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THIRD REPORT ON THE CONTENT, FORMS AND
DEGREES OF STATE RESPONSIBILITY
(PART TWO OF THE DRAFT ARTICLES)

by

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9 p.

INTRODUCTION

1. The present report is the third one dealing with the issues under the topic of State responsibility (part two of the draft articles) submitted by the Special Rapporteur for consideration by the International Law Commission. A first preliminary report 1/ was submitted by the Special Rapporteur in 1980 in the course of the Commission's thirty-second session, while the second report 2/ was submitted by him in the course of the Commission's thirty-third session.
2. The historical development of the consideration of the draft articles on the topic of State responsibility is summarized in the first report. 3/ Thus, under the general plan adopted by the Commission, the origin of international responsibility forms the subject of part one of the draft with respect to which the Commission has completed a first reading of the text of 35 articles which it has provisionally adopted. 4/ The thirty-five draft articles of part one which have been referred to Member States for their comments are concerned with determining on what grounds and under what circumstances a State may be held to have committed an internationally wrongful act, which, as such, is a source of international responsibility.
3. Part two, the subject of the present third report, deals with the contents, forms and degrees of international responsibility, that is to say, with determining the consequences which internationally wrongful acts of a State may have under international law, in different cases (reparative and punitive consequences of an internationally wrongful act, relationships between these two types of consequences, material forms which reparation and sanction may take). Once these two essential tasks are completed, the Commission may decide to add to the draft a part three concerning the "implementation" (mise en oeuvre) of international responsibility and settlement of disputes.
4. By its resolution 36/114, the General Assembly, having considered the report of the International Law Commission on the work of its thirty-third session, recommended, inter alia, that the Commission should "continue its work aimed at the preparation of draft articles on part two of the draft on responsibility of States for internationally wrongful acts, bearing in mind the need for the second reading of the draft articles contained in part one of the draft". 5/

1/ A/CN.4/330 and Corr.1 and 3.

2/ A/CN.4/344 and Corr.1 and 2.

3/ Supra, note 1, paras. 1-9.

4/ Yearbook of the International Law Commission 1980, vol. II (Part Two), pp. 26-61, document A/35/10, chap. III.

5/ See General Assembly resolution 36/114, para. 3 (b).

CHAPTER I

STATUS OF THE WORK ON PART TWO OF THE TOPIC

A. The Special Rapporteur's first report: Identification of the three parameters and analysis of the problem of method of dealing with part two

5. In his first report, 6/ the Special Rapporteur analysed, in a general way, various possible new legal relationships (i.e. new rights and corresponding obligations) arising from an internationally wrongful act of States as determined by part one of the draft and noted a number of circumstances which are, in principle, irrelevant for the application of part one but have relevance in the development of part two. 7/

6. The Special Rapporteur then analysed, in paragraphs 97 to 100 of that preliminary report, the problem of method of dealing with part two, as follows:

"97. In dealing with Part 2 of the draft articles on State responsibility, our Commission is thus faced primarily with a problem of method, which is not only caused by the circumstance just mentioned, but also by the relative paucity of hard legal materials in this field. Indeed, while there are many decisions of international tribunals dealing with damages, there is little on countermeasures of injured States and even less on third States responses. Actually, the more serious the breach of an international obligation, the less likely it is to find an objective legal appraisal of the allowable responses to such a breach. Furthermore, while already in 1961 the then Special Rapporteur, Mr. F. V. Garcia Amador noted in his sixth report on State responsibility that in respect of the duty to make reparation ... the diplomatic and arbitral practice, as also the writings of the authorities thereon, are at present in a state of complete anarchy, 8/ the practice of States in relation to countermeasures is (also) dictated to a large extent by purely political factors.

"98. The problem of method then, in the view of the present Special Rapporteur, is the following. It is relatively easy to formulate a catalogue of possible new legal relationships established by international law as consequences of an internationally wrongful act, and even to arrange this catalogue in a scala of strength. But when one comes to the choice between those consequences, that is, the question of the legal admissibility of one consequence or another, there is no escape from the necessity to draw up a

6/ Supra, note 1.

7/ See first report, supra, note 1, paras. 10-25.

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

scale of values, both as regards the values affected by the breach and as regards the values affected by the response. A mere statement that there should be proportionality between response and breach simply leaves the question fully open. On the other hand, drawing up a scale of values obviously means operating in the field of primary rules, an operation the Commission has, in general, studiously avoided in drafting Part 1 of the draft articles on State responsibility. The main exception to this neutral approach of the Commission is, of course, article 19 of the draft articles: the qualification of some internationally wrongful acts as international crimes. But even there it seems clear that the international crimes, listed as possible examples in paragraph 3 of the draft article, cannot each entail the same new legal relationships (see above para. 67).

"99. A possible way out could be the Commission proceeding by way of approximation. Starting on the one side from a scala of possible responses and on the other side from the general rule of proportionality between the actual breach and the actual response, and recognizing on the one hand that a bilateral treaty, a multilateral treaty or a rule recognized by the international community as a whole may explicitly or implicitly determine the content of proportionality, and, on the other hand, that the seriousness of the situation created by the actual breach may entail moving to a stronger actual response, the Commission could give examples of normal implications of proportionality. Such examples could then deal with the following heads of limitation of possible responses:

"(a) Normal limitations by virtue of the particular protection, given by a rule of international law, to the object of the response;

"(b) Normal limitations by virtue of a linkage, under a rule of international law, between the object of the breach and the object of the response;

"(c) Normal limitations by virtue of the existence of a form of international organization lato sensu, covering the situation, resulting from an actual breach and a possible response thereto.

"100. This approach, it would seem, has the advantage of flexibility. The examples to be given by the Commission would indeed be no more than examples, since it seems impossible to cover all situations which may arise in practice by hard and fast, quasi-automatic rules. Furthermore, they would be examples of normal implications of proportionality. The rapid development of rules of international law in bilateral, regional and world-wide international relations seems to preclude a more abstract approach."

7. The first report then set out three parameters for the possible new legal relationship arising from internationally wrongful acts of a State. The first parameter was the new obligations of a State whose act is internationally wrongful. The second parameter was the new right of the "injured" State, while the third parameter was the position of the "third" State in respect of the situation created by the internationally wrongful act. In drawing up a catalogue of possible

new legal relationships established by a State's wrongfulness, the report discussed: the duty to make reparation "reparations" in its various forms falling within the first parameter, the principle of non-recognition of exceptio non adimpleti contractus and other "countermeasures" covered under the second parameter, and the right, possibly even duty, of a "third" State to take a neutral position as envisaged under the third parameters.

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

9. Taking into account the discussion of the first report in the Commission, 9/ and the comments made on the topic in the Sixth Committee during the thirty-fifth session of the General Assembly, 10/ the Special Rapporteur prepared his second report on the topic, which is briefly analysed below.

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

10. In his second report, 11/ the Special Rapporteur dealt primarily with the first parameter, i.e. the new obligations of the State which is held to have committed an internationally wrongful act entailing its international responsibility (the author State).

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

"CONTENT, FORMS AND DEGREES OF STATE RESPONSIBILITY

"CHAPTER I. GENERAL PRINCIPLES

9/ Yearbook ... 1980, vol. II (Part Two), pp. 62-63, document A/35/10, chap. III, paras. 35-48.

10/ See the topical summary of the discussion held in the Sixth Committee of the General Assembly during its thirti-fifth session, prepared by the Secretariat document (A/CN.4/L.326), paras. 145-154.

11/ Supra, note 2.

"Article 1

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

"Article 2

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

"Article 3

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

**"CHAPTER II. OBLIGATIONS OF THE STATE WHICH HAS COMMITTED
AN INTERNATIONALLY WRONGFUL ACT**

"Article 4

"Without prejudice to the provisions of article 5:

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

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

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

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

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

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

"Article 5

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

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

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

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

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

13. The report then stated the reasons for including the three preliminary rules, articles 1 and 3 of which dealt with the continuing force, notwithstanding the breach, of the primary obligations and rights of the States concerned, 12/ while article 2 refers to possible special, self-contained régimes of legal consequences attached to the non-performance of obligations in a specific field. 12/

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

15. This analysis is then confronted with State practice, judicial and arbitral decisions and doctrine, leading up to the proposed articles 4 and 5. 12/ Article 4, paragraph 1, refers to the new obligations tending towards a belated performance of the original primary obligation (stop the breach stricto sensu; stop the breach lato sensu; and restrictio in integrum stricto sensu). Paragraphs 2 and 3 of article 4 refer to the new obligations tending towards a substitute performance (reparation ex nunc, reparation ex tunc and reparation ex ante).

12/ See para. 11, above.

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

17. In its consideration of the report, the Commission decided to discuss first articles 1 to 3 together. It was suggested, and found generally acceptable, to start part two of the draft articles with an article providing for a link between the draft articles in part one and those to be drafted in part two, in the form of a statement that "an internationally wrongful act of a State gives rise to obligations of that State and to rights of other States in accordance with the following articles".

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

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

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

21. During the discussion on articles 4 and 5 several members expressed a preference for dealing with the new obligations of the author State, arising from its internationally wrongful act, rather in terms of new rights of the injured State, and possibly other States, to demand a certain conduct of the author State after the breach occurred. While in part one, relating to the origin of State responsibility, it was generally irrelevant, towards which State or States the primary obligation existed, this question was essential in dealing with the legal consequences of a breach of such primary obligation. Obviously, such an approach would still make it necessary to spell out which conduct of the author State could be demanded by the injured State, and, possibly, other States. Furthermore, such

an approach could leave open the question whether or not the injured State (or, as the case may be, other States) should first demand the specified conduct of the author State before taking any other measure in response to the breach. In this respect one member expressed the opinion that any legitimate countermeasure could always be taken in advance of any request for restitutio in integrum or for reparation.

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

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

24. Taking into account these views and those expressed in the Sixth Committee during the thirty-sixth session of the General Assembly, 13/ the Special Rapporteur has prepared the present report, re-evaluating the approach to the development of draft articles for part two, contained in the two addenda to the present document. 14/

13/ For the Sixth Committee debate, see the topical summary of the discussion held in the Sixth Committee of the General Assembly during its thirty-sixth session, prepared by the Secretariat; (A/CN.4/L.339), paras. 111-130.

14/ See A/CN.4/354/Add.1-2.