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SEVENTH REPORT ON STATE RESPONSIBILITY

by

Mr. Willem Riphagen, Special Rapporteur

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A State which wishes to invoke article 6 of Part Two of the present articles must notify the State alleged to have committed the internationally wrongful act of its claim. The notification shall indicate the measures required to be taken and the reasons therefor.

Article 2

1. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification prescribed in article 1, the claimant State wishes to invoke article 8 or article 9 of Part Two of the present articles, it must notify the State alleged to have committed the internationally wrongful act, of its intention to suspend the performance of its obligations towards that State. The notification shall indicate the measures intended to be taken.

2. If the obligations, the performance of which is to be suspended, are stipulated in a multilateral treaty, the notification, prescribed in paragraph 1 shall be communicated to all States parties to that multilateral treaty.

3. The fact that a State has not previously made the notification prescribed in article 1, shall not prevent it from making the notification, prescribed in paragraph 2, in answer to another State claiming performance of the obligations covered by that notification.

Article 3

1. If objection has been raised against measures taken or intended to be taken, under article 8 or article 9 of Part Two of the present articles, by the State alleged to have committed the internationally wrongful act, or by another State claiming to be an injured State in respect of the suspension of the performance of the relevant obligations, the States concerned shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

2. Nothing in the foregoing paragraph shall affect the rights and obligations of States under any provisions in force binding those States with regard to the settlement of disputes.

Article 4

If under paragraph 1 of article 3, no solution has been reached within a period of 12 months following the date on which the objection was raised, the following procedures shall be followed:

(a) Any one of the parties to a dispute concerning the application or the interpretation of article 12 (b) of Part Two of the present articles may, by a written application, submit it to the International Court of Justice for a decision;

(b) Any one of the parties to a dispute concerning the additional rights and obligations referred to in article 14 of Part Two of the present articles may, by a written application, submit it to the International Court of Justice for a decision;

(c) Any one of the parties to a dispute concerning the application or the interpretation of articles 9 to 13 of Part Two of the present articles, may set in motion the procedure specified in the annex to Part Three of the present articles by submitting a request to that effect to the Secretary-General of the United Nations.

Article 5

No reservations are allowed to the provisions of Part Three of the present articles, except a reservation excluding the application of article 4 (c) to disputes concerning measures taken or intended to be taken under article 9 of Part Two of the present articles by an alleged injured State, where the right allegedly infringed by such measure arises solely from a treaty concluded before the entry into force of the present articles. Such reservation shall not affect the rights and obligations of States under such treaties or under any provisions in force, other than the present articles, binding those States with regard to the settlement of disputes.

Annex

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a party to the present articles shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph.

2. When a request has been made to the Secretary-General under article 4 (c) of Part Three of the present articles, the Secretary-General shall bring the dispute before a conciliation commission constituted as follows:

The State or States constituting one of the parties to the dispute shall appoint:

(a) One conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(b) One conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way. The four conciliators chosen by the parties to the dispute shall be appointed within sixty days following the date on which the Secretary-General receives the request.

The four conciliators shall, within sixty days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The failure of a party or parties to submit to conciliation shall not constitute a bar to the proceedings.

4. A disagreement as to whether a conciliation commission acting under this annex has competence shall be decided by the commission.

5. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any State to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

6. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

7. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

8. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the

parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

9. The fees and expenses of the Commission shall be borne by the parties to the dispute.

B. Text of the draft articles and annex, with commentaries thereto

General commentary

(1) Any legal system is faced with the question of what should happen if its primary rules of conduct are, in fact, not observed. The obvious simple answer is that in such a case there should be some means of "enforcement" of the primary rules, some way to arrive at a situation of fact which comes as close as possible to the situation which would have resulted from the voluntary observance of the rules. One such way is to establish that situation; another is to induce voluntary observance by the threat of adverse consequences in case of non-observance.

(2) In the international legal system there are inherent limitations to "enforcement" of primary rules binding on sovereign, territorially separated, States. Indeed the absence of a central power with its own substratum requires more "subtle" techniques to promote the desired result. New substantive legal relationships between States, entailed by an internationally wrongful act, is one of those techniques. However, some form of "organization" remains necessary; substitution of one set of substantive legal relationships for another simply raises again the same problem of "implementation" of that other set of rules. Moreover, inevitably, the "secondary" set of rights and obligations tends to move even further away from the desired result as expressed in the primary rules. This is particularly clear where the lack of "organization" leads to the acceptance of a decentralized response to an (alleged) internationally wrongful act, i.e. measures of reciprocity, reprisals and possibly even "self-help" and "punishment".

(3) Moreover, the very existence of an internationally wrongful act depends on a set of facts and a set of primary rules; on both points there may very well be a genuine divergence of opinion between the States concerned in a concrete case.

(4) The allegation by State A that an internationally wrongful act has been committed by State B may cause allegedly injured State A to take measures which, in themselves, are not in conformity with its primary obligations towards State B. State B, denying that it committed an internationally wrongful act, may then allege on its part to be injured by an internationally wrongful act of State A and take measures itself, which in themselves are not in conformity with its obligations. The latter measures may then again cause countermeasures, and so on and so forth. The "old" existing primary legal relationships are thus in danger of becoming, in fact, completely nullified by such escalation.

(5) Only some "organization", some form of compulsory third-party dispute settlement procedure can help to put a stop to that escalation.

(6) States, in creating primary rules binding upon them, sometimes also envisage the situation (allegations) of non-observance of those rules and provide for an organizational device to deal with that situation, possibly in the form of a compulsory third-party dispute settlement procedure leading to a final and binding decision in concrete cases, and possibly even providing for an organizational device to deal with a situation in which that final and binding decision is not complied with. More often than not, however, no such machinery is established nor, for that matter, excluded a priori.

(7) The present articles of Part Three intend to lay down a minimum of residual rules and procedures to be applied if no other machinery is expressly accepted by the States concerned (compare article 2 of Part Two). They are inspired by the machineries envisaged in the 1969 Vienna Convention on the Law of Treaties and the 1982 United Nations Convention on the Law of the Sea.

Article 1

A State which wishes to invoke article 6 of Part Two of the present articles must notify the State alleged to have committed the international wrongful act, of its claim. The notification shall indicate the measures required to be taken and the reasons therefor.

Commentary

(1) The first step in a situation in which an internationally wrongful act is alleged is obviously that the alleged injured State or States demand a reparation lato sensu, i.e. measures to be taken by the alleged author State to establish a situation which comes as close as possible to that which would have prevailed if the primary rule had been complied with, possibly including measures which prevent repetition of the act (see article 6 of Part Two).

(2) The notification under this article must indicate the (alleged) facts and the (alleged) rules which were not complied with.

(3) Compare with article 65 (1) of the Vienna Convention on the Law of Treaties.

Article 2

1. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification prescribed in article 1, the claimant State wishes to invoke article 8 or article 9 of Part Two of the present articles, it must notify the State alleged to have committed the internationally wrongful act of its

intention to suspend the performance of its obligations towards that State. The notification shall indicate the measures intended to be taken.

2. If the obligations, the performance of which is to be suspended, are stipulated in a multilateral treaty, the notification, prescribed in paragraph 1, shall be communicated to all States parties to that multilateral treaty.

3. The fact that a State has not previously made the notification prescribed in article 1 shall not prevent it from making the notification, prescribed in paragraph 2, in answer to another State claiming performance of the obligations covered by that notification.

Commentary

(1) Normally, some period of time should be accorded to the alleged author State to examine the situation and react to the notification either by raising objections or by declaring its willingness to take the measures required.

(2) There may be, however, "cases of special urgency" in which the injured State has immediately to protect its interest, possibly by taking, within its own territory, measures which are not in themselves in conformity with its international obligations (compare also article 10 (2) (a) of Part Two). In the latter case, however, another notification is required (para. 1).

(3) Such measures may involve the interests of third States, in particular where the obligations, the performance of which is to be suspended by the injured State, are stipulated in a multilateral treaty (compare articles 10 to 13 of Part Two). Such third States should then be informed, in order to be able to raise objections (para. 2).

(4) Paragraph 3 is inspired by article 65 (5) of the Vienna Convention on the Law of Treaties. It may well be that an immediate measure taken by the State, the interests of which are adversely affected by the act of another State, is, for the time being rather considered by the former State as a measure of "retortion" (i.e. an act not in itself prohibited by international law). If the latter State, however, considers this measure as constituting an internationally wrongful act, the former State must be in a position to invoke article 8 or article 9 of Part Two.

Article 3

1. If objection has been raised against measures taken or intended to be taken, under article 8 or article 9 of Part Two of the present articles, by the State alleged to have committed the internationally wrongful act, or by another State claiming to be an injured State in respect of the suspension of the performance of the relevant obligations, the States concerned shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

2. Nothing in the foregoing paragraph shall affect the rights and obligations of States under any provisions in force binding those States with regard to the settlement of disputes.

Commentary

Notification and objection thereto create a situation of dispute between States, which should be settled by peaceful means. Paragraphs 1 and 2 of this article basically repeat the wording of article 65, paragraphs 3 and 4 of the Vienna Convention on the Law of Treaties.

Article 4

If, under paragraph 1 of article 3, no solution has been reached within a period of 12 months following the date on which the objection was raised, the following procedures shall be followed:

(a) any one of the parties to a dispute concerning the application or the interpretation of article 12 (b) of Part Two of the present articles may, by a written application, submit it to the International Court of Justice for a decision;

(b) any one of the parties to a dispute concerning the additional rights and obligations referred to in article 14 of Part Two of the present articles may, by a written application, submit it to the International Court of Justice for a decision;

(c) any one of the parties to a dispute concerning the application or the interpretation of articles 9 to 13 of Part Two of the present articles, may set in motion the procedure specified in the Annex to Part Three of the present articles by submitting a request to that effect to the Secretary-General of the United Nations.

Commentary

(1) This article is inspired by article 66 of the Vienna Convention on the Law of Treaties and, accordingly, makes a distinction between the types of rules of international law, the application and interpretation of which is involved in the dispute.

(2) Subparagraph (a) of the present article deals with the plea of jus cogens within the context of the application of article 12 (b) of Part Two. The typical effect of jus cogens is that a rule of international jus cogens cannot be set aside by any other rule of international law, except another rule of international jus cogens (normally subsequent, but possibly contemporaneous, as in the hypothetical case where the rule of jus cogens provides for its own suspension as such for other States in case of its violation by one or more States). The

situation in which the commitment of any internationally wrongly act by one State is invoked by another State to justify measures of reciprocity or reprisal which in themselves are contrary to a rule of international jus cogens, is comparable to the situation in which a treaty is invoked in order to justify acts of that State, in conformity with its obligations under that treaty, but conflicting with a peremptory norm of general international law. The supremacy of the latter norm, however, entails the necessity of ascertaining its particular quality; in case of diverging opinions on this point of individual States, "the principal judicial organ of the United Nations" is best qualified to decide the issue.

(3) Though conduct not in conformity with a rule of international jus cogens does not necessarily constitute an international crime, there is an obvious connection between the two concepts, if only because both concepts involve the protection of fundamental interests of the international community and a recognition by that community as a whole that such protection requires a particular rule overriding other international rules of conduct and entailing particular additional legal consequences in case of a breach. Consequently, subparagraph (b) of the present article provides for the same procedure of final and binding decision of the International Court of Justice as in subparagraph (a). This subparagraph does not refer to article 15 of Part Two (the additional legal consequences of aggression), the reason therefor being that the (alleged) commitment of aggression and the related 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. Whether, to what extent and how the International Court of Justice has a role to play in the process, is a matter of interpretation and application of the Charter itself.

(4) Finally, subparagraph (c) of the present article deals with cases in which the prevention of escalation is the main reason for organizing a procedure of compulsory conciliation. If and when objection is raised against a notification of (intended) measure of reciprocity or reprisal, and no solution is reached by other peaceful means, a third-party operation, be it not resulting in binding decisions, could help to restore as much as possible the original legal relationships between the States concerned.

Article 5

No reservations are allowed to the provisions of Part Three of the present articles, except a reservation excluding the application of article 4 (c) to disputes concerning measures taken or intended to be taken under article 9 of Part Two of the present articles by an alleged injured State, where the right allegedly infringed by such measure arises solely from a treaty concluded before the entry into force of the present articles. Such reservation shall not affect the rights and obligations of States under such treaties or under any provisions in force, other than the present articles, binding those States with regard to the settlement of disputes.

Commentary

(1) This article is inspired by the 1982 United Nations Convention on the Law of the Sea, inasmuch as it recognizes the interaction and, therefore, the legal nexus between the substantive rules and the international machinery for settling the inevitable difficulties of their application in concrete cases.

(2) However, the provisions of Part Three are still meant to be residual rules; in creating a primary rule of conduct - or at least before the question of actual performance becomes controversial - the States may expressly provide for another way of dealing with such controversies, if and when they arise. In particular, they may, at the time of creating a rule of international law, have envisaged that future controversies relating to the implementation of such rule should exclusively be solved by consensus as a result of negotiation. Even though such an attitude would reflect on the legal character of the rule itself and of the "rights" and "obligations" resulting therefrom, it cannot be denied that the articles of Part Three (like other articles on "implementation" in respect of other topics, proposed by the International Law Commission and/or adopted at United Nations Conferences) contain an element of "progressive development" of international law. Indeed, this is in line with the other Parts of the present article which, to a certain extent, move away from the "unilateralism" (unlimited admission of countermeasures) and "bilateralism" (relationships only between an author State and a directly affected State) which characterize older rules of international law.

(3) Nevertheless, on balance, it would seem appropriate to admit a reservation, be it only in respect of the legal consequences provided for in article 4 (c) of Part Three, of an infringement of a "right" created by a treaty concluded before the date of entry into force of the present articles.

Annex

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a party to the present articles shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph.

2. When a request has been made to the Secretary-General under article 4 (c) of Part Three of the present articles, the Secretary-General shall bring the dispute before a conciliation commission constituted as follows:

The State or States constituting one of the parties to the dispute shall appoint:

(a) One conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(b) One conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way. The four conciliators chosen by the parties to the dispute shall be appointed within sixty days following the date on which the Secretary-General receives the request.

The four conciliators shall, within sixty days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The failure of a party or parties to submit to conciliation shall not constitute a bar to the proceedings.

4. A disagreement as to whether a conciliation commission acting under this annex has competence shall be decided by the commission.

5. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any State to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

6. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

7. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

8. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of

law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

9. The fees and expenses of the Commission shall be borne by the parties to the dispute.

Commentary

(1) Paragraphs 1 and 2 of the annex reproduce (with the necessary changes of reference) paragraphs 1 and 2 of the annex to the Vienna Convention on the Law of Treaties. Paragraphs 3 and 4 are taken from articles 12 and 13 of annex V of the United Nations Convention on the Law of the Sea; its provisions are implied by the concept of a compulsory conciliation procedure.

(2) Paragraphs 5, 6, 7 and 8 are modelled on paragraphs 3 (with a change of reference from "any party to the treaty" to "any State"), 4, 5 and 6 of the annex to the Vienna Convention on the Law of Treaties. Paragraph 9 is again taken from article 9 of annex V of the United Nations Convention on the Law of the Sea. It would seem that in the present context of State responsibility, this rule is preferable to the one contained in paragraph 7 of the annex to the Vienna Convention on the Law of Treaties, which, in the context of presumably less frequent procedures relating to the validity of a treaty, puts the financial burden on the United Nations.

II. PREPARATION OF THE SECOND READING OF PART ONE OF THE DRAFT ARTICLES (DRAFT ARTICLES 1 TO 35)

Introduction

(1) In their written and oral comments on draft articles 1 to 35 of Part One several Governments have remarked that their comments were provisional, inasmuch as they were subject to the contents of Parts Two and Three of the draft articles, as yet unknown to them. It may then be expected that at least some Governments will later on comment in written or oral form on those articles in the light of the complete set of draft articles on State responsibility.

(2) Nevertheless, it would seem useful for the Commission, after it has adopted provisionally the draft articles of Parts Two and Three, to start the second reading of Part One in the light of the comments already received from Governments and possibly also taking into account the published comments of learned authors on the work of the Commission in this field.

(3) It would seem advisable, at the present stage, to concentrate on criticisms voiced in respect of individual provisions of draft articles 1 to 35. Indeed, the whole history of the debates in the Sixth Committee of the General Assembly on the successive reports of our Commission on the topic seems to convey the impression that generally the approach of the Commission to the topic, and the various draft articles provisionally adopted by it, have met with the approval of the Sixth Committee.

(4) Accordingly, the present section will not deal with such suggestions as are sometimes made, according to which the feasibility of arriving at a generally acceptable codification and progressive development of the rules of international law on State responsibility, in the form of a United Nations convention on State responsibility or otherwise, is put into doubt.

(5) Obviously, the Commission will, in the final stage of its work on the topic, have to decide on its recommendation to the General Assembly as regards the follow-up to be given to its work, but the approach of presenting a set of draft articles seems beyond question now.

(6) Consequently, the present section will, in respect of each individual article, try to summarize the suggestions for improvement (including, as the case may be, deletion) of the draft articles made: (a) in the written comments of Governments as received up until now; (b) in the oral comments voiced by Governments in the Sixth Committee, and - occasionally - (c) in some learned writings directed specifically to such draft articles.

A. Written comments

Article 1. Responsibility of a State for its internationally wrongful acts

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

(1) Austria seems to suggest that the text of the article should more clearly express "that international responsibility is not limited to internationally wrongful acts" and, in this context, notes "seemingly contradictory comments" in the Commission's commentary to articles 1 and 2, referring inter alia to circumstances precluding wrongfulness. 1/

(2) In the opinion of the present Special Rapporteur, the text of article 1 can remain as it stands. The relationship between article 1, article 3, chapter II, chapter III and chapter V (in particular article 35) is sufficiently clear from the texts themselves. It is true, that article 35 is simply a "saving clause", but that does not necessarily mean that "any question that may arise in regard to compensation for damage caused by that act" (i.e., an act, the wrongfulness of which is precluded by the - non-exhaustive - provisions of the other articles of chapter V) is necessarily a question to be dealt with under the topic "liability for injurious consequences arising out of acts not prohibited by international law". Indeed, the suggested limitation of the scope of the latter topic to, in fact, environmental matters, would exclude such coverage. Quite another question is whether the draft articles on State responsibility should, as it were, fill the gap left by article 35, a question on which our Commission has not, as yet, pronounced itself.

Article 2. Possibility that every State may be held to have committed an internationally wrongful act

Every State is subject to the possibility of being held to have committed an internationally wrongful act entailing its international responsibility.

(1) The Federal Republic of Germany believes that the content of this article is self-evident and suggests its deletion or, at least, the incorporation of its legal substance in article 1. 2/

(2) In the opinion of the present Special Rapporteur, the latter suggestion could be accepted. Indeed, articles 1 and 2 embody the same legal rule, looked at from two different points of view: that of the injured State and that of the

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1/ Yearbook ... 1980, vol. II (Part One), pp. 90-91.

2/ Yearbook ... 1981, vol. II (Part One), p. 74.

author State. No change of wording seems to be required: the article could simply become the second paragraph of article 1.

(3) Austria's comments refer to the position of member States of a federal State, and can better be dealt with under article 7. 3/

Article 3. Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when:

(a) conduct consisting of an action or omission is attributable to the State under international law; and

(b) that conduct constitutes a breach of an international obligation of the State.

(1) Austria raises the issue of the omission of "fault" from the definition of the subjective elements, and the omission of "damage" or "injury" from the definition of the objective elements of the internationally wrongful act. 4/

(2) Czechoslovakia raises the same issue, as well as that of the omission of the "existence of causal connection". 5/

(3) Both written comments reserve the position of the respective Governments; their final opinion is said to depend on the complete set of draft articles.

(4) In the opinion of the present Special Rapporteur, draft article 3 could remain as it stands. Inevitably both the "subjective" and the "objective" elements of an internationally wrongful act are based on the interpretation of the "primary" rule involved. Indeed, a legal relationship between States, being a legal relationship between legal entities, requires a "translation" of legal notions into facts (including the fact of "causal connection") and vice versa, in order to ultimately arrive at the desired result of primary rules, which is a situation of fact. In this sense "abstractions" and "fictions" (both, in essence, the separation of the relevant from the irrelevant) are necessary ingredients of primary legal rules. The present draft articles on State responsibility, being meant to be applicable irrespective of the "origin" and content of the primary rules involved, cannot but move to a higher level of "abstraction" and "fiction".

(5) Consequently, draft article 3 reduces the elements of an internationally wrongful act to two elements: "attributability" of human conduct to the State, and

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3/ Yearbook ... 1980, vol. II (Part One), p. 91.

4/ Ibid., pp. 89-91.

5/ Yearbook ... 1981, vol. II (Part One), p. 73.

breach of an international obligation. A third element - the absence of "circumstances precluding wrongfulness" - is added in chapter V, while what could be called a fourth element - the requirement that the international obligation be "in force" for the State at the time the act was performed - is added in draft article 18 and elaborated in draft articles 24 to 26.

(6) It would seem to the present Special Rapporteur that the suggested additional three elements referred to by Austria and Czechoslovakia (i.e., "fault", "causal connection" and "damage") are, one way or another, taken care of by the system of the draft articles.

(7) "Fault" can actually be seen as a "breach of an international obligation" in the sense of draft article 16, if and when the primary rule requires of the State only conduct which can be "reasonably" required of it. This is particularly true if the conduct consists of an omission (in the case of an obligation of due diligence). To what extent that is the case depends on the (interpretation of the) primary rule itself, in particular in the light of its object and purpose. Obviously, circumstances precluding wrongfulness also may play a role in determining "fault" on the part of the State. At the same time, the element of attributability of human conduct to the State contains an element of "fault" of the State. The draft articles recognized this in accepting attributability to the State of conduct of persons which are "organs" of the State, but act outside their competence or contrary to instruction and in accepting attributability to the State of conduct of persons, which are not "organs" of the State, but act "in fact on behalf of the State", and in accepting that "conduct which is related to that of the persons or groups of persons, not acting on behalf of the State" may give rise to State responsibility.

(8) As to "damage" as a possible element of an internationally wrongful act, again this is a matter of the (interpretation of the) primary rule involved. As is the case with "fault", draft articles 20, 21 and 23 of Part One are relevant here. Also, in the opposite direction, article 35 is relevant in this connection. Furthermore, it is self-evident that a (pecuniary) compensation can only be claimed if there is a "damage" (compare also article 6 of Part Two).

(9) Finally, "causal connection" as a possible element of the internationally wrongful act refers to a link between an act or omission and a situation of fact, which may be qualified as "damage". Here it is even more obvious that the (interpretation of the) primary rule is involved. There exist in international law obligations per se requiring a particular course of conduct irrespective of possible factual consequences of conduct not in conformity with that required by the obligation (as is recognized in draft article 20).

Article 6. Irrelevance of the position of the organ in the organization of the State

The conduct of an organ of the State shall be considered as an act of that State under international law, whether the organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinate position in the organization of the State.

(1) Yugoslavia 6/ and the Federal Republic of Germany 7/ suggest the deletion of this draft article since its content is nowadays undisputed.

(2) In the opinion of the present Special Rapporteur it would still be useful to retain the draft article as it stands. It is a fact that in the modern State power is functionally "decentralized", and that the organs of the State are often, to a greater or lesser extent, independent of each other. In this sense to consider the State as one, as it were monolithic, entity is to create a legal fiction. Nevertheless it is a basic tool of international law and, as such, draft article 6 - like its territorial analogue (draft article 7) - merits a place in the present draft articles. In this connection it is to be noted, on the other hand, that rules of international law sometimes recognize the functional decentralization of power within the State and the relative position of its organs. Draft articles 21 (2) and 22 illustrate this point. 8/

Article 7. Attribution to the State of the conduct of other entities empowered to exercise elements of the government authority

1. The conduct of an organ of a territorial governmental entity within a State shall also be considered as an act of that State under international law, provided that organ was acting in that capacity in the case in question.

2. The conduct of an organ of an entity which is not part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall also be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question.

6/ Yearbook ... 1980, vol. II (Part One), p. 105.

7/ Yearbook ... 1980, vol. II (Part One), p. 74.

8/ See also draft article 18 (5).

Paragraph 1

(1) Austria refers to questions arising from the situation in which member States of a federal State have retained a limited measure of international personality. 9/

(2) It will be recalled that the Commission dealt with this question first in its commentary (paragraphs (10) and (11)) on draft article 7 and then in its commentary (paragraph (18)) on draft article 28. It arrived at the conclusion that (a) "in the cases ... in which component States retain an international personality of their own ... it seems evident that the conduct of their organs is ... attributable to the federal State where such conduct amounts to a breach of the federal State's international obligations; (b) "where the conduct of organs of a component State amounts to a breach of an international obligation incumbent upon the component State, such conduct is to be attributed to the component State and not to the federal State"; and (c) the federal State should be responsible for internationally wrongful acts attributable to the member State, if they were committed in a sphere of activity subject to the control or direction of the federal State" (by virtue of draft article 28 (1)).

(3) It is to be noted that Austria, in its written comments, refers to an entirely different question and seems to suggest "that the consequences of an internationally wrongful act committed by a member State of a federal union may affect the federal State, for instance if it resulted in the duty to make monetary compensation and the member State did not possess financial autonomy".

(4) In the opinion of the present Special Rapporteur, the Commission should reconsider the question. The Commission's position, as set out in paragraph (2) above, seems to be based upon a strict separation between the member States, having retained "an international personality of its own" and therefore able to have its own international obligations, the breach of which by it entails its own international responsibility, and the federal State, which is, so to speak, a "third" State in respect of the legal relationship between the member State and another State, and therefore responsible towards the latter State only if the internationally wrongful act of its member State is "committed ... in a field of activity in which" that member State "is subject to the power of direction or control" of the federal State. On the other hand, even if the member State has retained "an international personality of its own", it is considered to be "a territorial governmental entity within a State" (i.e., within the federal State) and, therefore, the conduct of its organs is considered as an act of the federal State, irrespective of whether or not the member State, under the constitution of the federal State, acted within the field of its "autonomy" (i.e., not under the direction or control of the federal State, in other words, not holding a "subordinate position" in the sense of draft article 6).

9/ Yearbook ... 1980, vol. II (Part One), p. 91.

(5) The lack of symmetry is obvious, but does not necessarily make the set of draft articles 6, 7 (1) and 28 (1) unsuitable for application in the case of federal unions. Rather the point seems to be that, whatever measure of "international personality" is retained by the member State, the "territory" of this territorial governmental entity is, at the same time, part of the territory of the federal State. This aspect is bound to be relevant when the question of the new rights of the injured State comes up. If it is accepted that such new rights include a right of the injured State to claim reparation lato sensu (under the proposed draft article 6 of Part Two) and, under certain circumstances, a right to suspend the performance, by the injured State, of its obligations towards the author State (under the proposed articles 8 and 9 of Part Two), the question arises whether the "separation-construction" underlying draft article 28 (1) of Part One is realistic. As noted by Austria, 10/ the member State, which has not committed the internationally wrongful act "in a field of activity in which that State is subject to the power of direction or control" of the federal State, may simply not have itself the (financial and other) means to fulfil its new obligations under article 6 of Part Two. Furthermore, it may not be in the position that the performance of obligations towards it alone may be suspended. Finally, and perhaps even more important, any measure, even if only by way of retortion, taken by the injured State, is bound to affect also the interests of the federal State as a whole.

(6) Consideration might therefore be given by the Commission to a simplification of matters by putting the member States of a federal State (provided, of course, that it is a State) completely on the same footing as any other territorial governmental entity within a State. After all, the "retention" (in itself a notion of historical rather than legal meaning) of a measure of international personality by a member State of a federal State is bound to be of a rather limited character, if only because of the full international personality of the federal State.

(7) The present Special Rapporteur accordingly proposes: (a) to add, in draft article 7 (1), between the word "State" in the first line and the word "shall" in the second line, the phrase "whether or not empowered under the internal law of that State to be subject to international obligations"; and (b) to strike out, in the commentaries to draft articles 7 and 28, all references to the situation of member States of a federal State retaining a measure of international personality.

(8) In essence, this would mean that, in so far as the (secondary) rules of State responsibility are concerned, the (primary) international obligations of a member State of a federal State are assimilated to international obligations of the federal State (be it, of course, as to their contents, limited to that member State).

10/ See para. (3) above.

(9) The observations of Czechoslovakia 11/ and Mongolia 12/ relate to the points dealt with in the foregoing paragraphs.

Paragraph 2

(1) Canada expresses the opinion that the responsiblity in respect of the conduct of an entity, which is not part of the formal structure of the State, must be more restrictively delineated. 13/

(2) Mongolia expresses the opinion that this provision "... must in no case and in no circumstance be made the basis for the attribution to a State of the acts of those of its organs which are not State organs". 14/

(3) In the opinion of the present Special Rapporteur, draft article 7 (2) should remain as it stands; it is a necessary link in the chain connecting articles 5, 6, 7 and 8. As stated by the Commission in paragraph (18) of its commentary: "The justification for attributing to the State, under international law, the conduct of an organ of one or other of the entities here considered still lies, in the final analysis, in the fact that the internal law of the State has conferred on the entity in question the exercise of certain elements of the governmental authority". Indeed, the State can only act through human beings and the way in which it "organizes" those human beings for the purpose of exercising the governmental authority is not relevant for its responsibility under international law. In this respect, the most "formal" way of organization, dealt with in article 5, can be contrasted with the most "informal" way, referred to in article 8.

(4) Nor does it seem necessary or advisable to try to define the term "elements of the governmental authority". Though, of course, the functions or role of the State in a given society vary from State to State, the exercise of governmental authority can be clearly distinguished in law from other State activities. Furthermore, in cases falling under draft article 7 (2), the question whether or not the internal law of the State concerned has conferred on a particular entity the exercise of elements of the governmental authority can be easily answered by comparing the nature of the powers conferred with the nature of the powers retained by the State organs (in the sense of article 5) or organs of a territorial governmental entity (in the sense of article 7 (1).

11/ Yearbook ... 1981, vol. II (Part One), p. 73.

12/ Ibid., p. 76.

13/ Yearbook ... 1980, vol. II (Part One), p. 94.

14/ Yearbook ... 1981, vol. II (Part One), p. 76.

Article 8. Attribution to the State of the conduct of persons acting in fact on behalf of the State

The conduct of a person or group of persons shall also be considered as an act of the State under international law if:

(a) it is established that such persons or group of persons was in fact acting on behalf of that State; or

(b) such person or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority.

(1) Austria suggests to add to paragraph (a) the condition of "effective exercises of elements of the governmental authority" or, at least, to "exclude transactions under private law". 15/

(2) The Netherlands suggests that paragraph (a) could be deleted if the phrase "in the absence of the official authorities" were omitted from paragraph (b). 16/

(3) Canada expresses the opinion that "the circumstances in which a State may be held responsible for such actions" (i.e., as described in paragraph (b)) "must be more restrictively delineated". 17/

(4) Yugoslavia considers that, from a logical point of view, draft article 8 should be placed after articles 9 and 10, and suggests to insert in the draft articles a clause containing inter alia a definition of "an entity empowered to exercise elements of the governmental authority". 18/

(5) In the opinion of the present Special Rapporteur, there are valid reasons for dealing in separate articles with the cases meant to be covered by paragraph (a), and with those meant to be covered by paragraph (b). As the Commission remarks in its commentary to the article (paragraph (1)), there is a clear distinction between the two groups of cases in respect of where the "initiative" lies. In this respect, the cases under article 8 (a) are "in between" the situation referred to in article 7 (2) and that referred to in article 11 (1), while the cases under article 8 (b) are rather "in between" the situation referred to in article (2) and that referred to in article 14; there are shades between legal and illegal power.

15/ Yearbook ... 1980, vol. II (Part One), pp. 91-92.

16/ Yearbook ... 1981, vol. II (Part One), p. 102.

17/ Yearbook ... 1980, vol. II (Part One), p. 94.

18/ Ibid., p. 106.

(6) Paragraph (a) then deals with the unofficial agents of State entities lato sensu. It is obvious that, if such agents are used in order to try to escape the State responsibility which would have been incurred by the same conduct of an official agent, such escape cannot be admitted by international law. Indeed the State entity, in making use of an unofficial agent, would at least commit itself a "related act" in the sense of article 11 (2). By the same token it seems clear that in such situations the "objective" and the "subjective" elements of the internationally wrongful act are inextricably interwoven (as is also the case in draft article 27).

(7) For this reason a formulation of the rule in terms of "attributability" only presents particular difficulties.

(8) Thus, while there is validity in the argument that the words "in fact acting on behalf of that State" are somewhat vague, it would seem difficult to refer, in paragraph (a), to "effective exercise of elements of the governmental authority", because those terms imply a prima facie "justification" of that exercise, at least under the internal law of the State concerned. Even less would it seem possible to combine paragraphs (a) and (b) in a single rule, as suggested by the Netherlands, if only because "the absence of the official authorities" is an essential element in the paragraph (b) cases.

(9) The Commission might, however, consider another solution, which would be to combine the rule of article 8 (a) with article 11 (1) in the form of an exception. Article 11 (1) could then read as follows:

> "1. The conduct of a person or group of persons not acting as an organ of a State, of a territorial governmental entity or of an entity empowered to exercise elements of the governmental authority shall not be considered as an act of the State under international law, except if it is established that such person or group of persons acted in concert with and at the instigation of such organ."

(The words "in concert with and at the instigation of" are taken from the Commission's commentary to article 8 (paragraph (5)). This solution, while still dealing with the article 8, paragraph (a) cases within the framework of "attributability", would perhaps better indicate that it is not so much the fact that persons act on behalf of the State, which creates "attributability", as the fact that those persons being only de facto agents of the State is not a bar to State responsibility for an internationally wrongful act, if otherwise committed.

(10) If this solution is adopted, article 8 would be limited to the present paragraph (b). Here, as noted before, we are dealing with an entirely different situation inasmuch as the initiative lies with the private persons concerned and not with the State organs. Though no written comments of Governments have been as yet presented as regards paragraph (b) of article 8, the present Special Rapporteur ventures to suggest that the Commission reconsider the adequacy of the retention of the final words: "and in circumstances which justified the exercise of those elements of authority".

(11) It would seem to the present Special Rapporteur that those words are not necessary to distinguish the situation of paragraph (b) from the situation of "insurrectional movement" (article 14). On the other hand, the mere fact that, "in the absence of the official authorities", a person or group of persons, on their own initiative "fill the gap", equates, from the point of view of international law, their conduct of in fact exercising elements of the governmental authority, to such conduct of official authorities. Anyway, whether or not the circumstances justify their filling the gap is rather a matter of appreciation under the internal law of the State. To burden the application of international law rules of State responsibility with such appreciation would seem inadequate.

(12) Incidentally, the combination of article 8 (a) and article 11 (1) would go some way in the direction of Yugoslavia's proposed sequence of articles. 19/ As to the definition of "elements of the governmental authority", reference may be made to paragraph 4 under article 7 (2) above.

Article 10. Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity

> The conduct of an organ of a State, of a territorial governmental entity or of an entity empowered to exercise elements of the governmental authority, such organ having acted in that capacity, shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity.

(1) Chile suggests the following wording of this draft article: "The conduct of an organ or entity, as the case may be, which exceeded its competence according to internal law or contravened instructions concerning its activity shall also be considered as an act of the State under international law". 20/

(2) The Netherlands 21/ and Yugoslavia 22/ remark that the draft article should also be made applicable to the organ mentioned in article 9.

(3) In the opinion of the present Special Rapporteur, the present wording of article 10 is sufficiently clear as to be understood as referring to "an entity empowered to exercise elements of the governmental authority" in both the situations mentioned in article 7 (2) and in article 10.

19/ See para. (4), supra.

20/ Yearbook ... 1980, vol. II (Part One), p. 97.

21/ Ibid., p. 102.

22/ Ibid., p. 105.

(4) The suggestion made by Chile raises the problem of distinguishing between conduct of an organ "acting in that capacity" and conduct of the same human being, acting as a private person. According to paragraph (29) of its commentary on article 10, the Commission introduced the expression "such organ having acted in that capacity" - expression left out in the wording suggested by Chile - "... to indicate that the conduct referred to comprises only the actions and omissions of organs in carrying out their official functions and not the actions and omissions of individuals, having the status of organs, in their private life". On the other hand, the Commission considered and rejected an limitation on the rule of State responsibility, laid down in article 10, such as the qualification that the conduct of the person involved should at least be within the "general competence" or "apparent competence", or should have been performed "with the use of means derived from function" (paragraphs (22) to (25) of the commentary on article 10), while recognizing at the same time (paragraph (26) of the commentary) "that it is not always easy to establish in a specific case whether the person acted as an organ or as an individual".

(5) In the opinion of the present Special Rapporteur, the distinction between conduct of a person "acting within the scope of the discharge of his State-function", and conduct of that person "in his private life" is at the same time somewhat artificial and in actual practice often easy to make. There is only one human being, and whether his motivation in doing, or refraining from doing, certain acts is serving the interests of the State, or letting his personal bias prevail, is probably, in many cases, not even clear to himself. On the other hand, for the victim of his conduct, the distinction is clearly irrelevant, and the question of proof becomes paramount (compare paragraph (18) of the Commission's commentary on article 10). Accordingly, the correct wording of article 10 is dependent upon a choice of the direction of development of the law on State responsibility in connection with the development of the primary rules of international law. It seems clear that States hesitate to take the risk that they be held responsible for acts of their organs-human beings, which are motivated by - under internal law generally prohibited - personal bias. But there is, at least culpa in eligendo on the part of the State and, on the other hand, an effective protection of the interests of injured States in international law requires that such States are not burdened with the task of proving that a person, being an organ of another State, really acted in the specific case "on behalf" of that State.

(6) On balance, the present Special Rapporteur is of the opinion that the insertion of the words "such organ having acted in that capacity" in article 10 might (unintendedly) serve to create uncertainty in international relations, since it might be interpreted as permitting the - in itself logical - defence, that the "organ", when "contravening instructions concerning its activity", and even more so when "exceeding its competence according to internal law", did not act as an "organ" of the State. He therefore proposes to follow the suggestion of Chile as to the wording of article 10. This would also be in line with the proposed combination of article 8 (a) with article 11 (1) (compare paragraph 9 under article 8 supra).

Article 11. Conduct of persons not acting on behalf of the State

1. The conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law.

2. Paragraph 1 is without prejudice to the attribution to the State of any other conduct which is related to that of the persons or groups of persons referred to in that paragraph and which is to be considered as an act of the State by virtue of articles 5 to 10.

(1) The Federal Republic of Germany suggests "that the purview of article 11 be worked into article 8". 23/

(2) The present Special Rapporteur agrees with the substance of this proposal, but would prefer to do it the other way around as proposed above (paragraph 9 under article 8, supra).

Article 12. Conduct of organs of another State

1. The conduct of an organ of a State acting in that capacity which takes place in the territory of another State or in any other territory under its jurisdiction shall not be considered as an act of the latter State under international law.

2. Paragraph 1 is without prejudice to the attribution to a State of any other conduct which is related to that referred to in that paragraph and which is to be considered as an act of that State by virtue of articles 5 to 10.

and

Article 13. Conduct of organs of an international organization

The conduct of an organ of an international organization acting in that capacity shall not be considered as an act of a State under international law by reason only of the fact that such conduct has taken place in the territory of that State or in any other territory under its jurisdiction.

(1) The Federal Republic of Germany considers that "the legal content of articles 12 and 13 is ... something that can be taken for granted and could without harm be omitted from the draft". 24/

23/ Yearbook ... 1981, vol. II (Part One), p. 74.

24/ Ibid.

(2) The present Special Rapporteur is of the opinion that the articles should be retained. In time of peace, an organ of a State, acting in that capacity in the territory of another State, can only do so with the consent of that other State. It seems useful to provide, even only implicitly, that such consent in itself does not make that other Stage responsible for the conduct of such organ. Similar considerations apply in favour of retaining article 13.

(3) Austria points out, in relation to article 13, that "It is doubtful, whether the Commission's decision not to include in this article a second paragraph, corresponding to the provisions in articles 11, 12 and 14, meets the requirements of the case". 25/

(4) The present Special Rapporteur is of the opinion that the reasons advanced by the Commission in paragraph (13) of its commentary on article 13 for not inserting a clause corresponding to paragraph 2 of articles 11, 12 and 14 are not particularly convincing. While, as stated above, the mere consent of the territorial State to the activities of organs of international organizations within its territory does not make that State responsible for the conduct of such organizations, the situation is not fundamentally different from that envisaged in article 12. The Commission itself recognizes, in the paragraph just cited, that "if the territorial State associated itself with the perpetration, by an organ of the organization, of an action constituting an internationally wrongful act, or if it failed to react in the appropriate manner to such an action, it might incur international responsibility by reason of its own conduct which, by virtue of draft articles 5 to 10, would always be attributable to it". Indeed, international organizations having generally less "power" than a State, it would seem in fact more likely that, if that international organization commits an internationally wrongful act at all, it has had or might get some form of "support" from the territorial State.

(5) Nor does it seem to the present Special Rapporteur that the formulation of the clauses "would pose special problems going beyond the scope of the present draft". After all, the clause is rather in the nature of a reminder that, while on the one hand the mere presence of the organ of a foreign State or of an international organization within the territory of a State does not in itself make the latter State responsible, on the other hand the factual situation might well involve also an internationally wrongful act of that territorial State.

(6) It is therefore proposed to add to article 13 a second paragraph worded in the same way as article 12 (2).

25/ Yearbook ... 1980, vol. II (Part One), p. 92.

Article 14. Conduct of organs of an insurrectional movement

1. The conduct of an organ of an insurrectional movement which is established in the territory of a State or in any other territory under its administration shall not be considered as an act of that State under international law.

2. Paragraph 1 is without prejudice to the attribution to a State of any other conduct which is related to that of the organ of the insurrectional movement and which is to be considered as an act of that State by virtue of articles 5 to 10.

3. Similarly, paragraph 1 is without prejudice to the attribution of the conduct of the organ of the insurrectional movement to that movement in any case in which such attribution may be made under international law.

and

Article 15. Attribution to the State of the act of an insurrectional movement which becomes the new government of a State or which results in the formation of a new State

1. The action of an insurrectional movement which becomes the new government of a State shall be considered as an act of that State. However, such attribution shall be without prejudice to the attribution to that State of conduct which would have been previously considered as an act of the State by virtue of articles 5 to 10.

2. The act of an insurrectional movement whose action results in the formation of a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered as an act of the new State.

(1) Austria expresses the opinion that "it is not clear whether article 14, paragraph 1, includes the case of an insurrectional movement, recognized by foreign States as a local de facto government, which in the end does not establish itself in any of the modes covered by article 15 but is defeated by the central authorities". 26/

(2) In the opinion of the present Special Rapporteur, the articles and the commentaries are sufficiently clear on this point: whether the insurrectional movement is recognized by foreign States or not, is irrelevant for the non-attributability of its conduct to the State within the territory of which it is established.

26/ Ibid.

(3) Czechoslovakia deems it appropriate "that the Commission pay due attention to the definition" of the term "insurrectional movement" and refers in this respect to the 1977 Additional Protocols to the Geneva Conventions of 12 August 1949. 27/

(4) The present Special Rapporteur recalls that the Commission, in paragraph (29) of the commentary on article 14 and paragraph (22) of the commentary on article 15, clearly intended the term "insurrectional movement" to be a neutral term and to cover also national liberation movements. For the purposes of the present articles 14 and 15 it does not seem necessary to distinguish the two types of movements. However, if the Commission, in the final stage, should wish to insert in the total set of articles a definition of terms (including the term "insurrectional movement") it would seem proper in that context to mention specifically the national liberation movements.

Article 17. Irrelevance of the origin of the international obligation breached

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act regardless of the origin, whether customary, conventional or other, of that obligation.

2. The origin of the international obligation breached by a State does not affect the international responsibility arising from the internationally wrongful act of that State.

(1) The Federal Republic of Germany suggests that consideration should be given to the possibility of incorporating in article 17 (1) the concept embodied in article 19 (1), by adding the words "and regardless of the subject-matter of the obligation breached". 28/

(2) The present Special Rapporteur would be inclined to accept this suggestion in itself, but feels that a decision to this effect could only be taken after the second reading of article 19.

27/ Yearbook ... 1981, vol. II (Part One), p. 73.

28/ Ibid., pp. 74-75.