other Party",³⁹ a unilateral act directed ultimately at the "enforcement" of the primary relationship. From this point of view, the existence and availability of other means to ensure the performance of obligations is clearly relevant.

(2) Paragraph 1 of article 10 therefore stipulates the condition of exhaustion of international procedures for peaceful settlement of the dispute. Thus, for example, if the obligation allegedly breached is one created in a treaty containing a procedure for settlement of disputes

³⁹ Sec paragraph 91 of the arbitral award in the *Air Service Agreement* case (*loc. cit.* (footnote 37 above), p. 445).

concerning the interpretation and application of that treaty, which allows an injured State party unilaterally to bring its claim to performance before an international court or tribunal, that procedure should be followed.

(3) Indeed, the *compulsory* character of a third-party dispute-settlement procedure in principle excludes for the time being other means of enforcement, such as the taking of a measure of reprisal.

(4) However, here again distinctions must be made according to the effectiveness of the dispute-settlement procedure.

(5) First, it may be that the functioning of the agreed dispute-settlement procedure depends on co-operation between the States in dispute (e.g. the appointment of arbitrators). Measures designed to promote that co-operation are allowed in such a case.

(6) Secondly, the agreed powers of the third party in the dispute-settlement procedure may be limited to aspects which are not relevant in the given situation. Thus a compulsory fact-finding procedure does not help if there is no dispute about the facts, but only on the existence or extent of the legal obligation allegedly breached.

(7) Thirdly, the third party may not be empowered to order effective interim measures of protection either on behalf of the claimant State or on behalf of the defendant State. In such a case, the claimant State has no choice but to take such measures unilaterally. Even if the third party is empowered to order effective interim measures of protection, the claimant State may take measures of protection subject to the power of the third party to order their withdrawal as an interim measure of protection on behalf of the defendant State.

(8) Finally, if the interim measures of protection ordered by the third party are not complied with, the system breaks down and the right to take measures of reprisal reappears.

(9) It should be noted that non-compliance with the final and binding decision of the third party constitutes a separate breach of an international legal obligation, a separate internationally wrongful act.

(10) On the other hand, the fact that a compulsory third-party dispute-settlement procedure does not provide for a final and binding decision by the third party does not take away the compulsory character of the procedure itself; paragraph 1 of article 10 would therefore be applicable, subject of course to paragraph 2.

Article II

1. The injured State is not entitled to suspend the performance of its obligations towards the State which has committed the internationally wrongful act to the extent that such obligations are stipulated in a multilateral treaty to which both States are parties and it is established that:

(a) the failure to perform such obligations by one State party necessarily affects the exercise of the rights

or the performance of obligations of all other States parties to the treaty; or

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

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

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

Commentary

(1) As already remarked above, modern treaty practice increasingly shows a tendency for multilateral treaties to impose obligations for the protection of "extra-State" interests (see commentary to article 5 above). Suspension by an injured State of the performance of such obligations, whether by way of reciprocity or by way of reprisal, would then also affect parties other than the State which originally committed the internationally wrongful act.

(2) This situation is often taken into account by special rules in the multilateral treaty in question, designed to organize the response to a breach of the obligation committed by a State party.

(3) While in principle such special rules are covered by the provisions of article 2, it would seem useful to elaborate on the substantive and procedural consequences of this type of multilateral treaty relationship as regards the applicable secondary rules.⁴⁰

(4) As to the substance, the situation mentioned in paragraph (1) above seems to exclude, in the first instance, a unilateral suspension by the injured State of the performance of its obligations. In this connection, it should be recalled that, under the provisos of article 5, subparagraph (d) (ii), (iii) and (iv), every other State party to the multilateral treaty is an injured State (in respect of both the original breach of the obligation and the suspension of performance by way of reciprocity or reprisal).

(5) Even so, the other States parties to the multilateral treaty may not in fact all be equally affected by the original breach of the obligation or by a countermeasure in response to that breach by another State party. Clearly, some collective decision has to be taken in order to weigh the interest served by the countermeasure against the effects thereof on the interests of the individual States parties which did not commit the internationally wrongful act.

⁴⁰ Again, on the different level of validity of the multilateral treaty itself, the 1969 Vienna Convention deals with the matter in its article 60, paragraphs 2 to 5.

(6) If the multilateral treaty provides for a procedure of collective decision on this point, that procedure should of course be followed. That collective decision may then imply that the States legally injured by the original internationally wrongful act waive their right to object to a countermeasure otherwise objectionable under paragraph 1 (a) and (b).

(7) No such waiver is permissible regarding suspension of the performance of obligations to respect human rights under paragraph 1 (c).

(8) If the multilateral treaty does not provide for a procedure of collective decision, the substantive rule of paragraph 1 remains applicable, subject to the provision of article 13 below.

Article 12

Articles 8 and 9 do not apply to the suspension of the performance of the⁴¹ obligations:

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

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

Commentary

See paragraphs (5) and (7) of the commentary to article 8 above.

Article 13

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

Commentary

(1) Article 13 deals with the case of what could be called the complete breakdown of the system established by a multilateral treaty as a consequence of an internationally wrongful act in relation to the obligations imposed by that treaty.

(2) Indeed, if there is a manifest violation which destroys the object and purpose of the multilateral treaty as a whole, there is not much sense in applying those provisions of that treaty—those parts of the system established by the treaty—which create the collective interest of the States parties thereto (article 11, para. 1 (a) and (b)), or those which call for a dispute-settlement procedure (article 10) or for collective decisions for the purpose of promoting performance of its particular obligations (article 11, para. 2). On the other hand, countermeasures must remain allowed, although in such a case the re-establishment of the “old” legal relationships is obviously unlikely, if not impossible.

⁴¹ The words “the performance of the” were omitted by mistake from the text of article 12 as submitted in the Special Rapporteur’s fifth report.

(3) In a sense, the breakdown of the system established by the multilateral treaty causes a “fall back” into the bilateral relationships between the States concerned (i.e. the author State and the injured State).

(4) Obviously, such a breakdown cannot be lightly assumed. Actually, a violation by one State party which falls under the definition given in the present article must be at least a “material breach” in the sense of the 1969 Vienna Convention and, as such, may give rise to termination of the treaty itself. Such termination, however, has no retroactive effect and some obligations remain.⁴² Furthermore, termination requires the unanimous agreement of the parties other than the author State.⁴³ Quite apart from the validity of the treaty, there is room for suspension of the performance of obligations by way of a countermeasure.

Article 14

1. An international crime entails all the legal consequences of an internationally wrongful act and, in addition, such rights and obligations as are determined by the applicable rules accepted by the international community as a whole.

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

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

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

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

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

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

Commentary

(1) The distinction drawn in article 19 of part 1 of the draft articles between “international delicts” and “international crimes” makes sense only if the legal consequences of the latter are different from those of the former.

(2) As to the new obligations of the author State—reparation *lato sensu*—it is hard to imagine that they would not arise in the case of the commission of an

⁴² See article 70 of the 1969 Vienna Convention.

⁴³ See article 60, paragraph 2 (a), of the 1969 Vienna Convention.

international crime, and the same applies to the new rights of the injured States to take countermeasures.⁴⁴ In other words, the question is rather one of *additional* legal consequences.

(3) Such additional legal consequences may be of three different kinds. First, there may be a new "collective right" of every other State to require the author State to fulfil its normal secondary obligations. Secondly, there may be additional secondary obligations of the author State, going beyond the "undoing" of its acts qualified as an international crime. Thirdly, there may arise new obligations of the other States as between them not to recognize or support the results of such an international crime.

(4) The first kind of additional legal consequences is dealt with in article 5, subparagraph (e).

(5) As to the second kind of additional legal consequences, they can be determined only by the international community as a whole if and when it recognizes some internationally wrongful acts as constituting international crimes.⁴⁵ Paragraph 1 of article 14 therefore refers to "the applicable rules accepted by the international community as a whole".⁴⁶

(6) The third kind of additional legal consequences is an application of the principle that all States other than the author State should practise a measure of solidarity when confronted with the commission of an international crime. Here again, both the substance of the solidarity and the international procedures for the "organization" of that solidarity—i.e. its translation into action—may well be determined by the international community as a whole if and when it recognizes some internationally wrongful act as constituting an international crime. However, a minimum of required solidarity can already be recognized as applicable in all cases of an international crime having been committed. Paragraph 2 of the present article indicates that minimum in respect of the substance of the new obligations.

(7) The procedural aspect is dealt with in paragraph 3 of the present article. It contains a residual rule, since, as noted above, the international community as a whole may determine otherwise.

(8) In particular, the international community as a whole may recognize that, although by definition its "fundamental interests" are involved, the commission of an international crime under certain circumstances affects some injured State or States more than others.

⁴⁴ Obviously, the obligation of the author State "to pay ... a sum of money corresponding to the value which a re-establishment of the situation as it existed before the breach would bear" (article 6, para. 2) can apply only to a payment to the State or States which have in fact suffered damage capable of being compensated for by such a payment. Nevertheless, every State other than the author State is entitled to require such a payment to be made to such State or States.

⁴⁵ It has already been recognized by the Commission that all international crimes, recognized as such, need not necessarily have the same additional legal consequences.

⁴⁶ In effect, this corresponds to the "legal consequences ... determined by other rules of international law relating specifically to the internationally wrongful act in question", referred to in article 2.

(9) An international crime is always an internationally wrongful act; accordingly, there may be an injured State or injured States under article 5, subparagraphs (a) to (d). Furthermore, a response comparable to a measure of collective self-defence may be allowed; and finally, the international community as a whole may recognize that, under certain circumstances, the matter could be more appropriately dealt with by regional action only.

(10) In the absence of such particular circumstances or arrangements, it should be recognized that an individual State which is considered to be an injured State only by virtue of article 5, subparagraph (e), enjoys this status as a member of the international community as a whole and should exercise its new rights and perform its new obligations within the framework of the organized community of States.

(11) Accordingly, paragraph 3 of the present article stipulates, as a residual rule, the application, *mutatis mutandis*, of the procedures embodied in the Charter of the United Nations with respect to the maintenance of international peace and security.

(12) It should be noted in this connection that the commission of an international crime does not necessarily affect the maintenance of international peace and security. The function of paragraph 3 of the present article is therefore quite different from that of article 4.

(13) For the same reason, Article 103 of the Charter of the United Nations will not necessarily apply and a similar rule must be stipulated with regard to the obligations under paragraphs 1, 2 and 3 of the present article.

(14) By the same token, the latter obligations may be considered obligations "under any other international agreement" in the sense of Article 103 of the Charter and, in accordance with article 3 of part 2 of the draft articles, the prevalence of the obligations under the Charter must be preserved. The result is a three-level "hierarchy" of obligations: obligations under the Charter of the United Nations, obligations under the present article, and other obligations.

Article 15

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

Commentary

(1) Among the international crimes listed in article 19 of part 1 of the draft articles figures "a serious breach of an international obligation ... such as that prohibiting aggression" (para. 3 (a)).

(2) The legal consequences of an act of aggression are of course dealt with, in regard to both substance and applicable procedures, in the Charter of the United Nations. To the extent that they are additional to those referred to in article 14, they should obviously be mentioned in the present article.

Article 16

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

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

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

(c) belligerent reprisals.

Commentary

(1) Articles 2 and 3 of part 2 of the draft articles presuppose the existence of rules of international law other than those contained or referred to in the provisions of the present part 2, determining particular legal consequences of particular internationally wrongful acts.

(2) Since articles 5 to 15 are general in the sense that they are formulated as covering *in abstracto* all new rights and obligations of States entailed by an internationally wrongful act,⁴⁷ it is necessary to indicate what falls outside the scope of those articles—in other words, fields of internationally wrongful acts and/or legal consequences thereof in regard to which those articles are not even meant to be residual rules.

(3) One such field of legal consequences is formed by the legal consequences of an internationally wrongful

act on the level of the invalidity, termination and suspension of the operation of treaties, a matter dealt with in the 1969 Vienna Convention.

(4) Another such field of legal consequences is formed by the legal consequences of an internationally wrongful act on the level of the legal relationships between States in their capacity as members of an international organization. Whether and to what extent such membership rights are curtailed or withdrawn, either by the organization or in direct application of its constitution, as a consequence of the commission of an internationally wrongful act depends on that constitution and on the legal practice of member States developed thereunder. It seems impracticable to stipulate general, even residual, rules on this matter.

(5) Finally, in the case of a belligerent relationship between States, a body of rules of *jus in bello* has been developed, particularly for the purpose of ensuring respect for human rights in armed conflicts. They involve a delicate balance between “military necessity” and other interests, including extra-State interests or values. Although such interests and values are also taken into account in the provisions of the present articles relating to reciprocity and reprisal, it cannot be denied that the state of belligerence and the resulting “military necessities” add a special dimension to the general problem. The determination of the necessary balancing points would be better left, for the time being, as part of the development of this branch of international law in the relevant international conferences, which benefit from the invaluable promotion and assistance of the International Committee of the Red Cross.

II. “Implementation” (*mise en œuvre*) of international responsibility and the settlement of disputes (part 3 of the draft articles)

3. There seems to be general agreement that an internationally wrongful act of a State entails: (a) new obligations of the author State (A); (b) new rights of other States, in particular of the injured State(s) (B); (c) in some cases, new obligations of third States (C) *vis-à-vis* the other injured State or States. This holds true even where a State is injured only in its capacity or status as a member of the international community of States as a whole.

4. All these “new legal consequences”, or new legal relationships between States, are dependent upon the commission of an internationally wrongful act by a State A, i.e. in the first instance, upon a set of facts. In order to be able to invoke those new legal relationships, the State B invoking them must consider those facts as established and, of course, claim that they constitute an internationally wrongful act by State A. This double claim of State B must be made before or at the same time as that State invokes the new legal relationships, either as a claimant or as a defendant against a claim made by another State.

5. On analysis, such a statement by a State may be objected to by the alleged author State A (or even, in the

case mentioned in paragraph 3 above under (c), by the third State C) on one or more of the following grounds: (1) the alleged facts are not “the truth, the whole truth and nothing but the truth”; (2) even if, and to the extent that, they are, they do not amount to “an act of the author State A” (in the sense of chapter II of part 1 of the draft articles); (3) even if, and to the extent that, they are, they do not constitute a “breach of an international obligation” of the author State A (in the sense of chapter III of part 1 of the draft articles); (4) even if, and to the extent that, they are, there are “circumstances precluding wrongfulness” (in the sense of chapter V of part 1 of the draft articles, other than article 30 (Countermeasures in respect of an internationally wrongful act) and article 34 (Self-defence)).⁴⁸

6. If there already exists between the claimant State (i.e. the State invoking the new legal relationships) and

⁴⁷ Other specific objections may be raised in the cases dealt with in article 11, paragraph 2, article 12, paragraph 2, article 14, paragraphs 2 and 3, and articles 27 and 28 of part 1 of the draft articles, but they do not change the overall situation. For the cases dealt with in articles 30, 34 and 35, see footnote 52 below.

the defendant State (i.e. the State against which the claim is made), by virtue of a consensus between them, a third-party dispute-settlement procedure relating to the performance of the obligation referred to in paragraph 5 above under (3), and the claimant and defendant States are bound by the rules on State responsibility (i.e. if those rules are laid down in a multilateral convention to which those States are parties), all those provisions would have to be applied by that third party, including such rules as incidentally involved other legal relationships. Thus, for example, if two States are parties to a future convention on State responsibility and, at the same time, parties to a treaty providing that any dispute between them, or any dispute regarding the interpretation and application of a particular treaty, shall be settled in accordance with a third-party procedure indicated in that treaty (in the latter case, if the alleged breach of an obligation under that treaty is a breach of an obligation as mentioned in paragraph 5 above under (3)), the third party should be empowered to apply all relevant rules embodied in the convention, including in particular the rule corresponding to article 10 of part 2 of the draft articles.

7. If there is no such international procedure for peaceful settlement of disputes available to the injured State, the question arises whether and how to provide for the "implementation" (*mise en œuvre*) of State responsibility.

8. It could be argued that the "new obligations" of the author State are, in reality, so closely connected with its primary obligation whose breach is alleged by an injured State that to provide for a new (and possibly separate) third-party dispute-settlement procedure for the implementation of State responsibility in this case would amount to the creation of a multilateral compulsory dispute-settlement procedure relating to all (primary) obligations, present and future, under international law of States becoming parties to the future convention on State responsibility.

9. On the other hand, there is an obvious analogy between the Vienna Convention on the Law of Treaties and a possible convention on State responsibility, an analogy which militates in favour of the addition to the rules on State responsibility of a part 3 more or less corresponding to articles 65 and 66 and the annex of the 1969 Vienna Convention.

10. Indeed, one might argue that one of the main objects and purposes of the 1969 Vienna Convention is to save a treaty as such from being "nullified" by circumstances which a State party to that treaty might invoke unilaterally.⁴⁹

⁴⁹ It should be noted here, at the outset, that the dispute-settlement procedure provided for in the 1969 Vienna Convention regarding the *validity*—this term taken in its largest sense—of a treaty presupposes that the States in dispute both recognize that there is a treaty. If the very *existence* of a treaty—in contradistinction to its *validity*—is denied, e.g. if an alleged party to that treaty maintains that the document embodying the treaty is a complete fake, the dispute-settlement procedures of the Vienna Convention cannot be applied to that dispute (unless, of course, there is not even any *prima facie* evidence of the fake). In other words, on the borderline between law and fact, the existence of a treaty may become a preliminary and "incidental" question to be looked into by the conciliation commission before it passes to the question of the validity of that treaty, if any.

11. It is, it would seem, for these reasons that the 1969 Vienna Convention, a large number of whose provisions are devoted to the "invalidity" of treaties, prescribes international procedures to be followed in case such invalidity is invoked and objected to.

12. One may well argue that the same reasoning is valid for some of the new legal relationships arising from an internationally wrongful act. Indeed, the allegation that such an internationally wrongful act has been committed by (the author) State A may cause (the allegedly injured) State B to take measures which, in themselves, are not in conformity with its obligations; State A—denying having committed an internationally wrongful act—may then allege to be itself injured by an internationally wrongful act of State B and take measures which, in themselves, are not in conformity with its obligations, and so on and so forth. The old, existing legal relationships are thus in danger of becoming, in practice, completely nullified by this oscillation (or escalation).

13. Only a compulsory third-party dispute-settlement procedure can help to stop such escalation. Several such procedures can be envisaged. For the moment, the Special Rapporteur suggests following the precedents of the 1969 Vienna Convention and the United Nations Convention on the Law of the Sea.

14. Accordingly, it is now proposed that, if a State considering itself to be an injured State wishes to invoke article 8 (reciprocity) or article 9 (reprisal) as a justification for the suspension of the performance of its obligations, it should notify the alleged author State of its reasons for doing so. If the alleged author State objects, on any of the grounds referred to in paragraph 5 above, it should inform the alleged injured State accordingly, stating its reasons for the objection.

15. Normally, notification and objection (possibly after another round or rounds of communication between the parties), taken together, will serve to narrow the issues on which the States concerned are in disagreement or dispute.

16. If, and to the extent that, such a dispute concerns the existence and breach of a primary obligation on the part of the alleged author State, that dispute can be settled only through the existing dispute-settlement procedure already binding on the parties or newly agreed between them, and paragraph 6 above would apply to the secondary rights and obligations as between the parties to that dispute (which are also parties to the future convention on State responsibility).

17. If, and to the extent that, the dispute concerns the non-performance by the alleged injured State of its primary obligation *vis-à-vis* the alleged author State (by way of invoking reciprocity or reprisal), and the interpretation or application of such primary obligation is subject to a dispute-settlement procedure already existing or newly agreed between the parties, such dispute settlement procedure should be applied to that dispute and, again, paragraph 6 above would be applicable to the secondary rights and obligations as between the parties to that dispute (which are also parties to the future convention on State responsibility).

18. If neither paragraph 16 nor paragraph 17 above applies (including the case that the third party in the agreed dispute-settlement procedure declares itself not competent to settle the dispute), the danger referred to in paragraph 12 above arises: the secondary rules tend to nullify the primary rules.

19. In the comparable situation of nullification of a treaty as such, i.e. in the case of one party to a treaty invoking "a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation", the 1969 Vienna Convention, under article 42 together with articles 65 and 66, gives "any one of the parties" to the dispute the right to set in motion the special procedures of dispute settlement provided for in article 66. This is comprehensible, since all the parties presumably have the same interest in knowing whether the treaty as such is still valid.⁵⁰

20. In the present case, however, where the alleged injured State—on the ground of its double claim (see para. 4 above)—suspects the performance of its obligations towards the alleged author State,⁵¹ it cannot thereby force the alleged author State to submit to a dispute-settlement procedure concerning the alleged breach, which may or may not be agreed between them. Accordingly, only the alleged author State should be empowered to set in motion the procedure of dispute settlement to be provided for in part 3 of the draft articles.

21. This is particularly necessary since, in challenging the countermeasure of the alleged injured State by unilaterally setting in motion such dispute-settlement procedure, the alleged author State cannot but accept at the same time that the third party pronounces on the incidental questions of fact and law concerning the internationally wrongful act allegedly committed by it and its new obligations arising therefrom.⁵²

22. In this connection, two points should be noted. First, it may well happen that there is a genuine divergence of opinion between the States concerned as to the interpretation of a treaty—or, for that matter, of rules of international law derived from any other source—applicable in their mutual legal relationship. A restrictive interpretation may be applied by one of them, which the other State contests, but—at least for the time being—accepts and then also applies as far as its corresponding obligations under that treaty towards the other party are concerned. This reciprocity is not that referred to in article 8 of part 2 of the draft articles; it is not a countermeasure, but rather a measure of

retortion. While there may be a dispute as to the interpretation and application of the relevant treaty or (other) rule of international law equally applicable to both parties, there is no dispute relating specifically to secondary rules.

23. Secondly, it may well happen that the States concerned have, in the past, agreed in principle to refer a future dispute as to the interpretation and application of a particular primary rule to a third-party dispute-settlement procedure, the implementation of which, however, will require further (voluntary) co-operation between the parties. In such a case, real countermeasures applied in order to arrive at such co-operation should again, as such, not be subject to the special procedure to be provided for in part 3 of the draft.

24. More generally, it should be recognized in part 3 that, in a sense, its procedural rules form an integral part of the legal consequences of an internationally wrongful act.⁵³

25. This implies, on the one hand, that the principle of the residual character of the provisions of part 2 of the draft, which is enunciated in article 2 as provisionally adopted by the Commission,⁵⁴ should also apply to the relevant provisions of part 3. In other words, States, when creating primary rights and obligations between them, may at the same time, or at some later time before the established primary obligation is breached, determine that part 3 shall not apply to (alleged) breaches of that obligation.

26. On the other hand, the link between parts 2 and 3 of the draft implies that a future convention on State responsibility should not allow reservations excluding the application of part 3. Indeed, in this respect the precedent of the United Nations Convention on the Law of the Sea, which recognizes the inseparability of its substantive and its procedural provisions, should be followed.

27. There are obvious qualifications to be added to what is stated in paragraphs 23 and 24 above. In the first place, article 2 of part 2 contains the proviso "without prejudice to the provisions of articles 4 and 12", which refer, respectively, to the United Nations system relating to the maintenance of international peace and security, and to the "system" of *jus cogens*. By analogy, and following again the 1969 Vienna Convention, part 3 should also contain a provision corresponding to article 66, subparagraph (a), of that Convention and provisions dealing with the relationship between the dispute-settlement procedure of part 3 and the procedural rules to be embodied or referred to in articles 14 and 15 of part 2, concerning "international crimes" and "acts of aggression".

28. Secondly, article 2 of part 2 covers deviations from the legal consequences provided for in that part both in the direction of adding legal consequences to responsibility and in the direction of taking them away. In

⁵⁰ Or not valid, through the application of what could be called the "pre-primary rules" of the 1969 Vienna Convention.

⁵¹ If the injured State invokes a material breach of a treaty as a ground for terminating the treaty or suspending its operation, article 66 of the 1969 Vienna Convention applies.

⁵² Including possibly—if circumstances precluding wrongfulness other than those mentioned in article 30 (Countermeasures in respect of an internationally wrongful act) and article 34 (Self-defence) of part 1 of the draft articles are invoked—"any question that may arise in regard to compensation for damage caused by that act" (article 35); in that case, of course, it is implied that the duty to pay compensation is a condition of the recognition of a "circumstance precluding wrongfulness" rather than a result of a rule of liability for injurious consequences of acts not prohibited by international law.

⁵³ In the same way as the rules contained in article 42, together with articles 65 to 68, of the 1969 Vienna Convention are a consequence of the principle *pacta sunt servanda* (article 26).

⁵⁴ See p. 4 above.

part 3, the addition of legal consequences corresponds to article 65, paragraph 4, of the 1969 Vienna Convention (and to paragraphs 16 and 17 above). To the “taking away” of legal consequences then would correspond the exclusion, explicit or implicit, of the dispute-settlement procedure of part 3 (analogous to article 66, subparagraph (b), of the Vienna Convention). Such exclusion could be considered as reflecting on the nature of the primary rights and obligations created between the parties, in the sense that those rights and obligations are thereby recognized, by the States creating them, to be, or come close to, “soft law”.⁵⁵ From this point of view, the question arises how to apply the principle underlying article 2 of part 2 to part 3, in so far as breaches of obligations originating before the adoption of the future convention on State responsibility are concerned. Surely an explicit deviation cannot be required for such application. On the other hand, implicit deviation may be hard to establish. On balance, there may be room for admitting a reservation to part 3 of the future convention on State responsibility (in so far as the dispute-settlement procedure corresponding to article 66, subparagraph (b) of the 1969 Vienna Convention is concerned) in respect of breaches of obligations entered into before the adoption of the future convention.

29. Furthermore, the impact of relevant provisions of part 3, as here proposed, on draft articles 10 and 13 of part 2 should be noted. Draft article 10, of course, refers to existing dispute-settlement procedures, relating either to all disputes or to disputes concerning the interpretation and application of the obligation allegedly breached by the author State. That draft article is in conformity with what is stated in paragraph 16 above. Draft article 13 is meant, *inter alia*, to stipulate an exception to article 10. If it is invoked by an alleged injured State and objected to by the alleged author State on the ground that the conditions of its applicability as stated therein are not fulfilled, the resulting dispute, as such, should be subject to the relevant provisions of part 3, provided that paragraph 17 above does not apply.

30. Article 19 of part 1 of the draft defines international crimes as internationally wrongful acts of a particular kind, involving the international community as a whole and, thereby—to an extent still under discussion—all other individual States as regards both their new rights and their new obligations. Draft articles 14

and 15 of part 2 relate to the legal consequences of international crimes; they refer explicitly (article 14, para. 3) or implicitly (article 15) to procedural provisions. Whatever further elaboration may be given by the Commission to the concept of an international crime, and by the international community as a whole to the recognition of an internationally wrongful act as a crime, it seems clear *a priori* that such recognition entails certain deviations from the general rules concerning the legal consequences of internationally wrongful acts. Such deviations consist of additional legal consequences, be they additional new obligations of the author State, additional new rights of other States, or additional new obligations of such other States towards each other and/or towards the international community as a whole.

31. There is an obvious connection between the concept of an international crime and the concept of *jus cogens*, as adopted in the 1969 Vienna Convention (article 53); indeed, they both imply a deviation from the bilateralism that characterizes most of the rules of international law, by virtue of what are considered to be fundamental interests of the international community. Clearly then, in addition to the “normal” questions concerning the facts of the case, there may well arise a dispute as regards the qualification of those facts as implying conduct conflicting with a rule accepted and recognized by that international community as essential for the protection of its fundamental interests. Such qualification involves both the global source of the obligation and the global consequences of its breach. Obviously this qualification cannot be left to each State individually.

32. Consequently, it is proposed that a provision analogous to that contained in article 66, subparagraph (a), of the 1969 Vienna Convention be included in part 3 of the draft articles on State responsibility—i.e. a provision stating that a dispute concerning the interpretation or application of article 19 of part 1 or article 14 of part 2 may be submitted by any one of the parties to the dispute, by a written application, to the ICJ for a decision.⁵⁶

33. It will be noted that the proposal made in the previous paragraph, in contradistinction to the one made in paragraphs 18 and 19 above, would, if adopted, give a right to any one of the parties to the dispute to set in motion the procedure before the ICJ. This difference finds its explanation in the multilateral aspect of, and the common interest of all States members of the international community in, the determination to be made by the Court.

34. It will be also noted that the above proposal does not refer to the interpretation or application of article 15 of part 2. Indeed, it would seem that the (alleged) commission of the particular international crime of aggression and the claim of self-defence should be dealt with in the first instance in accordance with the relevant provisions of the Charter of the United Nations.

⁵⁵ In this connection, it is interesting to note the conclusions of the report on “International texts with a legal bearing in the mutual relations between their authors and texts devoid of such bearing” submitted to the Institute of International Law at its 1983 session at Cambridge (United Kingdom) by M. Virally, Rapporteur of the Institute’s Seventh Committee, those conclusions having been amended by the Rapporteur in the light of the Institute’s discussions (*Institute of International Law, Yearbook*, vol. 60 (Part II), pp. 139 *et seq.*, footnote 1). Those conclusions have not been adopted by the Institute, no doubt in view, *inter alia*, of the doctrinal controversies concerning the very existence of “soft law” (a term not employed by either the Institute or the Rapporteur). Whatever the point of view one takes in this controversy (cf. M. Bothe, “Legal and non-legal norms; a meaningful distinction in international relations?” *Netherlands Yearbook of International Law*, 1980, vol. XI, p. 65), the phenomenon of the creation by States of “shared expectations” falling short of the creation of full rights and obligations can hardly be denied.

⁵⁶ In view of the multilateral aspect of such a decision, it is proposed that the following proviso contained in article 66, subparagraph (a), of the 1969 Vienna Convention not be included: “... unless the parties by common consent agree to submit the dispute to arbitration”.

Whether and to what extent the ICJ—one of the principal organs of the United Nations—has a role to play in the process is a matter of interpretation and application of the Charter itself.

35. The residual rule proposed in article 14, paragraph 3, of part 2 is rather in the nature of a condition for the exercise of the rights and the performance of the obligations of all States in the case of the commission of an international crime, and as such can be invoked in the procedure proposed in paragraph 32 above.

36. This special procedure under part 3 is, of course, not covered by article 10 of part 2 (see para. 29 above).

37. In outlining, in the foregoing paragraphs, the possible content of a part 3 of the draft articles on State responsibility, the Special Rapporteur is fully aware of operating at the borderline between codification and progressive development of international law. He re-

mains convinced of the necessity of adding a part 3 to the draft articles, for the reasons given in previous reports; nevertheless, he is conscious of the fact that, with regard to the details of its elaboration, several options are open for discussion. Consequently, and in view of the fact that most of the draft articles he has submitted for part 2 have not yet been discussed in the Commission, he has refrained at this stage from formulating draft articles for part 3. While part 1, provisionally adopted by the Commission in first reading, deals in reality with the refinement of primary rules, part 2 may be more or less compared with what, in the parlance of scientists dealing with the systems approach (in French, *la systémique*), is called “operational research” or “systems analysis”, and part 3 with what is called “systems engineering”. Even if, for one reason or another, one rejects that analogy, it cannot, it seems, be denied that there is an interaction between parts 1, 2 and 3 of the draft articles on State responsibility and that, consequently, an outline of part 3 may serve both the first reading of part 2 and the second reading of part 1.