UNITED NATIONS

GENERAL ASSEMBLY

Distr.
GENERAL

A/CN.4/354/Add.2
5 May 1982

Original: ENGLISH

INTERNATIONAL LAW COMMISSION
Thirty-fourth session
Geneva (3 May-23 July 1982)

THIRD REPORT ON THE CONTENT, FORMS AND DEGREES OF STATE RESPONSIBILITY

(PART TWO OF THE DRAFT ARTICLES)

by

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Addendum

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CE.82-62481

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CHAPTER V (continued)

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

114. The other field of relationship may be covered by the same treaty (in the sense of the same "instrument") or by a group of rules of international law flowing from another "source". 120/

115. On the other hand, separate treaty instruments dealing with the relationship between the same States may deal with the same field of relationship. 121/ In this connection, it may be recalled that a field of relationship may cover matters which are not dealt with in terms of "real" rights and obligations. 122/

116. In any case, where different fields of relationship, covered by different sets of rules of international law, are involved, a cumulative application of such sets of rules may result in the precluding of countermeasures outside the field of relationship involved in the breach, either temporarily or permanently.

117. Up till now, no specific distinction was made between bilateral and "regional" treaties, though some of the types of treaties mentioned before are, in fact, mostly multilateral or "regional". Actually, the mere fact that an international obligation

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

121/ Compare Preliminary Report A/CN.4/330 and Corr.1 and 2, paras. 60 and 61.

122/ Compare para. 59 above. Particularly in economic matters the interaction between economic facts may lead to treaty clauses which, while not creating per se rights and obligations in respect to conduct, nevertheless make such conduct relevant for the application of the treaty, sometimes in the form of special procedures in case of such conduct for example the GATT "nullification or impairment" and ICAO "hardship" provisions mentioned in para. 92 of addendum 1 to the present report. One might contrast such "good faith" expansions of the field of relationship, or "object and purpose", with the "contraction" of the field of relationship, implicit in the possibility of making reservations, and other distinctions between provisions essential and those not essential for the "object and purpose" of a treaty or legal relationship.

is imposed on a State by a multilateral treaty does not necessarily alter the bilateral character of the breach/injury relationship between States. 123/ Nevertheless, the treaty as an instrument remains a multilateral one, and, consequently, the Vienna Convention on the Law of Treaties treats the invoking of the invalidity, the termination, the withdrawal from and the suspension of the operation of a treaty as a matter which concerns all other parties to that treaty (Article 65 of the Vienna Convention). But this is rather a matter of procedure. As to substance, Article 60 of the Vienna Convention rather seems to underline the bilateral character of the breach/injury relationship by providing for two exceptions and those only in respect of a material breach of a multilateral treaty by one of the parties. 124/

118. In this connection it should be recalled that (see above paras. 83 et seq) that a "derived" or "constructive" injury may be "organized" in the multilateral treaty itself. This may particularly be the case in "regional" treaties, where the bilateral relationships between the parties are, in fact, so closely interrelated that the legal consequence thereof is in the treaty itself. Actually, Art. 60 of the Vienna Convention seems to approach this situation from three different angles. First, by limiting itself to "material" breaches it presupposes an "object and purpose" of the multilateral treaty as such (para. 3 under b). Second, in para. 2 under c, it refers to treaties "of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further peformance of its obligations under the treaty". And third, in para. (2) under (a) it presupposes a collective interest of all the parties by permitting the parties, other than the defaulting State, to terminate the treaty or suspend its operation in whole or in part "by unanimous agreement", i.e. by a collective decision. 125/

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

124/ See addendum 1 to the present report, paras. 77 et seq. Obviously the Vienna Convention only deals with the legal consequences of a breach in respect of operations relating to the treaty, and not with "State responsibility" (Art. 73). It does not purport to exclude other responses in other cases of breach even by other States than the directly injured State. Nevertheless, one may well ask why the suspension of the operation of a treaty in whole or in part by a party - particularly under the circumstances described in Art. 65 (5) of the Vienna Convention! - should be so limited, if more or less the same effect could be produced by taking a "counter-measure" under the rules of State responsibility! Indeed the whole tenor of the Vienna Convention provisions on the legal consequences of a breach of a treaty obligation seems at least to suggest a legal limitation of such countermeasures in particular as regards States not "specially affected" by the breach.

125/ A similar idea of cohesion of bilateral relationships is expressed inter alia in art. 20 (2) and in various articles of the Vienna Convention on succession of States in respect of treaties; see para. 81 of Add.1 to the present report, Note. 73.

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

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

121. A particular case of the shift from one subsystem to another is, it seems, the qualification of an internationally wrongful act as an "international crime". 126/ The notion of "international crime" seems to imply that (a) the wrongful act thus qualified can not be "made good" by any substitute performance (first parameter), and (b) it causes "injury" to all States (second parameter). Indeed, the notion itself is a typical deviation from the traditional approach of "bilateralism" and "reparation" in international affairs.

122. On the other hand, at least in the first instance, the word "international crime" evokes some general principles of municipal law as to penal consequences of conduct, such as the principle that conduct can only be qualified as criminal by previous legislation determining also the penalty, and the principle that a person is not guilty unless his guilt is established through the appropriate procedures. Of course such principles, being principles of municipal law, are not simply transferable to international law! But the same goes for the notion of "crime" itself. 127/

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

124. One such specific legal consequence could be an obligation of all States to "contribute" to a situation in which the author State of an "international crime" could be "compelled" to stop the breach. As a minimum such contribution would include refraining from a support a posteriori of the conduct constituting an "international crime". A second degree of contribution would be a support of countermeasures taken by another State or States and a third degree would be the taking of countermeasures against the author State.

126/ Of course the text of article 19 of Part One of the draft is not now under discussion; the second reading may lead to its revision in particular in the light of decisions taken in respect of Parts Two and Three.

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

125. In respect of all the three degrees of contribution further distinctions can be made. Thus, the support a posteriori, from which each State should refrain may refer to the conduct, constituting the "international crime" itself, or to the result of such conduct 128/ or even to the author State itself in other fields of relationship. Furthermore, support can be given, and countermeasures taken, by a State within its own jurisdiction, in a field of international legal relationship with the author State, or even within the jurisdiction of the author State itself. Finally, the support by State A of countermeasures taken by another State (or States) B against author State C may range from accepting that State B's measures include devices to prevent evasion through State A, to taking parallel measures in order to prevent substitution and even to the taking of measures amounting to aid or assistance to State B under art. 27 of Part One of the draft articles.

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

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

128. Thirdly, in modern times there is a strong tendency towards "regionalization", the formation of groupings of States with common interests and opinions. This generally results in particular legal relationships between the member States of such groupings. In some cases the grouping even entails legal consequences in the relationship with States outside the grouping, but the extent to which this is the case under general rules of international law is, as yet, far from clear. Again the question arises whether this phenomenon should be taken into account in our draft articles (see also para. 134 below).

128/ See e.g. the Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. A.Res.2625(XXV) of 24 October 1970: "No territorial acquisition resulting from the threat or use of force shall be recognized as legal".

129. Article 19, para. 2, of Part One of our draft articles presupposes the existence of international obligations "so essential for the protection of fundamental interests of the international community that their breach is recognized as a crime by that community as a whole". Presumably such "recognition" precedes the breach. Ideally it would be for that international community as a whole to determine the legal consequences of a breach, including the procedures according to which the existence of a breach is established and the corresponding obligations of all other States are determined. Actually, to the extent that the situation created by the commitment of an "international crime" also could give rise to action of United Nations organs in application of the relevant provisions of the United Nations Charter, the legal consequences of the "international crime" and the implementation of those consequences are already provided for. Any improvement of that "subsystem" of international law would seem beyond the task of our Commission. 129/

130. Article 19 of Part One of our draft articles also seems to presume that an "international crime" in the sense of para. 2 of that article may not be at the same time "a serious breach of an international obligation of essential importance for the maintenance of international peace and security" in the sense of para. 3 under (a). The question arises whether nevertheless "the international community as a whole", in "recognizing" particular conduct "as a crime" may at the same time "declare" applicable, and indeed, unless a contrary intention is clearly established, may be considered to have declared applicable the procedures of collective decision provided for in the United Nations Charter. 130/ The present Special Rapporteur is inclined to give a positive answer to this question.

131. Quite apart from the obligation of every State, as referred to in para. 124 above, the question arises as to the right of every State to respond to an "international crime" on its own initiative. Apart from the situation of concursus - dealt with in para. 127 above - the answer would seem negative in principle. 131/ A single State cannot take upon itself the role of "policeman of the international community". However, there may be room for an exception to this principle.

132. In this connection it would seem that some analogies may be drawn with the situation dealt with in the International Court of Justice's Advisory Opinion on Legal Consequences for States of the continued Presence of South Africa in Namibia. 132/ Indeed in this opinion the Court seems to make a distinction between legal consequences flowing from the mere fact of an international wrongful act having been committed and "... acts permitted or allowed - what measures are available and practicable, which of them should be selected, what scope they should be given and by whom they should be applied ...". 133/ Though this case turned on the scope of an

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129/ In particular in view of the existence of a Special Committee on the Charter of the United Nations and on the strengthening of the role of the Organization. See United Nations document A/AC.182/L.31 of 2 February 1982.

130/ Such a course of action would not, in the opinion of the present Special Rapporteur, require any formal amendment of the United Nations Charter; see 6 Netherlands International Law Review, pp. 252 and 253 (1959). In all its decisions relating to Namibia the International Court of Justice has accepted the competence of the United Nations bodies to deal with the implementation of the mandate agreements.

131/ This is without prejudice to the "countermeasures" referred to in para. 126 above.

132/ As stated in the Preliminary Report supra note 121, paras. 41, 55 to 62, and 69 to 74 - the case of Namibia is a special one in view of the particular legal status of the territory.

133/ See ICJ Reports, 1971, p. 55. It should be recalled that in its earlier Judgment of 21 December 1962 the Court had decided that Ethiopia and Liberia did not have a "separate self-contained" right to demand performance of the obligations of

obligation of non-recognition of the result of an internationally wrongful act - compare para. 125 supra - and also dealt with "political" measures in the sense of para. 126 supra, the distinction between the degrees of countermeasures may perhaps be applied also to the question of the right of a State or States to respond to an "international crime", in the absence of a collective decision to that effect of the competent United Nations body. One could then draw the conclusion that measures amounting to the withdrawal of support a posteriori and termination or suspension of treaty relationships with the author State are allowed, at least pending a decision of the competent organ of the United Nations.

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

134. One could imagine also another additional safeguard against precipitous action of a State in response to an alleged "international crime" of another State. Such other safeguard would be that the (still limited!) countermeasures could only be taken by a grouping of States collectively. Obviously, the question immediately arises how to qualify such grouping and the "collective" character of the decision! In itself the idea is not quite without precedent, apart from the fact that even an "international crime" may "affect" some parts of the international community more than other parts. 134/ Actually both the notion of collective self-defence and the provision of art. 60, para. 2 (a) of the Vienna Convention on the Law of Treaties seem to point in the direction of "regionalization" (see para. 128 supra). For the moment, the present Special Rapporteur feels that this aspect should only be analysed further if the Commission so decides, particularly since the scope and terms of art. 19 are still to be discussed in second reading. 135/

134/ At the time the Charter of the United Nations was adopted, a reasoning of this kind may have inspired the "transitional" security arrangements of Articles 106 and 107 juncto Article 53.

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

CHAPTER VI

DRAFT ARTICLES

135. It would seem a priori impossible to translate the analysis given in the foregoing chapters into an exhaustive simple set of articles of Parts Two and Three of the draft articles on State responsibility. Indeed that analysis is predicated upon the concept of a continuous process of interaction, which defies a "crystallization" into the fixed and separate forms of source/obligation/breach/consequence/implementation. 136/ In a sense this is recognized by the previous obiter dicta of our Commission, referred to in paragraph 6 above. This does not mean that no articles can be drafted, but only that such articles must be flexible and must contain terms which leave room for a variety of applications. Even then some "Gordian knots" have to be cut, if only in the choice between what is, and what is not "registered" in those articles.

136. As explained in Chapter II, paragraph 2 of the addendum 1 to the present report, Article 1 could read as follows:

Article 1:

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

Commentary:

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

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136/ Actually, while the rules of "State responsibility" are concentrated on conduct which is a "breach", similar questions arise with respect to conduct which is in "conformity" with rules of international law, particularly rules of procedure and rules of statutes. The various degrees of validity/invalidity of a legal act, and the various degrees of acquisition/non-acquisition or loss of a legal status are then the legal consequences involved in this type of questions. We have noted analogies before. (Compare also Preliminary Report, para. 39).

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

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

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

137. Article 2 could read as follows:

Article 2:

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

Commentary:

See commentary on article 1, paragraph (1).

138. As explained in Chapter II, paragraph 11, above Article 3 could read as follows:

Article 3:

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

Commentary:

(1) See commentary on article 1, paragraph (3).

(2) Ideally, States and other subject of international law, in making a rule of international law, establishing an obligation, should, at the same time, envisage the possibility that a State would not act in conformity with what is required of it by that obligation, and prescribe the legal consequences of such a situation. In actual fact this very often does not happen. Apart from the reason that one is hesitant "to make a last will and testament for a new-born baby", States often consider, at the time of stipulating obligations, that a non-performance of such obligations may create a totally new international situation, the consequences of which they are not willing to describe at that time; governments generally do not like to answer hypothetical questions! Nevertheless there exist rules of international law, in particular conventional rules, which do address the question, often in terms of procedures relating to the "implementation" of the treaty.

(3) Such rules may also be adopted by States in a later stage and then refer either to specific "primary" obligations stipulated in an earlier treaty, or to obligations generally or a category or categories of obligations. A typical example are treaties relating to dispute settlement. Such treaties may even contain provisions relevant for the determination of the substantive (new) obligations and (new) rights entailed by an internationally wrongful act of a State. 137/

(4) In a sense, rules of international law establishing a "primary" obligation and prescribing at the same time the legal consequences of a breach of such an obligation, may be compared with the treaties, referred to in article 33 (2) under (b) of Part One of the draft articles, inasmuch as they both envisage "circumstances" beyond the facts directly addressed in the primary obligation.

(5) Article 3 has the effect of giving the special articles of Part Two the character of rules which apply to the legal consequences of an internationally wrongful act only, unless otherwise provided for. Actually the special provisions are only presumptions as regards the intention of States which establish or accept rights and obligations between them. This not only applies to matters as referred to in paragraphs (1) and (2) of the commentary on article 1 and the matter of "implementation" but also to the question which State or States are considered to be "injured" by a breach of an obligation.

137/ Compare Article 36 (2) under (a) and Article 41 of the Statute of the ICJ; compare also Second Report, A/CN.4/344, paras. 41-43.

139. Article 4 could read as follows (see para. 95 of Addendum 1 above):

Article 4:

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

Commentary

(1) One of the more important elements in the progressive development of international law is the recognition of the existence of "peremptory norms of general international law". The legal consequences of such norms, i.e. of conduct of States in breach of (or in conformity with) such norms, may take different forms. Thus, under article 53 of the Vienna Convention on the Law of Treaties, States cannot conclude a valid treaty (i.e. a treaty having "legal force"), 138/ if its provisions provide for conduct contrary to a peremptory norm of general international law. Article 71 (1) deals with the legal relationship between the States having in fact concluded such a treaty; it appears from that article (in conjunction with article 69 (2)) that the treaty still has some legal effects. The effect of a new peremptory norm on existing treaties is treated somewhat differently in article 71 (2), in view of the presumably non-retroactive effect of the peremptory norm. In a different context of article 18 (2) of Part One of the draft articles on State responsibility, some "retroactive effect" is given to the peremptory norm, but only to the extent such norm makes an act of a State "compulsory". In the still different context of article 33 of the draft articles the obligation arising out of a peremptory norm is made resistant against state of necessity as a ground for precluding the wrongfulness of an act of a State.

(2) The present article deals with still another context, namely the context of article 1. It states that no "derogation" from a peremptory norm is permitted even as a legal consequence of an internationally wrongful act. Obviously, one cannot exclude that the same peremptory norm or a later one permits such "derogation", particularly as a legal consequence of conduct of a State which is itself incompatible with a peremptory norm. But this would still be an exception to be provided for by a peremptory norm itself.

138/ Article 69 (1); see also article 44 (5).

140. Article 5 could read as follows (see para. 94 of Add.1 to this report).

Article 5:

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

Commentary:

(1) Article 103 of the United Nations Charter stipulates that "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

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

(3) In this connection due account should be taken of the Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 139/ and the Definitions of Aggression. 140/

141. Article 6 could read as follows (see paras. 121 to 134 above):

Article 6:

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

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

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

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

139/ General Assembly resolution 2625 (XXV).

140/ General Assembly resolution 3314 (XXIX).

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

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

Commentary:

(1) Draft article 19 of Part One of the draft articles stipulates the possibility of internationally wrongful acts "which result from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole".

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

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

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

(5) The definition of "international crime" in article 19, paragraph 3 of the draft articles implies that the international community as a whole is "injured" by such wrongful act. It may therefore be presumed that the organized international community, i.e. the United Nations Organization, has a role to play in determining the special legal consequences entailed by such act, even if the maintenance of international peace

and security is not considered to be involved. On the other hand, the notion of a right of individual "self-defence", recognized in Article 51 of the United Nations Charter, cannot be held to be directly applicable.

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

(7) Subparagraph (a) stipulates the obligation not to recognize as legal the situation created by the international crime. The formula is inspired by the rule, embodied in the 1970 Declaration of Principles of International Law, which states that: "no territorial acquisition resulting from the threat or use of force shall be recognized as legal". Obviously, international crimes other than "a serious breach of the prohibition of aggression" may not create a situation in which the author State purports to exercise sovereign rights over a given area. Nevertheless one might well imagine that an international crime creates a legal situation under the municipal law of the author State, which as such could be recognized by another State within that other State's jurisdiction, possibly by virtue of the application of a treaty between the author State and the other State, which deals in general terms with legal co-operation between the two States.

(8) In this connection it should be noted that within the context of non-recognition of the continued presence of South Africa in Namibia the ICJ (in paragraph 125 of its Advisory Opinion) states that "... the non-recognition of South Africa's administration of the territory should not result in depriving the people of Namibia of any advantage derived from international co-operation". It would not seem that this statement should be construed as an exception to the duty of non-recognition, but rather as a reminder of the fact that - like any other right or obligation! - the obligation not to recognize as legal should not be interpreted "blindly" but in its context and in the light of its object and purpose as a countermeasure against the international crime - i.e. an act of a State - itself.

(9) Subparagraph (b) is necessarily drafted in rather vague terms. Its formulation is inspired by, on the one hand, article 27 of Part One of the draft articles as adopted in first reading by the Commission, and, on the other hand, by article 71, in fine, of the Vienna Convention on the Law of Treaties; both articles, of course, deal with a context different from the present one.

(10) While subparagraph (a) deals with the "result" of the international crime - the situation created by such crime - subparagraph (b) refers to the "author" of the crime. It prohibits international co-operation with the author State to the extent that such co-operation helps the author State to maintain the situation created by the crime. This is much broader than aid or assistance rendered for the commission of an

internationally wrongful act (art. 27 of Part One) which in its turn, of course, includes aid or assistance rendered for the continuation of the international crime. On the other hand it clearly does not cover international co-operation with the author State in fields which have nothing to do with the international crime or the situation created thereby. Obviously a State, other than the author State, may wish to avoid any type of international co-operation with the author State, and may do so without infringing any legal obligation which is incumbent upon it. But the present article deals with an obligation not to render aid and assistance, an obligation which, under paragraph 3 of the article would prevail over other obligations.

(11) In this connection it is interesting to note that the ICJ in its Advisory Opinion mentioned in paragraph 8 of this commentary, in respect of the application of existing bilateral treaties with South Africa stipulates a duty to refrain from such application only to the extent that it "involve(s) active Governmental co-operation" and, as regards the government entering into economic and other forms of relationships or dealings prohibits only such transactions and dealings "which may entrench its authority over the territory".

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

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

(14) As already indicated in paragraph (5) of this commentary it may be presumed that the international community as a whole, in "recognizing" as a crime the breach by a State of certain international obligations, at the same time accepts a role of the organized international community, i.e. of the United Nations system, in the further

stages of determining the legal consequences of such a breach and of the "implementation" of State responsibility in that case. Actually in all the cases mentioned by way of (possible) examples of "international crime" in article 19, paragraph (3) of Part One, the United Nations system has been involved in some way or another.

(15) The foundation of such role of the United Nations needs not necessarily to be found only in the text of the United Nations Charter itself. Thus, e.g., the ICJ in all its decisions relating to Namibia, accepted a link between the legal relationships created by the mandate system, and the functions and powers of United Nations organs, even though no "succession" of the United Nations organization to the League of Nations (in a sense comparable to a succession of States) had taken place. 141/

(16) The first part of paragraph 2 of the present article ("unless otherwise provided for by an applicable rule of international law ...") underlines the character of a presumptio iuris tantum. Strictly speaking that part is redundant in view of the provisions of draft article 3, of which it is an application. A reminder, however, does not seem amiss here.

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

(18) Paragraph 2, accordingly, refers to a situation in which the "jurisdiction" of the United Nations organs is "of a dual character" and emanates from a combination of Charter provisions with other rules of international law, in casu with the rules referred to in article 19 (2) of Part One of the draft articles. The question arises whether such combination may not require an adaptation of the component element of the combination. Indeed one might argue that normally, if a body of rules of international law is established through one and the same "instrument" the contents of the component parts of that instrument are usually adapted. In combining (a part of) such an instrument with (a part of) another instrument such mutual adaptation is not always guaranteed and may still have to be performed. Thus, e.g., Sir Hersch Lauterpacht in his separate opinion annexed to the ICJ's Advisory Opinion of 7 June 1955, held that "... there is room, as a matter of law, for the modification of the voting procedure

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141/ In this connection, particular reference should be made to the separate opinions of Sir Hersch Lauterpacht annexed to the Advisory Opinion of the ICJ of 7 June 1955 and 1 June 1956. These opinions are based on the notion that the "jurisdiction" of the United Nations organs in this case was a "jurisdiction whose source is of a dual character inasmuch as it emanates both from the Charter and the Mandate". Compare 6th Netherlands International Law Review (1959) pp. 234 et seq. and Ibid (1973) pp. 27 et seq.

of the General Assembly in respect of a jurisdiction whose source is of a dual character ..." but that such modifications should not be "... inconsistent with the fundamental structure of the Organization". 142/ On the other hand the ICJ itself rather seems to consider, in the case of the combination of the Mandate system and the United Nations Charter, that the Charter only provides for a "machinery of implementation", to be applied as such and without adaptation (and, for that matter, without requiring the consent of the mandatory power!). 143/

(19) In view of the "dual character" of the "jurisdiction" of United Nations organs under paragraph 2 it may be argued that the decisions of those organs do not create "obligations under the present Charter" in the sense of article 103 of the Charter. In any case, the obligations directly flowing from paragraph 1 of the present article cannot be qualified as such. On the other hand, the performance of the latter obligations - and the exercise of "rights" implied thereby - may conflict with obligations and rights under other agreements and rules of international law not embodied in agreements, both obligations and rights in the relationships with the State author of the international crime and obligations and rights in the relationships between the other States. Accordingly paragraph 3 of the present draft article provides for a position of the obligations and rights under paragraphs 1 and 2 of the present article, in between in the hierarchy stipulated in article 103 of the United Nations Charter. 144/

CHAPTER VII

ARTICLES TO BE DRAFTED

142. The draft articles, presented in Chapter VI, replace articles 1, 2 and 3 as proposed in the second report. Articles 4 and 5 as proposed in the second report deal with different matters, and are also withdrawn, since their contents should be adapted to the decisions the Commission may take on articles 1 to 6, proposed in the present Report.

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

142/ ICJ Reports 1955, p. 112 et seq., see also ICJ Reports 1956, p. 38 et seq.

143/ Compare also the "autonomy" of dispute settlement procedures, provided for in treaties dealing primarily with substantive matters, which procedures remain applicable also in case the treaty is unilaterally considered terminated. In order not to prejudge this issue the words "mutatis mutandis" have been added in paragraph 2 of the present draft article.

144/ Actually the hierarchy of article 103 is sometimes reflected in exceptions to obligations under other agreements. (Compare e.g. article XXI (c) of the GATT).

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

145. In the reports following the present one, the Special Rapporteur intends to elaborate, in the form of draft articles, the approach set out in the present report, as well as to present draft articles for Part Three, concerning the "implementation" of State responsibility.