UNITED
NATIONS

A

General Assembly

Distr.
GENERAL

A/CN.4/354/Add.1
12 March 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

Mr. William Riphagen, Special Rapporteur

Addendum

CONTENTS

Chapter		Paragraphs	Page
II.	Revision of the draft articles submitted in the second report	1 - 15	2
III.	The general problem underlying the drafting of part two ..	16 - 64	7
IV.	The catalogue of legal consequences	65 - 91	22
V.	The "link" between a breach of an international obligation and the legal consequences thereof	92 - 100	36

82-06029 0275j (E)

/...

CHAPTER II

REVISION OF THE DRAFT ARTICLES SUBMITTED IN THE SECOND REPORT

1. At the end of the second report (see also para. 11 of Chap. I of the present report) the Special Rapporteur submitted five draft articles. Articles 1 to 3 were intended to deal with the general framework of the three parameters of the legal consequences of an internationally wrongful act. Articles 4 and 5 intended to deal with the first parameter: the new obligations of the State which has committed an internationally wrongful act. After the discussion of those draft articles, the Commission decided to refer them to the Drafting Committee. The Drafting Committee however, for lack of time, did not consider these articles. In the light of the discussions which took place in the Commission, and later on in the Sixth Committee of the General Assembly, the Special Rapporteur now should wish to change his proposals as contained in the second report.

2. First of all it was suggested, during the discussions referred to above, that part two of the draft articles on State responsibility should begin with an article explaining the link between the 35 articles composing part one (as adopted by the Commission in first reading) and part two. The Special Rapporteur agrees with this suggestion. Consequently, it is now proposed that a new article 1 of part two should read as follows:

Article 1

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

3. It is submitted that the question whether this article should have a title and, if so, which title, could perhaps better be decided at a later stage.

4. It is also submitted that the wording of the new article 1 does not necessarily mean that the other articles of part two would give an exhaustive picture of all the legal consequences of any internationally wrongful act of a State. Indeed, in the opinion of the Special Rapporteur, it would seem unwise to commit the Commission at this stage to draw up such an exhaustive catalogue. The conceptual reasons for this opinion are set out in paragraphs 97 to 100 of the preliminary report (see also para. 6 of Chap. I of the present report). To these may be added the practical reason that it may prove to be impossible to reach a measure of consensus on such a complete solution. It may well be that, as in so many other fields of international law, there is a consensus on a number of legal consequences of certain types of internationally wrongful acts of a State, and a consensus on the absence of certain types of legal consequences in certain situations, but that a "grey zone" is left on which opinions differ. If, then, the grey zone is not too large, the "codification" of those points on which consensus exists would still be a meaningful achievement.

5. Obviously, the new article 1, as proposed is not an alternative for article 1 as earlier proposed. Articles 1 to 3 as proposed in the second report, were intended to have a different function.

6. In this connexion it should be recalled that the Commission, already in a relatively early stage of its consideration of the topic of "State responsibility", remarked:

> "The Commission must nevertheless emphasize here and now that it would be absolutely mistaken to believe that contemporary international law contains only one régime of responsibility applicable universally to every type of internationally wrongful act, whether more serious or less serious and whether injurious to the vital interests of the international community as a whole or simply to the interests of a particular one of its members. Having said that, it must quickly be added that this by no means implies - indeed it is very unlikely - that when the Commission considers the question of forms of responsibility and of the determination of the subject or subjects of international law permitted to implement (mettre en oeuvre) the various forms concerned, it will conclude that there is one uniform régime of responsibility for the more serious internationally wrongful cts, on the one hand, and another uniform régime for the remaining wrongful acts, on the other. In point of fact, international wrongs assume a multitude of forms and the consequences they should entail in terms of international responsibility are certainly not reducible to one or two uniform provisions. Moreover, we have seen the extent to which State practice and the authors of legal writings bring out the differences in gravity that exist even among the various internationally wrongful acts which are lumped together under the common label of international crimes. The same must undoubtedly be true of other internationally wrongful acts; the idea that they always entail a single obligation, that of making reparation for the damage caused, and that all they involve is the determination of the amount of such reparation, is simply the expression of a view which has not been adequately thought out." 1/

7. These remarks are, no doubt, substantially correct. But their impact on the task with which the Commission is confronted at present - the drafting of part two - is somewhat staggering and calls for a cautious approach.

8. If there are indeed a multitude of different regimes of State responsibility, and if there is even no "least common denominator" of those régimes, the prospect of drawing up a complete set of articles in part two would seem rather dim. In any case, there is much to be said in favour of postponing the consideration of a set of "framework" articles, as suggested by the present Special Rapporteur in its second report, to the moment the Commission has reached conclusions as to the three parameters of the legal consequences of an internationally wrongful act of a State.

1/ Yearbook of the International Law Commission, 1976, vol. II (Part Two), p. 117, para. 53 also, ibid., para. 54, in particular: "The idea that there is some kind of least common denominator in the régime of international responsibility must be discarded".

9. As a matter of fact, articles 1 to 3 - particularly article 2 - were meant to point out at the outset that there are more than one or two different régimes of responsibility, and that - article 1 and article 3 - in any case an internationally wrongful act of a State does not necessarily make a tabula rasa of its legal relationships with other States as they existed before. Actually such statements, though true, would lead up to a drafting - as indeed suggested in the Commission by Ambassador G. Aldrich - along the following lines:

> "A breach of an international obligation by a State affects the international rights and obligations of that State, of injured States and of third States only as provided in this part." 2/

But this clearly would commit the Commission to draft a complete set of articles for part two. Without giving up the hope of doing just that, the Commission would perhaps prefer not to indicate its ambitions too early.

10. An additional reason for such an attitude might be that - at least in the opinion of the Special Rapporteur - a complete codification of the rules relating to State responsibility is highly unlikely to be workable in practice and thereby acceptable to the States composing the international community without some machinery of dispute settlement being provided for as an integral part of the draft articles. 3/

11. In case, however, the Commission - possibly without prejudice to the place where the articles eventually would appear in the draft - would wish to confirm the earlier decision to let the Drafting Committee consider those articles, the Special Rapporteur would withdraw his original proposal and suggest that the Drafting Committee take as a basis of discussion the wording, orally presented last year by Ambassador G. Aldrich, 4/ to wit:

Article ... (replaces articles 1 and 3 as suggested in the second report)

2/ A/CN.4/SR.1669, p. 4.

3/ Already in para. (36) of its commentary to art. 33 (state of necessity) of part one the Commission remarks: "... that the State invoking the state of necessity is not and should not be the sole judge of the existence of the necessary conditions in the particular case concerned." (Yearbook ..., 1980, vol. II (Part Two), p. 50.) Furthermore, the articles of part one often refer to ius cogens and similar notions, as affecting State responsibility. Would it be likely that States are willing to accept such provisions without some guarantee for impartial dispute settlement? The history of the law of treaties and the United Nations Conference on the Law of Treaties of 1968 and 1969 would seem to point in the direction of a negative answer to this question.

4/ A/CN.4/SR.1669, p. 4.

/...

[Text as in para. 9 above]

Article ... (replaces article 2 as suggested in the second report)

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

12. Turning now to articles 4 and 5 as proposed in the second report, the Special Rapporteur would like first of all to do justice to a remark made both in the Commission and in the Sixth Committee, to the effect that those articles - and, presumably, the title of chapter II - should rather be drafted in the form of what the "injured" State - and, possibly, "third" States - is or are entitled to require from the "author" State of an internationally wrongful act. Indeed, in the articles adopted in first reading by the Commission for part one, reference is often made to conduct (consisting of action or omission) of a State, which is not in conformity with what is required of it by an international obligation. It would seem that everyone agrees that such conduct - i.e. an internationally wrongful act - does not destroy the original obligation, but rather creates a situation in which additional, or at least more specific, obligations are "automatically" added. 5/ But it is surely up to the other State or States to invoke the "new" obligations of the author State. 6/

13. Since, at this stage, the question whether only the directly injured State or also other States may - or possibly, should invoke the "new" obligation of the author State, should not be prejudiced, a "neutral" formulation of the "chapeau" of the article would seem to be the following:

Article ...

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

...

14. Apart from this drafting point, articles 4 and 5 as proposed in the second report, raise the point of substance and of method, already touched upon in

---

5/ Obviously, the original obligation may not be couched in abstract terms, but may require only a specified conduct at a specified time; in such a case, by definition, the absence of that specified conduct at that specified time constitutes not only a breach of that obligation, but actually renders the obligation so to speak obsolete; no belated performance but only substitute performances can be envisaged in such a case. But all this is self-evident, and anyway the bulk of international obligations are formulated in abstract terms.

6/ Although in some cases, the other State or States may not be free not to invoke the new obligation; this however, is a matter of the third parameter.

/...

paragraphs 6 and 7 above. Indeed, if there were no "least common denominator in the régime of international responsibility", this would apply also to the first parameter: the description of the "new obligations" of the author State. 7/

15. This brings us back to our general problem, on which it would seem useful to elaborate, since its solution determines our total method of work in respect of the topic of State responsibility.

7/ Actually, art. 5, as proposed in the second report, deviates from art. 4, in respect of a particular type of "primary" rules, namely those relating to "the treatment to be accorded by a State (within its jurisdiction) to aliens" and, as such, introduces "another" régime of State responsibility.

CHAPTER III

THE GENERAL PROBLEM UNDERLYING THE DRAFTING OF PART TWO

16. In the opinion of the Special Rapporteur international law, as it stands today, is not modelled on one system only, but on a variety of interrelated subsystems, within each of which the so-called "primary rules" and the so-called "secondary rules" are closely intertwined, indeed inseparable.

17. Actually, every single "primary" rule - as an expression of what ought to be - necessarily raises the next question: what should happen if what is, is not in conformity with what ought to be under that primary rule? Since the answer to this question is also framed in terms of "ought to be", this answer raises the same type of "next" question, and so forth. The circuit is finally closed by either accepting the actual set of facts, or by creating - by the exercise of factual power - another set of facts, which may be more or less far removed from the realization of the original "ought to be", more or less "equivalent" to the situation originally envisaged by the "primary" rule.

18. Now, obviously, in the process of creation of a rule of international law - be it through "custom", "treaty", "decisions" of "competent" international institutions, or even judgements of international tribunals - the questions referred to in the foregoing paragraph, are very seldom (fully) looked at, let alone explicitly answered. This does not mean that there are no answers in international law. Sometimes some of the questions are explicitly addressed and answered in respect of particular "primary" rules. In other cases there may be a more or less consistent practice of States and even a practice which is considered as "law". But, since "practice" is made up from conduct in a great variety of actual circumstances, and such conduct is often inspired, or at least influenced, by "political", i.e. ad hoc, considerations, it is awfully hard to draw from it general rules, and even impossible - as the Commission had realized earlier - to draw from it one set of general rules applicable to all "primary" rules. 8/

19. Under those circumstances, there is no escape from a "categorization" of "primary" rules for the purpose of determining the legal consequences of their breach, and from formulating different sets of legal consequences for each category of "primary" rules. And even then, it must be realized that in a given situation more than one subsystem of interlinked "primary" and "secondary" rules may apply. This, then requires a determination of the interrelationship between those subsystems. Thus we will get ever further away from the unitary concept of

---

8/ Of course, our Commission is not bound only to "describe" or "codify" the actual practice of States in so far as it appears to be accepted as "law"; it has also a task of "progressive development" which, of necessity, implies some power to suggest a way "to cut the Gordian knot".

"international obligation" which is the corner-stone of part one of the draft articles. 9/

20. A first attempt to distinguish subsystems of international law may, in the opinion of the Special Rapporteur, be based on the function of the different subsystems. 10/ It would seem that, roughly, one could distinguish (a) rules of international law, the purpose of which is to keep the States apart, from (b) rules, which reflect the idea of a "sharing" between States of a common "substratum", and from (c) rules which organize a parallel exercise of sovereignty in respect of certain international situations.

21. The prime example of category (a) rules is the rule, now recognized as being a rule of universal customary law, which stipulates that "every State shall refrain from the threat or use of force against the territorial integrity or political independence of any other State". Here the sovereignty of one State (in the final analysis exercised through "the threat or use of force") is confronted with the sovereignty (in the form of its "territorial integrity and political independence") of another State, and the resolution of this conflict is found in a conduct-rule of international law. It should be noted that the rule envisages the existence of a particular "intent" on the part of one State, in respect of a particular "effect" on the part of another State. A breach of the international obligation stipulated in this rule, by a State, cannot be distinguished from the violation of a right, implied in this rule, of another State. 11/ There would seem to be no doubt that the legal consequences of a breach of this obligation is a duty to restore completely the status quo ante, including a wiping out of all the consequences of the wrongful act and a providing of guarantees against repetition (first parameter). As to the second and third parameters of the legal consequences, article 34 of the draft articles implies, and the United Nations Charter gives, an answer to some of the relevant legal questions. 12/

9/ Surely, part one, as adopted in first reading, makes itself some distinctions between "categories" of primary rules, and - in its chapter on "circumstances precluding wrongfulness" (the "zero-parameter"; see second report, para. 49, note 36) - recognizes the fact that a given situation may be govered by different and even conflicting rules. At some stage in the second reading of those draft articles the Commission may wish to consider the question whether even part one does sufficiently reflect the diversity of "primary" rules.

10/ Here, as will appear below, we have to take into account the "dimensions" of any subsystem: rules of procedure, of conduct and of status.

11/ The relationship between this obligation and this right is underlined in the words "in their international relations" appearing in Art. 2, para. 4, of the United Nations Charter; of course, which relationships are considered to be "international" is another matter.

12/ As to the ultimate "closing of the circuit", reference must, alas, be made to the last sentence of para. 17 above.

22. It is to be noted in this respect that measures of individual and collective self-defence, as well as enforcement action by the United Nations, must respect the set of rules of international law relating to humanitarian ius in bello, and that a guarantee against repetition may not, in principle, be sought in the permanent annexation of the author State of the internationally wrongful act in question.

23. There are other "primary" rules of international law, which have the same function of keeping the States apart, though perhaps the breach of none of those other primary rules entails all the legal consequences outlined above at least in so far as the second and third parameters are concerned. Nevertheless, some kind of "least common denominator" seems to apply to the régimes of State responsibility in regard to this category of rules.

24. While even the scope of the prohibition of aggression is not entirely clear, 13/ the scope of other primary rules having the same function is even less clear. Actually, it seems that it was not so much the scope of the "primary" rules, but rather considerations concerning the legal consequences of the breach of such rules, which inspired doubts as to the formulation of such "primary" rules.

25. Indeed, while it is easy to recognize that no State has the right to intervene in the affairs of any other State, it is less easy to determine specific obligations deriving thereform, and even more difficult to determine the limits of allowable responses to a breach of such obligations particularly in terms of the second and third parameters. As a matter of fact, one is bound to admit that "intervention" may be less "serious" as to its effects than "aggression", and that measures of "self-help" strictly limited (also in time) to the purpose of terminating ex nunc a factual situation constituting an infringement of a right may not be identifiable with an action directed against the territorial integrity and political independence of another State. 14/ In short, it is more difficult to

---

13/ Compare the Definition of Aggression adopted by the General Assembly, and in particular the various reservations made and interpretations given in the course of its preparation and adoption. For the text of the Definition, see General Assembly resolution 3314 (XXIX) of 14 December 1974 (Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 31 (A/9631), p. 143).

14/ In this connexion it is interesting to note that the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations annexed to General Assembly resolution 2625 (XXV), in the second paragraph of the part on intervention, refers to: "measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind". (Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 28 (A/8028), p. 123.)

strike the balance between conduct on the part of one State and the response to such conduct by another State, when one arrives at situations which are less "serious" than an outright war. 15/

26. While the main difference between "aggression" and "intervention" is that the former implies the exercise of factual or "military" power not only "within" but "over" foreign territory - the most blatant disregard of the sovereignty of another State - there are less serious forms of conduct, also prohibited by rules of universal customary law, the function of which is to keep the States apart. Thus the principle that a State may not "use" the territory of another State for the performance of its government functions. 16/ Here again, there may be no difference between the legal consequences of a breach of the relevant obligations and those of a breach of the obligations mentioned earlier, in so far as the first parameter is concerned; but the admissibility of countermeasures in such a case may be judged differently and the existence of a third parameter of legal consequences - rights, let alone duties, of third States - seems, in principle, excluded. 17/

27. While the rules of universal customary international law mostly have the function of keeping the States apart, 18/ obligations founded on treaties may have quite a different function, and may reflect a notion of sharing a common substratum, or at least a notion of organizing a parallel exercise of sovereignty in respect of certain international situations. 19/

15/ Even the Definition of Aggression referred to above, in its art. 2, contains the proviso that "the Security Council may ... conclude that the determination that an act of aggression has been committed would not be justified in the light of other circumstances including the fact that the acts concerned or their consequences are not of sufficient gravity". Compare also the reference to "gravity" in art. 3, under (f), of the same Definition.

16/ Perhaps one might mention in this connexion also the "hard core" of a State's immunity, as regards the "imperium" of another State, for acts committed within the former's territory. It is to be noted that both in this case, and in the case mentioned in para. 25 above, the rules of international law relate to "jurisdiction" rather than to "sovereignty".

17/ If only because the obligations referred to here may be suspended by the consent of the State, the territory, respectively the "immunity" or "independence" of which is concerned.

18/ Also by making a distinction between States "directly" concerned with a rule and its application, and "third" States.

19/ On the other hand, treaties may also serve to specify in more detail the customary rules of separation of States, e.g., treaties establishing a boundary.

/...

28. Situated in between obligations arising out of universal customary international law and obligations arising out of treaties are the rules of customary law which apply to relationships between States and which are, so to speak, "triggered" or "filled in" by some form of _consent_ between those States. the procedure of consent then creates a _status_ from which rights and obligations between States are derived. A typical example are the rules of customary law relating to _diplomatic intercourse_. The mutual consent to establish diplomatic relations implies the consent of the receiving State to the exercise of some governmental functions by the sending State within the former's territory, as well as privileges and immunities of the diplomatic mission, its personnel and its materiel, and entails corresponding obligations of the sending State. It is significant to recall here that the corpus of rules of diplomatic law is considered by the International Court of Justice to be a "self-contained régime", thus that the breach of an obligation in this field by the sending State can be countered only by what is in essence a partial (declaration of _persona non grata_) or total (breaking off of diplomatic relations) termination or suspension of the relationship, comparable to the _exceptio non adimpleti contractus_ in the law of treaties. 20/

29. The rules of customary international law relating to the _treatment of aliens_ are also often linked with an element of "consent" on the part of the"receiving" State in the form of admission of the alien. 21/ In this field, however, a different function appears. While a _ius communicationis_, in the sense that a State is _obliged_ to admit aliens, does not exist under customary international law, the rules on the _treatment_ of aliens apply irrespective of any formal act of admission. In other words, the mere "presence" of the alien within the "jurisdiction" of another State is considered to give rise to an "international situation" which entails obligations and rights of the States concerned. The recognition that international trade in the larger sense of the word is _grosso modo_ in the interest of all States is at the basis of the rules of customary international law in this field. 22/

30. It would seem, therefore, that even in the realm of universal customary international law there are different sets of obligations of States, fulfilling different functions. It is submitted that this difference in "primary" rules cannot but influence the content of the applicable "secondary" rules.

20/ Actually, in view of the rules applicable in the case of breaking off of diplomatic relations, the qualification "suspension of the relationship" seems more adequate. The "status" character of the régime is also reflected in the obligations of _third_ States.

21/ The "sending" State being presumably the State of nationality of the alien.

22/ A functional approach which also underlies the _particular_ position of merchant ships flying the flag of a foreign State and engaged in navigation; to a lesser extent the same applies to civil aircraft.

/...

31. The differentiation of obligations becomes even more necessary if obligations arising out of treaties are taken into account. 23/ Treaties fulfil a variety of functions. Their "least common denominator" is the fusion of the voluntates of individual States at a particular time into an instrument the content of which thereafter becomes, in principle, independent of each individual voluntas. This procedure, in itself, cannot but influence the relationship between States, and not necessarily only between those States which are "parties" to it.

32. Actually, the Vienna Convention on the Law of Treaties contains several provisions dealing with the legal consequences of conduct of a State, within the framework of the "validity" of the treaty and of the basic principle of pacta sunt servanda, the latter principle forming the link between the law of treaties and the law of State responsibility. 24/

33. As to the various functions of rules laid down in treaties, the same distinctions can be made as were made above in regard of rules of customary international law. Indeed, article 43 of the Vienna Convention on the Law of Treaties presupposes that rules laid down in treaties may well be an elaboration of rules of customary international law. But in any case a treaty always implies some element of "organization", as well as some element of "object and purpose", of the relationship as a whole, established by that treaty. Again, these elements may influence the legal consequence of a breach of an obligation resulting from the treaty. 25/

23/ There are international "instruments" of consensus between two or more States, which do not intend to create obligations and rights, but which may nevertheless entail legal consequences in the relationship between the States involved. Actually, the frequent reference in the Vienna Convention on the Law of Treaties to the legal relevance of what is "otherwise established", together with the various legal consequences attached to what is laid down in the text of a treaty as soon as that text is "adopted", as well as to the "object and purpose" of a treaty even before it is ratified, already suggest a gliding scale of legal "force" of transactions between States, which is not easily reconciled with the simple doctrinal dichotomy between the existence or absence of "true legal obligations". Indeed, how "true" is a legal obligation if there are circumstances precluding the wrongfulness of its breach?

24/ Consequently, the question arises as to the relationship between the two sets of rules; thus, e.g., between the exceptio non adimpleti contractus and a prohibition of reprisals.

25/ Even if the treaty does not itself spell out the legal consequences of such breach. Admittedly, the elements of "organization" and of "object and purpose", separable from rules of conduct contained in the treaty, may be so minimal as to be negligible for the purpose of determining the legal consequences of a breach of those rules of conduct. Furthermore, just like a rule of conduct, in a sense, "fails" if it is not implemented, the elements of "organization" and of "object and purpose" may "fail", and the question arises as to what should happen then; see paras. 17 above and 38 below.

34. The element of "object and purpose" of the treaty is particularly important in the context of "secondary" rules, if that object and purpose includes the creation or recognition of extra-State interests involved in the treaty and its implementation.

35. Such extra-State interests may be of different kinds. Actually, very few treaties are in the nature of a pure barter transaction, a simple do ut des relationship, in which only the respective separate interests of each individual State-party are involved. The very notion of an object and purpose of a treaty as a whole already implies some measure of extra-State interest, if only in the form of an inseparable common interest of the parties. In addition a treaty may envisage interests of "third" States, and even of "entities" other than States, such as individual human persons.

36. On the other hand, the element of "organization" of relationships, inchoate in every treaty, may be more developed in a particular treaty. Typical examples are the provision, in a treaty, of a procedure of dispute settlement as regards the (interpretation and) application of the treaty in concrete circumstances or of procedures for collective elaboration (and interpretation) of the general rights and obligations under the treaty.

37. In this connexion it should also be noted that, increasingly, treaties do not so much address the State as such - i.e. as an indivisible "person" - but rather take into account the relative independence of its elements inter se, by addressing those elements directly, both passively and actively. 26/

38. In short, a treaty may create a subsystem of international law with its own, express or implied "secondary" rules, tailored to its "primary" rules. This does not necessarily mean that the existence of the subsystem excludes permanently the application of any general rules of customary international law relating to the legal consequences of wrongful acts. As already remarked, the subsystem itself as a whole may "fail", in which case a fall-back on another subsystem may be unavoidable. 27/

26/ This is not the same phenomenon as the one referred to at the end of para. 35 above, since a link between the element involved and the State to which it belongs remains essential. Actually, the rules referred to here are more in the nature of rules of conflict of laws; in this respect they are akin to the rules of diplomatic law referred to in para. 28 above.

27/ An example of such fall-back is given by the Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States. Article 27 of this Convention bars the exercise of diplomatic protection; but such diplomatic protection revives if the receiving State does not comply with the award, rendered in its dispute with the foreign investor. For the text, see United Nations, Treaty Series, vol. 575, p. 159.

39. On the other hand, such a subsystem is, in principle, "self-contained" in the sense that it cannot be overruled by situations and considerations belonging to another subsystem. 28/

40. Which conclusions can be drawn from the foregoing analysis? It seems clear that part two of the draft articles on State responsibility cannot exhaustively deal with "the" legal consequences of any and every breach of any and every international obligation. The other extreme solution is to leave the determination of such legal consequences entirely to the judgement of those "bodies" which are charged with the peaceful settlement of international disputes. The latter solution, in the final analysis, leaves the matter to the individual sovereign States, since (a) they choose the means of settlement of disputes, and (b) they have to determine their action if those means of settlement fail. Clearly, then, our Commission has to seek a solution in between those two extremes.

41. Actually, the Commission was faced with a similar problem when it dealt with the law of treaties. Then (1) it singled out a particular type of transaction and (2) took care of the different subsystems created by treaties by saving clauses, such as that embodied in article 5 of the Vienna Convention on the Law of Treaties, 29/ while the Conference added, as an integral part of the Vienna Convention, (3) a general procedure for dispute settlement with respect to "invalidity, termination, withdrawal from or suspension of the operation of a treaty".

42. A general "saving clause" comparable to the one in the Vienna Convention on

---

28/ This might seem in contradiction with what has been said in para. 38 above. As a matter of fact, the interrelationship between the subsystems may be complicated by the fact that a particular set of actual circumstances may be relevant for more than one subsystem. Here the measure of "organization" of the relationship becomes particularly important; if it is not possible to "allocate" the situation to one or the other system, the more organized system prevails until it fails as such.

29/ Other saving clauses are contained, e.g., in arts. 73 and 75, and, of course, in the frequent use of terms such as "except in so far as the treaty may otherwise provide". It may be recalled that the then Special Rapporteur suggested in the Commission a special article dealing with a particular subsystem of international law, namely, "treaties providing for objective régimes". The Commission as a whole did not favour such special clause, considering that the matter could be dealt with within the framework of the articles on treaties and third States. The "State responsibility" aspects of that type of subsystem were, of course, not under discussion then. About those aspects, compare: Klein, Statusverträge im Volkerrecht (1980), pp. 225 et seq. Another saving clause adopted at the time, was more or less "hidden" in the introduction of ius cogens.

the Law of Treaties 30/ was suggested in the second report as article 2. 31/ The reference in that article to any "rule of international law" - and, in the redraft, to "other applicable rules of international law" - is sufficiently wide as to make all other articles of part two no more than rebuttable presumptions as to the legal consequences of internationally wrongful acts. A consequence of such an approach would seem to be that part three should contain a meaningful procedure for dispute settlement as to the lawfulness of the action taken, including the demands presented by a State invoking the legal consequences of a breach of an international obligation by another State as a ground for its action in response to such breach.

43. Just as in the case of the Vienna Convention on the Law of Treaties, the dispute settlement procedure would be limited to a particular legal question, which is only one of the questions to which a particular set of actual facts gives rise. Indeed the procedure would not deal with the question whether there has in fact been a breach of an international obligation in the first place. Such an isolation of one of many legal questions which may be relevant in a given situation surely has its disadvantages and its inherent difficulties of application. Nevertheless, it is a feasible machinery and one which is well known in international practice.

44. The first example is of course the Vienna Convention on the Law of Treaties itself. Obviously, the questions "concerning the application or the interpretation of articles 53 or 64" (ius cogens), as well as those "concerning the application or the interpretation of any of the other articles in Part V of the present Convention" are in fact only incidental to a situation where the implementation of a treaty is in issue. They are "preliminary" or "prejudicial" legal questions, taken out of the context of the legal appreciation of total situation in which they arise.

45. Another example is the separation of the "preliminary" legal question "whether the existing dispute is wholly or partly within the scope of the obligation to go to arbitration" as mentioned in article 1 of the Model Rules on Arbitral Procedure adopted by the Commission in 1958. 32/ Though these "Model Rules" have as yet not been embodied in a convention, they reflect a practice of States. 33/

30/ "Unless otherwise provided for by the treaty". Compare in particular, in the field where the law of treaties and the law of state responsibility meet, arts. 60 (4) of the Vienna Convention.

31/ See para. 11, above.

32/ Yearbook..., 1958, vol. II, pp. 80-88.

33/ See, e.g., the Ambatielos Case, Judgment of 1 July 1952, ICJ Reports 1952, p.28.

46. Sometimes a distinct legal question is put to the International Court of Justice by the States parties to a dispute. Thus in the North Sea Continental Shelf cases between the Federal Republic of Germany and, respectively, Denmark and the Netherlands.

47. In this connexion, reference may also be made to the machinery for dealing with "prejudicial" legal questions, adopted in the treaties establishing the European Communites. 34/ A similar machinery has been suggested for questions relating to the interpretation of rules of international law to be submitted to the International Court of Justice by national courts for an Advisory Opinion. Indeed the "isolation" of one or more legal questions arising in a dispute can just as well be envisaged as the "isolation" of the establishment of the facts of the case in an international procedure of "fact-finding".

48. Obviously, a general machinery for dispute settlement, as envisaged above, should be without prejudice to existing procedures in which the whole situation may be dealt with, in particular to the competence of the Security Council of the United Nations.

49. Within the framework of, on the one side, a general saving clause, and, on the other side, a general dispute settlement-clause, part two could "afford" to be reasonably abstract. But, it is submitted, not to the same extent that the present draft articles of part one are abstract, in the sense of making virtually no distinction at all between the content of the international obligation involved. Some "categorization" of those obligations, some recognition of the difference between possible subsystems of rules of international law remains necessary in order to give to part two a meaningful scope and content.

50. Of course, any subsystem of international law remains "abstract" in the sense that it generally does not take into account the "quantitative" aspects of the facts of a given situation. 35/ This is particularly true for the link between

---

34/ United Nations, Treaty Series, vol. 294, p. 130.

35/ Or, if it does seem to do so, it does so often by using even more abstract - non-legal - terms, which appeal, so to speak, to "les données immédiates de la conscience" (Bergson), such as "serious", "important", "gravity", etc. Of course there are also treaties which do use quantitative terms, directly related to the facts. Thus, e.g., the "agreed understandings" relating to arts. I and II of the ENMOD-treaty, adopted on 10 December 1976 (Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques, General Assembly resolution 31/72) translate some of the terms of the treaty, concerning the effects of conduct into notions of pure fact. But, significantly, there was no agreement on whether factual phenomena not covered by the agreed understanding to art. I were "allowed", and the agreed understanding to art. II is explicitly only "illustrative". In any case the intention of causing "destruction, damage or injury to any other State party" is made an element of the prohibition.

"primary" and "secondary" rules. Accordingly, any such link can never be "automatic". A "wrongful act" may be, in fact, of such negligible importance that it should not entail the "legal consequences" determined by the "secondary" rules. Thus, e.g., the Definition of Aggression presupposes that even an act of aggression as there defined, may be not "of sufficient gravity" to be treated as such.

51. The mirror-image of this "immediate" appreciation of a particular set of factual circumstances is the principle of law called the principle of proportionality, which in a sense may be said to underlie every link between "norm" and "sanction" in a system of law. Here, the principle may be concretized in a rule of "positive" law.

52. It would not seem necessary to refer explicitly in the draft articles of part two to the considerations in paragraphs 50 and 51 above, which apply to all subsystems of international law, provided that the two safeguards - a general saving clause and a general machinery for dispute settlement - are adopted.

53. On the other hand, it may be advisable to give explicit recognition to the fact that a given set of actual circumstances, in other words a factual situation, may be relevant for more than one subsystem, or, to put it inversely, that more than one subsystem may be applicable to such situation. 36/ In such a case a choice between, or combination of, such subsystems may be unavoidable. 37/

54. In a sense, one might consider the matter of the so-called "aggravating" or "extenuating" circumstances as falling within the scope of this choice between, or combination of, subsystems. However, a note of caution should be entered here. First of all, the terminology itself is derived from municipal law systems and practices and is, as such, prone to evoke false analogies. Actually, many aggravating or extenuating circumstances can be taken care of through the

36/ A "situation", in this sense, may extend in time, in other words: cover a series of facts occurring at different points of time.

37/ Actually such choice, and such combination, are already envisaged in some of the draft articles on circumstances precluding wrongfulness (the "zero-parameter"). Thus, e.g., state of necessity cannot be invoked as a justification for not complying with a rule of ius cogens. Furthermore, even if the circumstances are such that, in the first instance, countermeasures are allowed, or self-defence can be invoked, the measures actually taken should still be "legitimate", i.e. remain within the limits of the applicable rules of international law.

application of the considerations outlined in paragraphs 50 and 51 above. They are either elaborated in the abstract rule of law itself, or "immediately" apparent as a matter of fact. 38/

55. What is meant in paragraph 53 above is a somewhat different phenomenon, already touched upon in paragraphs 19 and 39 and note 28, above, to wit, the concursus of different subsystems. Various types of such concursus can be distinguished. First, the conduct of a State, which is not in conformity with what is required of it by an international obligation of that State, may at the same time be not in conformity with what is required by another, "parallel", obligation. In particular, treaty rights and obligations between States may well be created in order to specify, in per se rules, what under particular circumstances could be considered to be already covered by a more general rule of customary law. 39/ Similarly, and inversely, treaty rights and obligations may specify, in per se rules, conduct which, again under particular circumstances, would otherwise be clearly not only not prohibited, but maybe even lawful, under the rules of customary international law. If such "parallel" rules belong to different subsystems of international law, a choice between, or combination of, the legal consequences of a breach, provided for in such subsystems, may be necessary, when the particular circumstances are present. 40/

56. Accordingly, it may, e.g., be that the breach of an obligation relating to the treatment of aliens is at the same time an act committed with the intent to cause direct damage to another State and having this effect. On the other hand, it may

---

38/ Compare para. (22) of the commentary to art. 34 of part one of the draft (Yearbook ..., 1980, vol. II (Part Two), p. 60) where the "necessary" character of the action in self-defence, the "proportionality" and the "immediacy" of the reaction, are qualified as "... questions which in practice logic itself will answer and which should be resolved in the context of each particular case", a nice combination between the most abstract and the most concrete.

39/ Article 43 of the Vienna Convention on the Law of Treaties, in a different context, seems, inter alia, to envisage such a situation.

40/ Again, the "zero-parameter" offers an illustration, under art. 35 of part one, a duty to offer compensation for damage - and no more than that - may arise from an act, the wrongfulness of which is precluded by some of the earlier articles. Actually, this preclusion of wrongfulness is entailed by another "primary" ("anti-parallel") rule, with the result that there is a "parallel" rule belonging to a different subsystem (which some would describe as the subsystem of "liability for injurious consequences of acts not prohibited by international law"). But, in the cases referred to in arts. 31, 32 and 33, the preclusion does not arise if the State invoking it has contributed to the occurrence of the particular situation. In such "particular set of circumstances", another subsystem applies, namely, a subsystem of "legal consequences of wrongful acts", even though there still is "force majeure", a "material impossibility", "distress" or "necessity".

be that a breach of an obligation, though not "justified" by a circumstance precluding wrongfulness, is nevertheless committed under circumstances which should preclude other legal consequences than the duty to compensate the damage caused.

57. It is debatable whether _this_ type of _concursus_, and the interplay of "parallel" and "anti-parallel" primary conduct-rules which is at its basis, should be addressed in the draft articles of part two. The problem is _somewhat_ similar to that dealt with in paragraphs 50 to 52 above, and it might be said that here, too - as in the case referred to in paragraph 54 above - the relative weight of the connecting factors with one or the other applicable subsystem is either immediately apparent or - in the case of treaty rules - elaborated in the treaty itself. The two safeguards (para. 52) might then be considered sufficient. 41/

58. There are, however, two _other_ types of _concursus_, where the solution is perhaps less evident. One such type is the _concursus_ of subsystems having a clearly separate and different object and purpose; in fact, dealing with separate and different types of relationship. A typical example is given by the set of rules of international law relating to the respect for human rights in armed conflicts. In _principle_, these rules are applicable even if one of the parties in the armed conflict is an aggressor, and their observance by one party is obligatory even if the other party does not implement its obligations under those rules. This is in conformity with the object and purpose of protection of the human person as such. On the other hand, the restraints those rules put on the methods of warfare of the parties in an armed conflict, and thereby on the possibility of gaining a "military advantage" in a concrete situation, are sometimes recognized in the formulation of those rules _themselves_. In _this_ respect - the equality of opportunity to gain a military advantage - a neutral position of the rules, and the non-reciprocity, are perhaps less self-evident. Actually, the _conventions_ in this field address the problem. But in several other fields the questions arising from this type of _concursus_ are open.

59. Whereas in the example mentioned in the foregoing paragraph the _lex specialis_ character of the relevant rules is generally recognized, there seems to be less consensus on the inverse question, whether the breach of an obligation under a subsystem, which excludes a "reciprocal" breach as a response, also excludes the response of non-fulfilment of an obligation under _another_ subsystem, which is also applicable in the given situation. Thus, e.g., while it is accepted that a member State of the European Economic Community (EEC) cannot suspend its obligations under the EEC Treaty towards another member State on the ground of non-fulfilment of the latter's obligations as a member State, the question arises if the former State can suspend its obligations _outside_ the field of the EEC Treaty. A positive response to

---

41/ Indeed the Commission has already noted, in its commentary on chapter V of part one, that the articles contained in that chapter are not to be considered as an _exhaustive_ list of circumstances precluding wrongfulness (See _Yearbook ..., 1979_, vol. II (Part Two), p. 106).

/...

the general question could be based on two arguments: (1) the object and purpose, which excludes a "reciprocal" breach, is not involved, and (2) since a "reciprocal" breach is excluded there is a particular need to provide for other means of pressure to obtain observance of the other subsystem's object and purpose.

60. Both arguments are, however, not always decisive, because (1) the object and purpose of a subsystem may well include matters which are not covered by <u>strict</u> rights and obligations as provided for in the subsystem, and (2) the second argument may lose its validity if there are other means indicated in the subsystem's organizational provisions. <u>42/</u>

61. Indeed, the organizational provisions of the subsystem may, explicitly or implicitly, exclude some legal consequences of a breach of an international obligation, until the procedures indicated in those organizational provisions are

---

<u>42/</u> Though the treaties establishing the European Communities are of a special kind they also contain obligations which in some form or another can be found in other multilateral (e.g., the GATT) treaties, such as the obligation to refrain from imposing quantitative restrictions and measures having equivalent effect (which are not based on certain specified over-riding non-economic purposes such as public health protection). The "direct effect" of this provision, together with the organizational system under which local courts are required to submit to the European Court any legal questions relating to the interpretation of the treaty, and are bound by the European Court's opinion - in other words: the combination of local remedies and international court decisions - seems to exclude any claim from one member State against the other for damages, if a breach of the obligation occurs, even if the local remedy falls short of a <u>restitutio in integram stricto sensu</u>. Actually one can discern in the European Court's jurisprudence a certain tendency to leave at least some of the legal consequences of its declaratory decision on the interpretation of a treaty provisions or of a community regulation entirely to the determination of the local courts.

Furthermore, there is also room for the opinion that the object and purpose of the treaty excludes even countermeasures in a field of obligations outside the treaty, unless the organizational system fails, e.g., because the local courts do not ask for, or do not follow, the European Court's decisions. Even then, there is a breach of <u>another</u> obligation for which <u>other</u> remedies - be it of a declaratory character only - are provided for in the treaty, which must be exhausted. A comparison can be drawn with the Washington Convention on the settlement of investment disputes, where "diplomatic protection" is excluded pending the settlement procedures between a State and a foreign investor, but "revives" if the <u>award</u> is not complied with by that State.

"exhausted" without avail. 43/ Actually, all legal consequences of an internationally wrongful act presuppose that such an act has been established and it is a matter of organizational provisions to determine how this is brought about. 44/

62. Furthermore, as we have seen, the object and purpose of the subsystem may also exclude some legal consequences of a breach of a "primary" international obligation under that subsystem. Here, too, there is a limit to the exclusion, a fall back into another subsystem, if the original subsystem fails as such. 45/

63. In the foregoing paragraphs several "circumstances" of law and of fact, "precluding" one or more legal consequences to be drawn from an internationally wrongful act, have been considered. We have noted that if, on the one hand, the possibility of explicit exclusion of one or more such legal consequences in the formation of (abstract) rules of international law is admitted, and if, on the other hand, a general international procedure of "control" (in concreto) over the admissibility of the drawing of legal consequences, is adopted, the task of formulating general rules on those legal consequences is facilitated.

64. Nevertheless, it would still seem necessary to draw up a "catalogue" of possible legal consequences in a certain order of "gravity", and to indicate the (principal) "circumstances precluding (one or more) legal consequences" in a general way.

43/ There is a clear analogy with the rule of exhaustion of local remedies in the case of rules concerning the treatment of aliens, particularly if one admits that this rule only applies to the treatment of aliens within the jurisdiction of the State in question. There is also - again - a clear analogy with the "state of necessity" which cannot be invoked if the "primary" rule in question has already taken into account the possibility of such a situation.

44/ In this connexion it seems significant that the European Court on Human Rights does not consider the rule of exhaustion of local remedies to be applicable to a complaint of an individual that the State has not drawn the legal consequences of a finding of the Court that there has been a violation of his rights under the Convention. In such a case even the exhaustion of the international remedy of a (new) complaint to the European Commission on Human Rights is - according to the Court - not required.

45/ Here the "qualitative" (law) and "quantitative" (fact) aspects of the subsystem meet in a general breakdown of the envisaged implementation.

CHAPTER IV

THE CATALOGUE OF LEGAL CONSEQUENCES

65. As to the "catalogue", the present Special Rapporteur, in his first report, distinguished three "parameters", while underlining, in his second report, the interrelationship between those parameters. In the second report an attempt is made to analyse somewhat further the first parameter, i.e. what international law requires of a State in case of a breach of an international obligation by that State.

66. In this connexion another preliminary point should be noted, which was already touched upon in paragraph 12 above. In actual international practice "State responsibility" means that a rule of international law is invoked against State by someone else whose interests are affected in an existing factual situation; in general the "someone else" is another State, and the procedure of invoking is through the diplomatic channel. Now, leaving aside the possible denial of the State, whose responsibility is invoked, that the alleged existing factual situation, in reality exists, 46/ the first reaction of this State will be the requirement of some "proof" that the situation really is relevant for any rule of international law by which it is bound towards the other State invoking its responsibility; 47/ if not, it will invoke its "domestic jurisdiction". In other words, if State responsibility is invoked, immediately the relationship between the international system - or subsystem - and the national system arises. Indeed, while international law is gradually - and slowly, sometimes only "regionally" - building up its own - primarily "functional" - substratum and its own - equally "functional" and usually weak - power structure, one cannot escape a "debunking" of the fiction of "the State" as the sole actor on the international stage. In other words, as regards "the State", one has to differentiate.

67. Actually, the functional substratum of the rules of international law is translated into its personal and territorial prolongations. As to its personal prolongations, this is done in part one of our draft articles by the provisions of chapter II, relating to the "act of the State". 48/ There the main problem is to

---

46/ Or will come about, in the case of a "preventive" diplomatic démarche.

47/ Of course, the same occurs the other way round if the other State is allegedly acting in response to a wrongful act of the first-mentioned State.

48/ An element of "territorial" prolongation appears in art. 28, para. 1. Compare also art. 29 of the Vienna Convention on the Law of Treaties, relating to the territorial scope of treaties. Incidentally, both treaties and doctrine tend in this respect to focus on obligations only ("binding upon ..."); consequently, if a limited territorial scope of a treaty is "established" some complicated questions arise as to the scope of the rights in that case, particularly in respect of nationals of the State concerned, which do rather have a genuine link with the (autonomous) territory of that State which is not covered by the territorial scope of the treaty.

/...

distinguish between "organs of the State" and "a person or group of persons not acting on behalf of the State", and to take into account their possible factual interrelationship through conduct of the one "related to" conduct of the other, possibly by omission. 49/

68. The draft articles just referred to, then, differentiate the State or national system by making a distinction between conduct which can be considered an "act of the State" and conduct which cannot be so considered. Thereby they tend to address only breaches of an international obligation which are "intentional" as regards another State or construed to be so. 50/ Now, obviously, mens rea is not necessarily an element of the breach of an international obligation, quite apart from the general inapplicability of municipal law analogies in international law. The "state of mind" of a person, so important in many fields of municipal law, has to be translated, in international law dealing with "States" into terms of the internal structure of the national system. 51/

69. The foregoing tends to show that, in dealing with the legal consequences of an internationally wrongful act, one cannot fail to take into account the internal structure of the State as well as the character of the "primary" rules of international law involved. 52/ In these terms, the factual circumstances of

---

49/ This topic is touched upon in paras. 20 to 25 of the first report. The Special Rapporteur still holds to his opinion expressed in para. 24 thereof, though he also still feels that there is an uneasy discrepancy between the construction of rights of a State "in the person of its nationals" and the absence of responsibility, i.e. in fact of obligations, of a State in respect of conduct of persons not acting "on behalf of" the State. Of course, the gap is sometimes more or less filled by treaty provisions which "oblige" the State to "ensure" that "persons under their jurisdiction or control" commit, or refrain from committing certain acts. Whether treaty provisions of such a type are really meant to create an obligation, the non-fulfilment of which entails all the possible legal consequences of an internationally wrongful act, is another matter. Perhaps they only reflect a "duty to take care".

50/ Compare the notion of "constructive intent" known to several municipal legal systems in the field of penal law, such "constructive intent" being a state of mind in which a person commits an act not actually directed at a particular consequence or effect, but knowingly accepting that consequence as a foreseeable part of attaining a different purpose.

51/ If in fact there is any. If not, other constructions are necessary: see draft arts. 14, para. 2, and 15, para. 1, second sentence in comparison with art. 14, para. 3, and art. 15, dealing with a situation of "insurrection", in other words, of failure of the national system as such.

52/ In both cases the legal structure is the starting point; compare draft art. 5.

the breach - "intentional", "fortuitous", or "incidental" - have to be appreciated. 53/

70. As a counterpoint it may not be amiss to analyse the first parameter of the legal consequences of an internationally wrongful act in terms related to the internal structure of the State. 54/ In particular, the distinction between belated performance, culminating in restitutio in integrum stricto sensu, and substitute performance, culminating in the giving of guarantees against repetition of the breach, would seem appropriate, as well as the distinctions between the various degrees of either performance. 55/

71. Indeed the distinction between restitutio in integrum stricto sensu, and the application of "effective" local remedies seems essential for the determination of the first parameter of the legal consequences of a breach of an international obligation "concerning the treatment to be accorded to aliens." 56/

53/ There is in principle no State responsibility if the "private" author of the act just "happens" to be a national of the State, or "happens" to be acting within the territory of that State. There may be limits to State responsibility, if the breach is only "incidental", to otherwise lawful conduct of State organs.

54/ After all, also the Vienna Convention on the Law of Treaties (arts. 46) takes into account to some extent the internal structure of a State; this is particularly apparent if one compares that provision to the one laid down in arts. 48.

55/ In this connexion the Special Rapporteur should wish to correct a misunderstanding, which may have been created by the wording of arts. 4, para. 3, as proposed in his second report. Actually, an "apology" is rather in the nature of a compensation for immaterial, or "moral", damage suffered (a satisfaction which may sometimes be replaced by a declaratory judgement of an international tribunal), whereas a "guarantee against repetition" - possibly in the form of punishment of the human person who is the author of the act - obviously is a higher degree of substitute performance.

56/ If it were not considered possible that, in this field, the exhaustion of the available local remedies might entail a "result" or "treatment" which would be "equivalent" to that required by the international obligation, draft arts. 22 would lose its raison d'être. Actually, this draft article presupposes that, in fact, the interest of the alien is separable from the interest of the State in the performance of the "primary" obligation and, consequently, that there may be no direct injury to the foreign State. Accordingly, the applicability of the local remedies rule in cases where there is wrongful interference in international communications seems doubtful indeed (compare the case mentioned in the second paragraph of note 105 on page 31 of the second report, the case, mentioned ibid., note 69 on page 22, and the "prompt release of vessels" under arts. 292 of the draft Convention on the Law of the Sea, document A/CONF.62/L.78 of 28 August 1981).

Those "primary" rules of international law are obviously not meant to "preempt" all rules of municipal law, which are applicable also to aliens, including rules providing for "local remedies". 57/ It stands to reason that the particular character of those "primary" rules is reflected in the legal consequences of a breach of those rules.

72. In this connexion it may be noted - though it does not belong to the topic of "State responsibility" - that the fairly recently perceived interdependences of States in the field of human environment as a "shared resource" has given rise to rules of international law, showing distinctions in the "primary" rules which can be considered as a mirror image of the distinctions in "secondary" rules, just referred to. In general, in this field the rules do not prohibit the use of the national part of such "shared" resource but require in successive degrees (a) the taking into account of the environmental impacts in national regulation of such use; (b) the "non-discrimination" between environmental impacts within and outside the State frontiers in the application of such national regulation, and (c) the equal access of national and foreign interested parties to local "remedies" provided for in such national regulations.

73. In view of the foregoing, it would seem useful to mention separately in the catalogue of legal consequences of an internationally wrongful act the "degrees" of the first parameter, to wit: (a) stop the breach (ex nunc), (b) application of local "remedies" (in principle working ex tunc), and (c) restitutio in integrum stricto sensu (which, in a way, works ex ante). All this is "belated performance" of the original "primary", obligation. In the case of material impossibility belated performance, a "substitute performance" is required in similar "degrees",

---

57/ Compare note 56 above. Compare also General Agreement on Tariffs and Trade (GATT, Basic Instruments and Selected Documents, vol. IV; Sales No. GATT/169-1) prohibiting measures having an effect equivalent to quantitative restrictions (the so-called non-tariff barriers to trade) but making an exception for measures having specified (non-commercial) purposes. Actually, the so-called "minimum standard" - see also second report, para. 89 - is the result of a balancing of public and private interests. In the same way the GATT art. XX balances the interest of free international trade with national non-commercial interests. The "intention" of the national measure involved is decisive here, in order to distinguish between a breach of the obligation and conduct "incidentally" causing the same effect. Furthermore, in respect of all obligations the "fortuitous" material impossibility of performance is a circumstance precluding wrongfulness, but not necessarily precluding the duty to compensate damage caused thereby. It is interesting to note the jurisprudence of the European Communities Court of Justice in respect of the application of arts. 30 and 36 of the EEC treaty, which are the equivalent of GATT provisions mentioned before. The Court tests the effects of the national measure on the protection of the non-commercial interest as well as the effects on intra-community trade and, in essence, applies a functional standard of "unreasonable interference" of the one with the other.

namely: (1) compensation, 58/ (2) reparation (in principle _ex tunc_), and (3) the giving of guarantees against repetition of the breach (_ex ante_). 59/ All these possible legal consequences in the first parameter can be considered as "_self-enforcement_" of the "primary" obligation by the author State.

74. The _second_ parameter deals with what could be called "_national enforcement_" by the injured State or States, while the _third_ parameter deals with "_international enforcement_". 60/ If self-enforcement has fully taken place, the circuit is closed. This does _not_ necessarily mean that, _in the meantime_, no other measures of enforcement may be taken, in particular measures of the second parameter. The same goes for the relationship between the second and third parameter measures. 61/

58/ Including possibly an apology as a compensation for "moral" damage. Compensation is _ex nunc_ and is _not_ necessarily the pecuniary equivalent of the "wiping out _all_ the consequences of the wrongful act".

59/ Which may include punishment of the author.

60/ The distinction between the three parameters is predicated upon the notion of "injured" State. One might perhaps object that this notion tends to reintroduce the element of "damage" in the "definition" of an internationally wrongful act, which the Commission has rejected at an earlier stage. However, "injury" and "damage" are _not_ identical terms. Injury means an infringement of a _right_, and does not necessarily create a damage in the ordinary sense of the word. Actually - in the opinion of the Special Rapporteur - a "right" is a "bundle of potential conduct" and not a "thing" which can be damaged, though many "rights" in this sense are connected with - and sometimes expressed in terms of - "physical" objects.

On the other hand, in determining the legal consequences of a particular wrongful act of a State under international law, it is simply unrealistic to put all other States on the same footing. It is all right to recognize that _some_ conduct of a State, which is a breach of an international obligation, _may_ infringe a "fundamental interest of the international community as a whole", but that does _not_ mean that each individual State (other than the author State which also belongs to that international community) is an "injured" State. It may be that in case of such conduct some other States or even all other States, are entitled, or even obliged, to take measures or to accept burdens resulting from such measures, but this is a matter of international enforcement. The use of the term "obligation" tends to hide the concomitant rights and to blur the distinction between a right to a certain conduct or action which is the _consequence_ of (the breach of) that obligation, and the right which is the _origin_ of the obligation in the sense of being protected by it; those two rights do not necessarily appertain to, and appertain only to, the same subject of international law, under the same conditions.

61/ Actually, the three parameters are - as the word "parameter" already indicates - _inter_related parts of a total system of "closing the circuit" (see para. 17 above). This interrelationship also appears in the possible fallback on another subsystem if the original subsystem as a whole fails. Thus, e.g., while some international obligations in the field of respect for human rights may, in _individual_ cases, be left to self-enforcement by the State concerned, a "gross", "persistent" and "widespread" violation may call for other measures of enforcement.

/...

75. The catalogue of "degrees" of second parameter measures is similarly structured as that of the first parameter measures. One can distinguish here: (1) the mere non-recognition of the situation resulting from the breach; (2) the unilateral termination of the relationship; 62/ (3) the "balancing" countermeasure; 63/ (4) the countermeasure in another field of relationship; (5) measures of "self-help"; and, finally, (6) the ultimate measure of self-defence. 64/

76. As already remarked in paragraph 74 above, the first and second parameter measures may "overlap" in time. Though, generally, the author State must be given an opportunity for self-enforcement, 65/ there is no rule excluding all second parameter measures pending such self-enforcement.

77. Second and third parameter measures also "overlap", be it in a different way. Actually, it is here that we encounter the problem of determining the "injured" State or States. 66/ This is, clearly, primarily a matter of the "primary" rules

---

62/ This applies to the future: see art. 70, para. 1, under (b), of the Vienna Convention on the Law of Treaties. It should be recalled that in the case of suspension of the relationship, there even remains some obligation as regards the future: see in art. 72, para. 2, of the Vienna Convention the obligation to refrain from acts tending to obstruct the resumption of the operation of the treaty, an obligation to some extent comparable to the one, laid down in art. 18 of the Vienna Convention.

63/ In the same field of relationship; such measure goes further than a termination or suspension of the relationship, which does also release the other party or parties from any obligation further to perform the treaty. In this connexion one has to distinguish the balancing countermeasure from the situation, described in art. 65, para. 5, of the Vienna Convention.

64/ Which may comprise measures in order to guarantee a non-repetition of the breach. In the present context it does not seem necessary to enter into the question of the possible legality or illegality, according to the circumstances, of measures designed to prevent an imminent breach, though the prohibition of the "threat" of force in Art. 2 (4) of the United Nations Charter and the fact that art. 2 of the Definition of Aggression considers the "first use of armed force" as constituting only "prima facie evidence of an act of aggression" have some puzzling aspects. But perhaps we are here rather in the field of the "immediate" appreciation, referred to above in para. 50, note 35, and para. 54.

65/ Compare also the general duty of prior notification in art. 65 of the Vienna Convention on the Law of Treaties - to which provision para. 5 of the article does not seem to intend to stipulate a real exception - and art. 45 of the same Convention: a belated consent.

66/ Compare the preliminary report, paras. 62 and following, in particular the last sentence of para. 62.

involved. Indeed, the degree of involvement of States parties in a breach of an international obligation imposed by a multilateral treaty is the problem article 60, paragraph 2, of the Vienna Convention on the Law of Treaties attempts to solve by distinguishing (a) the "defaulting" party; (b) the "party specially affected by the breach", and (c) other parties to the treaty. The provision thereby recognizes that the mere fact that a State is a party to a treaty does not necessarily make it an "injured" State in the case of a breach of an obligation imposed by that treaty. On the other hand the fact that a State is not a (formal) party to a treaty does not necessarily exclude it from being injured by such a breach. 67/

78. The same question arises in respect of rules of international law established by other "sources" than treaties. 68/ In particular, there may well exist "regional" customary law.

79. Furthermore it cannot be a priori excluded that a breach of an international obligation laid down in a bilateral treaty in reality is committed in order to "injure" a third State. 69/

80. Actually, the relationship breach/injury is primarily a factual relationship and the question is under what circumstances this factual relationship is - by law - translated into a legal relationship between author State and injured, i.e. "non-third", State. Traditionally, international law is rather reluctant to

---

67/ Compare preliminary report, para. 96. Compare also the position of "third" States for which a right arises under art. 36 of the Vienna Convention.

68/ Thus, one could regard the "inherent" right of collective self-defence both as a recognition that a State not attacked may have the status of "injured" State, and as a substitute for collective enforcement by the organized community of States as a whole.

69/ This is the inverse of the situation dealt with in draft art. 27 of part one. An example might be a bilateral treaty on trade between States A and B, in which the "origin" of products of the States concerned is determined taking into account the economic relations of either State with a third State or States. A related question in this connexion is whether the actual treatment given by a State A to another State B, in breach of a treaty between those two States, is relevant for the rights of a third State which is a beneficiary State under a most-favoured-nation clause in a treaty it has concluded with State A. In short, relationships between different sets of States may be "interlocked" either only in fact or also in law, just like they may be interlocked in law - through a multilateral treaty - but not in fact.

perform such translation 70/ being essentially "bilateral-minded". 71/ Of course, even traditional international law, in respect of a breach of an international obligation imposed by a rule of customary law, recognized the factual possibility of more than one State being "injured" by one and the same conduct of another State. 72/

81. Modern international law seems to admit increasingly a "constructive injury" to a State, either as a result of its participation in multilateral rule-making, or as a result of the recognition of extra-State interests being protected by the primary rule of international law. 73/ In both cases the "primary" rule of

---

70/ Also in the inverse situation of responsibility of a State in connexion with a wrongful act of another State; compare draft arts. 27 and 28.

71/ Compare the ICJ Judgements in the Nottebohm and Barcelona Traction cases; compare also the much criticized ICJ Judgment in the case of Ethiopia and Liberia vs. Union of South Africa. (For the texts of the judgments in those cases see: Nottebohm case, Judgement, I.C.J. Reports 1953, p. 11, and ibid., 1955, p. 4; Barcelona Traction case, Judgement, I.C.J. Reports 1961, p. 9; ibid., 1964, p. 6, and ibid., 1970, p. 3; South West Africa case, Judgment, I.C.J. Reports 1962, p. 319, and ibid., 1966, p. 6). See also prelimary report, para. 62: link with the principle of "non-intervention in the external affairs of another State"; in the 1981 debate in the Sixth Committee on the ILC report the representative of China also referred to the relevance of this principle in the present context. (A/C.6/36/SR.45, para. 37).

72/ Compare preliminary report, para. 63. The tendency is to be noted to avoid the actual existence of "parallel rights of protection", particularly where it is possible to consider the injury of a State as only "derived" from the injury of another State. The inverse case of joint responsibility of a member State of an international organization and that organization itself seems to be envisaged in the Third United Nations Conference on the Law of the Sea. See document FC/27; the division of competences as to the various stages of jurisdiction in the same field of activities seems to inspire this particular provision.

73/ The factual effect of a breach of an international obligation imposed by a multilateral treaty is underlined by the formula "that a material breach of its provisions by one party radically changes the position of every other party with respect to the further performance of its obligations under the treaty" in art. 60 (2) under c, of the Vienna Convention on the Law of Treaties, a formula similar to that contained in art. 62 (1) under b, of the same Convention, dealing with "fundamental change of circumstances". A similar approach can be found in several provisions of the Vienna Convention on Succession of States in Respect of Treaties: compare "would radically change the conditions for its operation" in arts. 15 (b), 17 (2), 18 (3), 19 (3), 27 (5), 30 (2) (a), etc. But art. 60 (2) under c, of the Convention on the Law of Treaties also refers to the "character" of the treaty itself, and the character of particular treaties is also relevant in some of the provisions, just mentioned, of the Convention on Succession of States, as well as in other provisions of that Convention, such as art. 17 (3).

/...

international law itself has to create the "constructive injury" either explicitly or implicitly. The mere fact of being a party to a multilateral treaty, and the mere mentioning, in the rule, of non-State "entities", do not, in themselves, suffice to create that effect in respect of second parameter rights, let alone third parameter obligations. Indeed there are many multilateral treaties - and rules of customary international law - which create only bilateral legal relationships, be it of uniform content. Thus, e.g., the envisaged new Convention on the Law of the Sea - and the rules of customary international law it may "codify" - does regulate a number of legal relationships between coastal States and flag States, between coastal States inter se and flag States inter se, but this in itself does not mean that any State party to that Convention is "injured" by a breach of an obligation under that Convention, by another coastal State (or flag State) vis-à-vis another flag State (or coastal State). The possibility of "splitting" up a multilateral treaty into a number of bilateral relationships is recognized - be it also limited - in the Vienna Convention on the Law of Treaties' articles on reservations 74/ and on modification of multilateral treaties between certain of the parties only (article 41). No modification inter se is, of course, allowed in respect of rules of ius cogens in view of the extra-State interest involved.

82. On the other hand, to keep to examples drawn from the law of the sea, coastal States' rights and flag States' rights cannot, in principle, be "transferred" to another State nor exercised for the benefit of another State. However, a "regionalization" of such rights may be allowed. 75/

74/ A reservation formulated by State A and accepted by State B, but objected to - in the manner described at the end of art. 20 (4) (b) - by State C entails the result that between State A and State B the treaty applies to the extent modified by the reservation (art. 21 (1)), between State A and State C the treaty provisions apply not at all, and between State B and State C the treaty applies in its unmodified form (art. 21 (2)).

75/ Compare the effect of "co-operative arrangements" on third States in art. 211 (3) of the Draft Convention on the Law of the Sea. Article 199 of the Convention obliges States "in the area affected" to co-operate "in eliminating the effects of pollution and preventing or minimizing the damage" and to "jointly develop and promote contingency plans"; it is not quite clear, however, whether such regional co-operation also has an effect on the application of art. 221 in the sense that the "proportionality" of the measure in relation to the actual or threatened damage is applied for each of the co-operating States individually rather than in respect to the area as a whole and the sum total of the measures taken by each co-operating State. One might well see here an analogy with "collective self-defence".

83. Furthermore, nothing seems to prevent the creation of "solidarity" - in the relationships between the parties to a multilateral treaty - of the other parties vis-à-vis a breach of an obligation under the multilateral treaty by one of them. 76/

84. It would seem that a "constructive injury" may also result from the "object and purpose" of the "primary" rule or set of rules. Actually the introduction of extra-State interests as the object of protection by rules of international law tends towards the recognition of an actio popularis of every State having participated in the creation of such extra-State interest, the other possibilities of enforcement being either only self-enforcement, or enforcement by the "subject" to which this extra-State interest is allocated for this purpose. 77/

76/ A "draft Convention on Investments Abroad" proposed in 1959 and at some time under consideration by the Organisation for European Economic Co-operation - now the Organisation for Economic Co-operation and Development (OECD) - contained an art. IV (see Journal of Public Law, vol. 9,, No. 1, pp. 116 et seq.), the second sentence of which reads as follows: "The Parties shall not recognize or enforce within their territories any measures conflicting with the principles of this Convention and affecting the property of nationals of any of the Parties until reparation is made or secured". Such provision would go further than what is mentioned in the present paragraph, inasmuch as it deals also with measures taken by non-parties to the Convention. Whether this is admissible or not is not the point here. In any case the clause is valid as between the States parties to the Convention and creates a "constructive injury" of the State party whose national is not a victim of the measure. A similar clause - this time limited to the parties to the Convention - is contained in art. VIII of the above draft, which reads: "If a Party against which a judgment or award is given fails to comply with the terms thereof, the other Parties shall be entitled, individually or collectively, to take such measures as are strictly required to give effect to that judgment or award". See also art. 64 of the Washington Convention on the Settlement of Investment Disputes, as interpreted by Broches, in Recueil des Cours de l'Académie de Droit International, 1972, vol. II, pp. 379-380.

77/ This "subject" may be an individual human person - compare the individual complaint to the European Commission on Human Rights under the European Convention on Human Rights - or an international organization. An interesting example of a combination of self-enforcement - including a duty to provide for special local remedies - and a "declaratory" enforcement through an international tribunal is found in the European Convention on State Immunity and its Additional Protocol; under the Convention, a State party is under an international obligation to give effect to a judgement of a foreign national court in a case in which it cannot claim State immunity in respect of the jurisdiction of that Court. See arts. 20 and 21 of the Convention and arts. 1, 4 and 6 of the Protocol (For the texts of the Convention and Protocol, see International Legal Materials, vol. XI, 1972, pp. 470-489).

/...

85. The existence of a "derived" or a "constructive" injury does not necessarily mean that the "injured" State is entitled to take all the measures of the second parameter catalogue. 78/ In particular, self-defence, self-help and countermeasures outside the field of the relationship involved in the breach are probably not allowed (at least not without a collective decision to this effect). In other words, there may be a correlation between the degree of involvement in the injury and the degree of second parameter measure allowed.

86. Obviously, if one and the same conduct of State A is internationally wrongful both in respect of State B and of State C and causes separable injuries to both States, there is no reason why State B and State C would not both be entitled to take all second parameter measures independently, to the extent that such measures are allowed at all. The situation is less clear when State C's injury is a "derived", a "constructive" or an "extra-State" injury. Actually, it is the "primary" rule which determines not only the international obligation, but also the right which it intends to protect, in other words, the injury caused by the breach of this obligation. By the same token it is the "primary" rule which should determine to what extent State C is entitled to national enforcement (second parameter measures) or, for that matter, entitled to claim self-enforcement by the author State, particularly the various types of substitute performance (first parameter). 79/

87. As already remarked, traditional international law is "bilateral minded". This goes for all the three stages of the process of international law. Being a party to a "primary" legal relationship, being a "party" to the breach of an international obligation, and having a persona standi for the purpose of activating an international procedure of "remedy" 80/ are different stages, the first not

---

78/ Indeed - as noted above in para. 80 - the traditional tendency towards "bilateralism" limits even the mere recognition of a "derived" injury.

79/ In this connexion the question arises as to whether State C can claim reparation if State B has settled its claim against State A, possibly by a waiver of that claim. In the Barcelona Traction case this complication was one of the reasons for ICJ not to admit the existence of a "derived" injury to Belgium; in the Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations (I.C.J. Reports, 1949, p. 174), however, the independent claim of the United Nations was considered by ICJ as a corollary of the independence of the United Nations itself and the complication of parallel claims was taken lightly. The difference between the two cases is, of course, that in the latter case there was a concursus of two separable wrongs, flowing from the breach by one and the same conduct of two distinct rules of international law, one analogous to a rule of diplomatic law and the other relating to the treatment of (private) aliens. But then it would perhaps have been more logical to consider the second claim as being only subsidiary to the first, or, what amounts to the same as "preempted" by the first claim, if actually brought and honoured.

80/ Compare also preliminary report, paras. 39-42.

necessarily entailing the second, let alone the third. Consequently, while the possibility of a purely factual situation, where one "act of a State" causes injury to more than one other State, has always been recognized, traditional international law has been hesitant to admit "derived", "constructive" or "extra-State" injury. 81/

88. Thus, as we have seen, obligations imposed by the rules of general customary law are "bilateralized", and the same goes, in principle, for obligations imposed by treaties: pacta tertiis nec nocent nec prosunt. Even being a formal party to a multilateral treaty does not necessarily make a State a (full) "party" to any (even material) breach of an international obligation under that treaty. On the other hand, it is admitted that a treaty (particularly a treaty establishing an "objective régime") may create "rights" for State which is not a (formal) party to it, and, though these "rights" may be taken away by the formal parties to the treaty through modification of the treaty without the consent of the "third" State (a sharp contrast with the position of the formal party to the treaty, as determined by article 41 of the Vienna Convention on the Law of Treaties), one may assume that the "third" State may be injured by a breach of an obligation under the treaty. 82/

89. The degree of being a "third" State in respect of a "primary" legal relationship necessarily influences the degree of being a "party" to a breach of the international obligation which is only an element of that legal relationship. While, in modern international law, it is certainly not generally correct to state "that an obligation to perform specific acts, by way of reparation for the damage

---

81/ Indeed, the notion of "sovereignty" of each individual State implies a separation between foreign sovereign States as regards legal relationships in any of the three stages, even to the extent of not admitting the "third" State to obtain a purely declaratory judgement of an international court.

82/ In principle, however, no "rights" of State C as regards State A under a treaty between States A and B may be created by a treaty between States B and C. But, here again, the pacta tertiis rule may be set aside in a treaty between State B and State C inasmuch as State C may invoke, as regards State B, a (legal) relationship between State B and State A (most-favoured-nation clause); even there the rule is not without exceptions. The pacta tertiis rule may also be set aside through "regionalization": see para. 82 above. Actually, while the "bilateralism" inherent in the ("functional") rule of reciprocity is only relevant for the application of the most-favoured-nation clause if expressly so provided, and the fact that the beneficiary State could get the "favour" requested by becoming a party to the treaty, to which the granting State and the most-favoured nation are parties, is not considered relevant, there are objective régimes of a "territorial" kind (frontier traffic, land-locked States) and of a "personal" kind (generalized system of preferences; according to many also: regional integration régimes including a measure of common jurisdiction) to which the most-favoured-nation clause does not apply. In short, the notion of "third State" is far from being self-evident.

/...

or otherwise, can only derive from an agreement between the State committing the breach and the injured State, 83/ neither can the statement of Grotius 84/ "that kings ... have the right of demanding punishment ... on account of injuries which ... excessively violate the law of nature or of nations in regard to any persons whatsoever ..." be accepted without qualification as a description of present-day international law. Nevertheless, the latter statement comes closer to the truth, be it that the response to such "excessive violations" is nowadays generally made subject to the control of the organized community of States.

90. At the same time, the obligation of a "third" State to react to a given violation makes its appearance in international law. Here again there are various degrees of such obligation. One may distinguish between (a) an obligation not to "recognize as legal" the result of such violation by the author State; (b) an obligation to "accept" for oneself some "injurious" consequences of measures lawfully taken by the injured State in response to the violation; and (c) an obligation to take (positive) measures in order to restore the situation as it existed before the breach, and possibly even in order to prevent a repetition of the breach. 85/

91. Such obligations to "react" of a "third" State are obviously an element of international enforcement which presupposes an organized community of States which, as such, reacts against a violation of a rule of international law which it

---

83/ Kelsen, as quoted in the second report, note 37. There may, however, exist international obligations, the breach of which does not entail any duty of substitute performance.

84/ Ibid.

85/ There is here a certain analogy with the distinction between ex nunc, ex tunc and ex ante, made earlier in the preliminary and second reports. The obligation under (a) is in reality an obligation not to support a posteriori the breach committed by the author State, while the obligation under (b) may, e.g., include a suspension of obligations of the injured State as regards freedom of movement of persons and goods towards the "third" State, and possibly even an obligation of the "third" State not to substitute the movement of its persons and goods towards the author State for that from the injured State towards the author State. Obviously the distinction, in a situation of "conflict" between State A and State B, between C's attitude as non-support of B, neutral, or support of A may be gradual indeed.

considers as essential for the protection of _its_ fundamental interests. 86/ The existence of obligations of this kind is, so to speak, a prelude to _part three_ of the draft articles on State responsibility. 87/

86/ This organized international community need not be a universal one; compare para. 83 above. But the obligation cannot, in principle, affect the rights of a State which does not belong to that community. Of course, here also there may be _concursus_: compare collective, as distinguished from individual, self-defence.

87/ At the same time they underline the particular position of "primary" obligations imposed by a decision of a competent internatonal organization, including judicial decisions. Compare also preliminary report, paras. 69-78.

CHAPTER V

THE "LINK" BETWEEN A BREACH OF AN INTERNATIONAL OBLIGATION AND THE LEGAL CONSEQUENCES THEREOF

92. As may have appeared from the above, the process of international law, from the formation of its rules to their enforcement, is determined by its structure, or rather by the structure or "character" of its subsystems and the relationships between those subsystems. "State responsibility" is only one phase in this total process of international law; it cannot but take into account the earlier and later phases of the process. 88/

93. It would seem, therefore, that any meaningful and acceptable "codification" of rules of international law on State responsibility should be placed within the framework of, on the one hand, a general clause admitting explicit or implicit deviation from those rules in a particular subsystem of rules of international law, and, on the other hand, of a general clause on the procedure of settlement of disputes relating to the interpretation of those rules. Even within such a framework it should be made clear that the rules are not exhaustive in the sense that they purport to describe "automatic" legal consequences, entailed by an internationally wrongful act, whatever the circumstances of the particular case. Only with those three "safeguards" could one - in the opinion of the Special Rapporteur - venture to draw up abstract rules in this field. 89/

88/ In this connexion it should be pointed out once again that there are subsystems of international law which govern a particular "substratum" of international situations, without necessarily creating "primary" rights and obligations in the strict sense of the word. Thus, e.g., the GATT provisions concerning "nullification or impairment" of "advantages", and the ICAO provisions relating to "hardships" caused by one member State to another. Other subsystems - notably in the field of international environmental law - avoid the "State responsibility" phase altogether.

89/ As was pointed out above, this approach has much in common with the approach the Commission adopted in respect of chapter V of part one of the draft articles, dealing with (the "zero parameter" of) "circumstances precluding wrongfulness". Indeed, in arts. 30, 34 and 35 - and, to a certain extent, even in art. 33 - there is a certain overlap with part two. Furthermore, art. 29 may even be regarded as a "deviation ad hoc"; a real deviation is taken into account in art. 33, para. (2), under (b). In this connexion it should be recalled that another "circumstance precluding wrongfulness" is dealt with in art. 18, para. 2, of the draft articles; compare preliminary report, para. 79.

94. Every one of the many different "régimes" (or "subsystems") of State responsibility (see para. 6 above) is in present-day international law subject to the universal system of the United Nations Charter, including its elaboration in unanimously adopted "declarations" such as the Declaration of Principles of International Law etc. and the Definition of Aggression, and including also its built-in provisions on collective and individual self-defence. Surely, there is no consensus on the exact scope and content of this universal system. The Special Rapporteur submits, however, that the Commission is not called upon to elaborate, let alone try to improve this system. One simply has to accept its "deviations", its "non-exhaustiveness" and its "interpretation-mechanism" as overruling any of the draft articles on State responsibility which the Commission has adopted and will adopt in the future.

95. Another legal phenomenon - one could hardly call it a system or subsystem - the Commission (or so it seems to the Special Rapporteur) has to accept as axiomatic, is the open-ended body of rules called ius cogens. Again there is no consensus on the exact scope - including its, possibly graduated, "force" 90/ - and content of this legal phenomenon. But its existence is accepted in present-day international law, and the future development of its content is unforeseeable and, indeed, by definition left to "the international community as a whole". In principle, that "international community as a whole" would also have to develop the "content, forms and degrees of State responsibility" resulting from any breach of an international obligation imposed by a rule of ius cogens. In this field, however, the Commission, by provisionally adopting article 19 of part one of the draft articles on State responsibility, would seem to be, equally "provisionally", bound to indicate at least some possible legal consequences of the distinction it made between "international crimes" and other internationally wrongful acts, subject, of course, to what has been stated in paragraph 94 above, and subject to the general "safeguards" indicated in paragraph 93 above. 91/ This point will be dealt with later in the present report.

96. For the purposes of drafting rules relating to the legal consequences of internationally wrongful acts it would seem useful to distinguish - at least as a start - international obligations imposed by (a) general customary international law; (b) conventional international law (i.e. "treaties"); and (c) international judicial, quasi-judicial, and other decisions of "international organizations". 92/

90/ Reference may again be made to para. 79 of the preliminary report.

91/ These two provisos are particularly important in respect of art. 19, para. (3) (a).

92/ Indeed, the increasing organizational elements in those three legal phenomena cannot but influence the modalities of the legal consequences (and "implementation" thereof) of a breach of an international obligation imposed by the "primary rule".

/...

97. Apart from the general legal system embodied in the United Nations Charter (para. 94 above) and ius cogens (para. 95 above) general customary international law creates legal relationships between States of a bilateral character. To an internationally wrongful act of one State corresponds the injury of one other State. In principle, therefore, the whole range of first parameter and second parameter legal consequences apply. 93/ Now the question arises whether one can distinguish between obligations under general customary international law according to their character, and draw from such distinction conclusions as to an a priori exclusion of certain "degrees" of legal consequences in the first and second parameters. 94/

98. Generally, the international obligations of one State vis-à-vis another State under the rules of customary international law, dealt with here, are limitations on the sovereignty of one State in view of the equal sovereignty of another State. It does not follow, however, that the breach of any such obligation infringes in the same way the sovereignty of the other State. As a matter of fact, customary international law differentiates between the various "emanations" of the

---

93/ Subject to the exclusion of particular legal consequences by virtue of other rules of international law; these limitations will be discussed separately. Obviously, a priori exclusion of some legal consequences and limitations resulting from other rules of international law tend to meet in a point where no distinction between the two can be made.

94/ Another question is whether there is always a perfect correlation between the breach of a international obligation and the infringement of a right. A negative answer to this question seems to be implied by the existence of "circumstances precluding wrongfulness". In any case, beyond the "no legal consequences" - except possibly by virtue of art. 35 of part one - stipulated in principle by a "curcumstance precluding wrongfulness", and "all legal consequences" stipulated in principle in the present paragraph, there may be room for other a priori exclusions of some legal consequences. Thus, while in general a specific "primary" rule of international law (particularly a rule of customary international law) can be considered as having fully balanced the interests of the States concerned for all circumstances in imposing a specific obligation on one of them, it may also be that such specific rule of international law in reality leaves room for a distinction between conduct of a State which is "inherently", conduct which is "fortuitously", and conduct which is "incidentally" in conflict with that "primary" rule, at least for the determination of the legal consequences of such conduct. In other words: it may not be easy to establish what, for the purposes of the legal consequences of an "act of a State" - in the terms of art. 16 of our draft articles, "is required of it by that obligation". The - non-exhaustive - "list" of "circumstances precluding wrongfulness" - in particular arts. 31, 32 and 33 - confirms this analysis. If one wants to keep a sharp distinction between "primary" and "secondary" rules, the articles just mentioned definitely belong to the first category.

/...

sovereignty of the States involved. In particular, it distinguishes between sovereignty _stricto sensu_, jurisdiction _stricto sensu_, and exclusive right of use of territory. 95/ Accordingly, the obligations under general international customary law to _respect_ the "sovereignty" of other States, relate respectively to sovereignty _stricto sensu_ (compare the terms "territorial _integrity_ and political _independence_"), to jurisdiction _stricto sensu_ (compare the various "immunities") and to use of territory (compare the obligations concerning the "treatment of aliens" admitted to the territory). To these obligations are added - in view of the particular international status of their "environment" - obligations relating to foreign ships (and similar means).

99. Is this differentiation of obligations relevant to the determination of the legal consequences of a breach of such obligations? The Special Rapporteur is inclined to give an affirmative answer to this question. 96/ At any rate - taking into account the non-exhaustiveness of the articles to be drafted in part two - a differentiation as regards obligations relating to the treatment of aliens as distinguished from obligations to respect the sovereignty _stricto sensu_ of a foreign State, is at the basis of article 5 as proposed in the second report. 97/ The main point of difference in (first parameter) legal consequences of the breach

---

95/ Admittedly, this distinction is not always clear in international doctrine and practice. In particular, "sovereignty" and "jurisdiction" are often used as indicating the same notion, while exclusive right of use of territory is often not distinguished from either (except in the relatively novel term of "permanent sovereignty over natural resources"). No doubt the _personification_ of the State is responsible for this confusion of the functional, personal and territorial aspects of the State, corresponding to its separate "responsibilities" of self-maintenance (political), of maintenance of "law and order" (legal), and of providing for the well-being of its nationals (socio-economic). However that may be, what interests us here is not so much the terminology, but rather the essence.

96/ Particularly in connexion with the distinctions made in note 94 in para. 97 _supra_. Actually those distinctions are analogous ones, this time in relation to the _author State's conduct_ as an exercise of its sovereignty _stricto sensu_ in its external relations ("inherent" conflict), its exclusive right of use of its territory ("fortuitous" conflict), and its jurisidction _stricto sensu_ ("incidental" conflict).

97/ As to the _scope_ of the category of obligations "concerning the treatment to be accorded by a State (within its jurisdiction) to aliens" it should be noted that (a) it does not cover diplomatic law; (b) it does not cover the treatment of foreign ships under the customary law of the sea; (c) it does not cover obligations to respect human rights, even if _within_ the framework of such obligations a distinction is made betwen human persons who are, and those who are not nationals of the State concerned.

/...

of an obligation is here that, in principle, a restitutio in integrum stricto sensu is not required and can be replaced by a substitute performance. 98/

100. While it is relatively easy to distinguish between obligations under general customary international law as regards respect of foreign sovereignty stricto sensu and obligations as regards the treatment of aliens within the territory, other obligations under general customary international law are less easy to classify. 99/ Actually, as regards jurisdiction stricto sensu, it is even controversial whether there are any "real" obligations and rights under general customary law, except in respect of the enforcement phase of jurisdiction. 100/ "Real" obligations and rights are, however, provided for in the rules of general customary international law relating to, on the one side, immunities, diplomatic and other, and on the other side, foreign ships. 101/

98/ Compare the three international arbitral awards in the Libyan nationalization cases, discussed inter alia in American Journal of International Law, vol. 75, No. 3, pp. 476 et seq.

99/ Even in respect of the first mentioned distinction there is, of course, always the possibility of a concursus in fact; art. 5, para. 2, as proposed in the second report attempts to take account of this fact.

100/ Compare the Lotus case (The case of the SS "Lotus", P.C.I.J. Judgements, No. 9, Series A, No. 10) in which P.C.I.J., however, seems to have overlooked the particular status of ships; both the 1958 Geneva Convention on the High Seas and the present draft Convention on the Law of the Sea overrule the Lotus decision. Apart from the special position of ships, international practice shows that in matters of jurisdiction stricto sensu reference is made rather to obligations of "comity" than of "law". Nevertheless these "non-obligations", are treated in a way analogous to the treatment of "real" obligations, inasmuch as "countermeasures" are sometimes taken as a response to a foreign exercise of jurisdiction stricto sensu considered to be not in conformity with such rules of "comity". In this connexion it is interesting to note the British Protection of Trading Interests Bill of 31 October 1979 (Halsbury's Statutes of England, 3rd ed., pp. 305 et seq.), which provides for a declaration of foreign requirements as "inadmissible", entailing a prohibition of compliance with such requirements, and even provides for a right of recovery of "multiple damages" paid under a foreign judgement. Note that the Bill envisages a declaration of inadmissibility of a foreign requirement, inter alia, "(a) if it infringes the jurisdiction of the United Kingdom or is otherwise prejudicial to the sovereignty of the United Kingdom; or (b) if compliance with the requirement would be prejudicial to the security of the United Kingdom or to the relations of the Government of the United Kingdom with the Government of any other country".

101/ Significantly, however, as regards foreign ships passing through the territorial waters, both the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, and the new draft Convention on the Law of the Sea formulate the limitations of the coastal State's jurisidiction in criminal and civil matters in terms of "should".

101. It is typical for the structure of customary international law relating to "immunities" and to the legal status of ships - both in older doctrine often expressed in terms of "territory": e.g., "exterritoriality" of foreign diplomatic missions, "a ship is territory of the flag-State" - that the obligations of a State to grant immunity and to respect the special status of foreign ships are matched by obligations of the State enjoying this immunity or special status. Thus the activities of foreign diplomatic missions must remain within certain limits, and foreign ships should act "innocently". 102/ If these obligations of the sending State, namely, the flag-State, are "real" obligations, the question arises of the legal consequences of a breach of such obligations. 103/ The answer to this question is not entirely clear in all cases. In its Judgement of 24 May 1980 in the Case Concerning the Diplomatic and Consular Staff in Teheran, 104/ the International Court of Justice held that an abuse of diplomatic functions could never justify a violation of diplomatic immunity. In a recent incident concerning the presence of a USSR warship in Swedish waters the Government of Sweden apparently held that article 23 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone did not prevent Sweden from retaining the foreign warship in its waters for the purpose of fact-finding. 105/ The new Draft Convention on the Law of the Sea contains various provisions regarding the prompt release of foreign (merchant) vessels and their crews, in case they have been arrested on the ground of violation of regulations, upon the posting of a reasonable bond or other financial security. 106/ It is controversial whether the rule of exhaustion of local remedies applies in the case of wrongful interference of a State with international communications serviced by an "alien" ship or

---

102/ Thus, diplomatic status can be "abused" and foreign ships, even on the high seas, should not engage in certain activities which are prejudicial to other States' interests, like piracy or, in the territorial waters of another State, activities other than "innocent passage" or - in straits - "transit passage". Incidentally, the Commission's commentary on art. 32 of the draft articles on State responsibility (distress) seems to presuppose that the activities of a (merchant) ship may be considered as an act of the flag-State. See Yearbook ... 1979, vol. II (Part Two), pp. 133-136.

103/ Of course, the question also arises if the obligations are not "real" obligations, but in that case - according to the viewpoint adopted by the Commission throughout the discussions of the topic - the question is not one of "State responsibility".

104/ I.C.J. Report, 1980.

105/ For reports of aspects of the incident see, e.g., The New York Times of 30 October 1981, sect. A, p. 3; 2 November 1981, sect. A, p. 13; and of 3 November 1981, sect. A, p. 3.

106/ See art. 292 in conjunction with arts. 73 (2), 220 (7) and 226 (1) (b) of the draft Convention on the Law of the Sea (A/CONF.62/L.78) of 28 August 1981.

/...

aircraft. 107/ In the matter of jurisdictional immunity there is a tendency to limit such immunity *a priori* to *acta iure imperii*, and a tendency not to grant immunity in case of acts of the foreign State which are contrary to its obligations under a rule of *international* law.

102. All this seems to show that there are certain international activities, both of Governments and of private persons, which have a *special status* under the rules of customary international law. Whether an "abuse" of such status may entail a "breach" of that status and, if so, to what extent, is not always clear. A suspension (for the future) of the relationship itself 108/ usually is allowed. 109/

103. On the other hand, the protection of the special status even in the case of "abuse" seems to suggest the conclusion that a breach of the corresponding obligation *without* any possible "justification" by virtue of the "abuse", may be regarded as an infringement of the sovereignty *stricto sensu* of the other State for the purpose of the legal consequences of the breach. However, this conclusion may amount to "swinging the pendulum" too far, or, to use a cybernetic metaphor, to exaggerate the "feed-back". Actually, in *customary* international law a distinction between *a priori* exclusion of certain legal consequences of a breach, limitation of

107/ See note 56 above.

108/ Compare declaration of *persona non grata* and breaking-off of diplomatic relations. In essence the measure contemplated in art. 23 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone is also a suspension of the relationship. Compare also the new draft Convention on the Law of the Sea, art. 228, para. 1, where the suspension of proceedings by the coastal State upon the taking of proceedings by the flag-State is provided for "unless ... the flag-State in question has repeatedly disregarded its obligation to endorse effectively the applicable international rules and standards in respect of violations committed by its vessels". Again it is clear that "primary" and "secondary" rules are closely intertwined.

109/ These cases of "special status" could just as well be considered as *limitations* rather than as a priori exclusions of certain legal consequences. See note 93 above.

legal consequences by virtue of "other rules of customary international law, and the content of "primary" rules, necessarily tends to become blurred. 110/

104. In view of the variety of obligations under rules of customary international law - "in between" the categories of rules protecting the sovereignty stricto sensu of other States and rules concerning the treatment of aliens - and taking into account the non-exhaustiveness of the rules to be drafted in respect of the legal consequences of internationally wrongful acts, the Special Rapporteur is inclined not to propose other rules excluding a priori some legal consequences of a breach of an obligation under customary international law.

105. Contrariwise, it might be useful, in the draft articles, to refer to limitations of second parameter legal consequences, resulting from the special status, accorded by the rules of customary international law to foreign States as juridical persons, to their diplomatic and consular missions and to the ships flying their flag. Such a reference clause would, in fact, serve the same purpose as, and underline, the general safeguard clause of possible "deviation" from the rules to be embodied in part two of the draft articles on State responsibility.

106. Turning now to international obligations under conventional international law (i.e. treaties) it must be noted, first of all, that the general safeguard clause of deviation is of particular importance for treaty régimes. Furthermore, it is perhaps useful to distinguish at the outset various functions of "treaties" within the structure and process of international law as a whole. A general "duty" of States to co-operate in matters of mutual or common concern may be considered as a "principle" of modern general customary international law. Obviously, the "breach" of such a "duty" cannot, however, be considered as giving rise to State responsibility in the sense this term has always been understood by the Commission. There are many treaties, both bilateral and multilateral, which

---

110/ This is also true for the distinction between the three parameters themselves. As noted already above, there is a gradual transition from one parameter to the other, or overlap between those parameters. Indeed, the restitutio in integrum stricto sensu and the guarantee against repetition of the breach are "legal consequences" of the first parameter already verging on the second parameter (just like a "state of necessity" contributed to by the State against which it is invoked verges on the determination of the legal consequences of a breach of an "obligation" of that other State). Furthermore, as to the second parameter of legal consequences, one is bound to distinguish between what the injured State can do as a response to a breach (a) within its own "jurisdiction" lato sensu (non-recognition of the result of the breach; balancing that result. See, e.g., the recovery of damages paid under a foreign judgement, note 100 above); (b) in respect of its legal relationship with the author State under a rule of international law (suspension of the legal relationship for the future; balancing countermeasures in the same field of the breach; countermeasures as regards other fields of relationship); and (c) within the "jurisdiction" lato sensu of the author State (self-help, self-defence). It would also seem clear that the measures under (b) and (c) verge on the third parameter.

/...

"affirm" this duty for a particular subject matter. 111/ Unless such treaty otherwise provides - and this is particularly the case in treaties providing for the establishment of international organizations - the non-fulfilment of such obligations to co-operate will entail no legal consequence whatsoever. Actually, treaty provisions stipulating an obligation to co-operate are not more than a "prelude" to international organization lato sensu, an "inchoate" form of such organization as a (functional) "fusion" of governmental powers of States. 112/

107. On the other hand, treaties establishing international boundaries do not as such create "obligations", but only "legal consequences" in respect of obligations and rights under very many other rules of international law. It is the breach of those obligations that entails State responsibility; the establishment of the boundary is a "prelude", it stipulates the (territorial) "separation" between States. 113/

108. Furthermore, there are treaties the sole function of which is to either unify, in a particular field, the exercise of jurisdiction stricto sensu by the States concerned, or to regulate the respective reach of such jurisdictions stricto sensu, and, possibly, the legal relevance of such exercise of jurisdiction stricto sensu in one State for the exercise of jurisdiction stricto sensu in the other State or States, in other words, to lay down rules of "conflict of law" between the States concerned. Here again, the "separation" or "fusion" of national legislations has, in the case of "breach" of an "obligation" under such a treaty, in principle no other legal consequence than those provided for in those treaties themselves. 114/

109. Two other types of treaties require a special mention, namely, treaties establishing "objective régimes" and treaties establishing international

---

111/ The new draft Convention on the Law of the Sea (see note 106 above) is full of clauses of this kind.

112/ One might say that such treaty provisions deal with "legal consequences" without passing through the phase of "obligations".

113/ This does not necessarily apply to sea boundaries. Actually, it would seem that the nature of the coastal States' "sovereign rights" as regards the exploration and exploitation of the mineral, or non-living resources of the continental shelf - a functional, not a territorial, sovereignty, be it expressed in spatial terms - reflects on the legal rules relating to the delimitation of the continental shelf between adjacent and opposite States. In this connexion it is interesting to note the recent Judgement of 24 February 1982 of the International Court of Justice in the Tunisia vs. Libya case, in particular the somewhat diminished reliance on the concept of "natural prolongation" of the land domain. See I.C.J. Communiqué No. 82/6 of 24 February 1982.

114/. Compare note 100 above at para. 100.

organizations. Both types of treaties usually also impose obligations on States (other than those referred to in paragraphs 106 to 108). 115/

110. As already remarked above, the main special point in relation to treaties establishing "objective régimes" is the position of "third" States in respect to such régimes. In principle, to the extent that non-parties to the treaty may become parties to the relationships governed by that treaty, they may also be "injured States" or "parties to the breach" of an obligation under such treaty. 116/ Actually, such "objective régimes" also exist by virtue of customary international law. 117/

111. As to treaties establishing international organizations, much the same reasoning applies in reverse. In principle, a breach of an obligation under such a treaty "injures" every other member State of the organization. But here, again in principle, any response to, or legal consequence of, such a breach is determined collectively in accordance with the constitution of the international organization involved. 118/

112. Though in modern international practice the five types of treaties discussed above together constitute a great part of existing treaties, there are also other treaties, particularly bilateral treaties, which are of the kind of "synallagmatic contracts" between States envisaging an "exchange of prestations" between those

---

115/ Often the same treaty does establish both an objective régime and an international organization to "administer" such a régime.

116/ Though not necessarily parties to the modification of the treaty. Nor does the establishment of the objective régime necessarily entail that the bilateralism of the breach-injury relationship is deviated from; under an objective régime of freedom of navigation on an international river a breach of an obligation of the "coastal State" in respect to the ship of a "flag-State" remains a bilateral affair, unless - as is often the case - not only the navigation in the technical sense, but also the communication between riparian, and possibly non-riparian, States and/or the economic integration-aspect of freedom of transportation are involved.

117/ Sea, outer space. Compare also note 75 above on the possibilities of "regionalization" in this respect, which, incidentally is not only relevant for the determination of the injured State for the purposes of State responsibility, but also for the determination of the author State or States and the responsibility of international organizations.

118/ Again, this does not mean that there may not be a concursus in the sense that a bilateral "primary" relationship is breached by the same conduct and entails a bilateral breach/injury relationship; "regionalization" is also possible in this respect. Here too, there may be similar régimes under the rules of customary international law inasmuch as in respect of the breach of certain obligations a legal consequence may only be drawn through a collective decision.

States. Actually, traditional doctrine is inclined to concentrate on these "reciprocal" treaties as regards the determination of the legal consequences of a breach of an obligation under a treaty. Indeed the element of barter is seldom quite absent in treaty transactions, though the same goes for the element of rule-making; there is always an interaction between "fact" and "law" in any system or subsystem. The focusing on the barter element in traditional international law is in conformity with the concept of individual and separate "sovereignty" of each State. 119/ As to the legal consequences of a breach of an obligation under such barter treaties, the emphasis lies in the second parameter, in particular in the "balancing countermeasures" of the injured State, which is in effect a return to the pre-treaty relationship. At the same time, such countermeasures, taken together with the breach of the obligation by the other State, necessarily destroy the law element (if any) in the treaty. The result is exactly the contrary of an "enforcement" of the treaty "rule". But then, of course, if the function of the treaty-transaction is nothing else than the exchange of prestations, the treaty has no "object and purpose" of its own.

113. If "countermeasures" are to be enforcement measures they must be "disproportional" to the breach of the obligation in terms of the effects of both. Consequently, such enforcement measures will normally be sought in "other" fields than that of the breach. This raises the question already referred to in paragraph 59 above.

119/ In this sense the non-reciprocity, underlying treaties giving effect to what is called "a new international economic order" is a shift towards the "law" element, as, for that matter, is the old idea of ius communicationis; the difference between these two approaches lies in another dimension.