

Draft articles on the responsibility of international organizations, with commentaries

2011

Adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10). The report, which also contains commentaries to the draft articles (para. 88), appears in *Yearbook of the International Law Commission, 2011*, vol. II, Part Two.



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(b) it has led the injured party to rely on its responsibility.

2. Any international responsibility of a State under paragraph 1 is presumed to be subsidiary.

Article 63. Effect of this Part

This Part is without prejudice to the international responsibility of the international organization which commits the act in question, or of any State or other international organization.

PART SIX

GENERAL PROVISIONS

Article 64. Lex specialis

These draft articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or of a State in connection with the conduct of an international organization, are governed by special rules of international law. Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members.

Article 65. Questions of international responsibility not regulated by these draft articles

The applicable rules of international law continue to govern questions concerning the responsibility of an international organization or a State for an internationally wrongful act to the extent that they are not regulated by these draft articles.

Article 66. Individual responsibility

These draft articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of an international organization or a State.

Article 67. Charter of the United Nations

These draft articles are without prejudice to the Charter of the United Nations.

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO

88. The text of the draft articles with commentaries thereto on the responsibility of international organizations as adopted by the Commission, on second reading, at its sixty-third session is reproduced below.

RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

General commentary

(1) In 2001, the International Law Commission adopted a set of articles on responsibility of States for internationally wrongful acts.⁴⁸ As stated in those articles, they “are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization” (art. 57).⁴⁹ Given the number of existing international organizations and their ever-increasing functions, these issues appeared to be of particular importance. Thus the Commission decided in 2002 to pursue its work for the codification and the progressive development of the law of international responsibility by taking up the two questions

that had been left without prejudice in article 57 on State responsibility. The present draft articles represent the result of this further study. In conducting the study, the Commission was assisted by the comments and suggestions received from States and international organizations.

(2) The scope of application of the present draft articles reflects what was left open in article 57 of the draft articles on State responsibility. Most of the present draft articles consider the first issue that was mentioned in that provision: the responsibility of an international organization for an act which is internationally wrongful. Only a few draft articles, mainly those contained in Part Five, consider the second issue: the responsibility of a State for the conduct of an international organization. The second issue is closely connected with the first one because the conduct in question of an international organization will generally be internationally wrongful and entail the international responsibility of the international organization concerned. However, under certain circumstances that are considered in articles 60 and 61 and the related commentaries, the conduct of an international organization may not be wrongful and no international responsibility would arise for that organization.

(3) In addressing the issue of responsibility of international organizations, the present draft articles follow the same approach adopted with regard to State responsibility. The draft articles thus rely on the basic distinction between primary rules of international law, which establish obligations for international organizations, and secondary rules, which consider the existence of a breach of an international obligation and its consequences for the responsible international organization. Like the articles on State responsibility, the present draft articles express secondary rules. Nothing in the draft articles should be read as implying the existence or otherwise of any particular primary rule binding on international organizations.

(4) While the present draft articles are in many respects similar to the articles on State responsibility, they represent an autonomous text. Each issue has been considered from the specific perspective of the responsibility of international organizations. Some provisions address questions that are peculiar to international organizations. When, in the study of the responsibility of international organizations, the conclusion is reached that an identical or similar solution to the one expressed in the articles on State responsibility should apply with respect to international organizations, this is based on appropriate reasons and not on a general presumption that the same principles apply.

(5) One of the main difficulties in elaborating rules concerning the responsibility of international organizations is the limited availability of pertinent practice. The main reason for this is that practice concerning responsibility of international organizations has developed only over a relatively recent period. One further reason is the limited use of procedures for third-party settlement of disputes to which international organizations are parties. Moreover, relevant practice resulting from exchanges of correspondence may not be always easy to locate, nor are international organizations or States often willing to disclose it. The fact that several of the present draft articles are based on limited practice moves the border between

⁴⁸ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 76.

⁴⁹ *Ibid.*, p. 141.

codification and progressive development in the direction of the latter. It may occur that a provision in the articles on State responsibility could be regarded as representing codification, while the corresponding provision on the responsibility of international organizations is more in the nature of progressive development. In other words, the provisions of the present draft articles do not necessarily yet have the same authority as the corresponding provisions on State responsibility. As was also the case with the articles on State responsibility, their authority will depend upon their reception by those to whom they are addressed.

(6) The commentaries on the articles of State responsibility are generally more extensive, reflecting the greater availability of practice. When the wording of one of the present draft articles is similar or identical to an article on State responsibility, the commentary of the former will give the reasons for its adoption and the essential explanations. Insofar as provisions of the present draft articles correspond to those of the articles on State responsibility, and there are no relevant differences between organizations and States in the application of the respective provisions, reference may also be made, where appropriate, to the commentaries on the latter articles.

(7) International organizations are quite different from States, and in addition present great diversity among themselves. In contrast with States, they do not possess a general competence and have been established in order to exercise specific functions ("principle of speciality"). There are very significant differences among international organizations with regard to their powers and functions, size of membership, relations between the organization and its members, procedures for deliberation, structure and facilities, as well as the primary rules including treaty obligations by which they are bound. Because of this diversity and its implications, the draft articles where appropriate give weight to the specific character of the organization, especially to its functions, as for instance article 8 on excess of authority or contravention of instructions. The provision on *lex specialis* (art. 64) has particular importance in this context. Moreover, the diversity of international organizations may affect the application of certain articles, some of which may not apply to certain international organizations in the light of their powers and functions.

(8) Certain special rules on international responsibility may apply in the relations between an international organization and its members (art. 64). These rules are specific to each organization and are usually referred to as the rules of the organization. They include the constituent instrument of the organization and the rules flowing from it (art. 2). The present draft articles do not attempt to identify these special rules, but do consider the impact that they may have on the international responsibility of the organization towards its members and on the responsibility of members for the conduct of the organization. The rules of the organization do not *per se* bind non-members. However, some rules of the organization may be relevant also for non-members. For instance, in order to establish whether an international organization has expressed its consent to the commission of a given act (art. 20), it may be necessary to establish whether the organ or agent that gives its consent is competent to do so under the rules of the organization.

(9) The present draft articles are divided into six Parts. Part One defines the scope of the articles and gives the definition of certain terms. Parts Two to Four (arts. 3 to 57) follow the general layout of the articles on State responsibility. Part Two sets forth the preconditions for the international responsibility of an international organization to arise. Part Three addresses the legal consequences flowing for the responsible organization, in particular the obligation to make reparation. Part Four concerns the implementation of responsibility of an international organization, especially the question of which States or international organizations are entitled to invoke that responsibility. Part Five addresses the responsibility of States in connection with the conduct of an international organization. Finally, Part Six contains certain general provisions applicable to the whole set of draft articles.

PART ONE

INTRODUCTION

Article 1. Scope of the present draft articles

1. The present draft articles apply to the international responsibility of an international organization for an internationally wrongful act.

2. The present draft articles also apply to the international responsibility of a State for an internationally wrongful act in connection with the conduct of an international organization.

Commentary

(1) The definition of the scope of the draft articles in article 1 is intended to be as comprehensive and accurate as possible. While article 1 covers all the issues that are to be addressed in the following articles, this is without prejudice to any solution that will be given to those issues. Thus, for instance, the reference in paragraph 2 to the international responsibility of a State in connection with the conduct of an international organization does not imply that such a responsibility will be held to exist.

(2) For the purposes of the draft articles, the term "international organization" is defined in article 2. This definition contributes to delimiting the scope of the draft articles.

(3) An international organization's responsibility may be asserted under different systems of law. Before a national court, a natural or legal person will probably invoke the organization's responsibility or liability under some municipal law. The reference in paragraph 1 of article 1 and throughout the draft articles to international responsibility makes it clear that the draft articles only take the perspective of international law and consider whether an international organization is responsible under that law. Thus, issues of responsibility or liability under municipal law are not, as such, covered by the draft articles. This is without prejudice to the possible applicability of certain principles or rules of international law when the question of an organization's responsibility or liability arises under municipal law.

(4) Paragraph 1 of article 1 concerns the cases in which an international organization incurs international responsibility. The most frequent case will be that of the organization committing an internationally wrongful act. However, there are other instances in which an international organization's responsibility may arise. One may envisage, for example, cases analogous to those referred to in chapter IV of Part One of the articles on responsibility of States for internationally wrongful acts.⁵⁰ An international organization may thus be held responsible if it aids or assists a State or another organization in committing an internationally wrongful act, or if it directs and controls a State or another organization in the commission of such an act, or if it coerces a State or another organization to commit an act that would, but for the coercion, be an internationally wrongful act. Another case in which an international organization may be held responsible is that of an internationally wrongful act committed by another international organization of which the first organization is a member.

(5) The reference in paragraph 1 to acts that are wrongful under international law implies that the present draft articles do not address the question of liability for injurious consequences arising out of acts not prohibited by international law. The choice made by the Commission to separate, with regard to States, the question of liability for acts not prohibited by international law from the question of international responsibility prompts a similar choice in relation to international organizations. Thus, as in the case of States, international responsibility is linked with a breach of an obligation under international law. International responsibility may thus arise from an activity that is not prohibited by international law only when a breach of an obligation under international law occurs in relation to that activity, for instance if an international organization fails to comply with an obligation to take preventive measures in relation to an activity that is not prohibited.

(6) Paragraph 2 includes within the scope of the present draft articles some issues that have been identified, but not dealt with, in the articles on responsibility of States for internationally wrongful acts, article 57 of which states thus:

These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.⁵¹

The main question that was left out in the articles on responsibility of States for internationally wrongful acts, and that is considered in the present draft articles, is the issue of the responsibility of a State which is a member of an international organization for a wrongful act committed by the organization.

(7) The wording of chapter IV of Part One of the articles on responsibility of States for internationally wrongful acts only refers to the cases in which a State aids or assists, directs and controls, or coerces another State. Should the question of similar conduct by a State with regard to an international organization not be regarded as covered, at least by analogy, in the articles on responsibility of States for internationally wrongful acts, the present draft articles fill the resulting gap.

(8) Paragraph 2 does not include questions of attribution of conduct to a State, whether an international organization is involved or not. Chapter II of Part One of the articles on responsibility of States for internationally wrongful acts deals, albeit implicitly, with attribution of conduct to a State when an international organization or one of its organs acts as a State organ, generally or only under particular circumstances. Article 4 refers to the "internal law of the State" as the main criterion for identifying State organs, and internal law will rarely include an international organization or one of its organs among State organs. However, article 4 does not consider the status of such organs under internal law as a necessary requirement.⁵² Thus, an organization or one of its organs may be considered as a State organ under article 4 also when it acts as a *de facto* organ of a State. An international organization may also be, under the circumstances, as provided for in article 5, a "person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority".⁵³ Article 6 then considers the case in which an organ is "placed at the disposal of a State by another State".⁵⁴ A similar eventuality, which may or may not be considered as implicitly covered by article 6, could arise if an international organization places one of its organs at the disposal of a State. The commentary to article 6 notes that this eventuality "raises difficult questions of the relations between States and international organizations".⁵⁵ International organizations are not referred to in the commentaries on articles 4 and 5. While it appears that all questions of attribution of conduct to States are nevertheless within the scope of the responsibility of States for internationally wrongful acts, and should therefore not be considered anew, some aspects of attribution of conduct to either a State or an international organization will be further elucidated in the discussion of attribution of conduct to international organizations.

(9) The present draft articles deal with the symmetrical question of a State or a State organ acting as an organ of an international organization. This question concerns the attribution of conduct to an international organization and is therefore covered by paragraph 1 of article 1.

(10) The present draft articles do not address issues relating to the international responsibility that a State may incur towards an international organization. Although the articles on responsibility of States for internationally wrongful acts do not mention international organizations when considering circumstances precluding wrongfulness, the content of international responsibility or the invocation of the international responsibility of a State, they may be applied by analogy also to the relation between a responsible State and an international organization. When, for instance, article 20 sets forth that "[v]alid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent",⁵⁶ the provision

⁵² *Ibid.*, p. 40.

⁵³ *Ibid.*, p. 42.

⁵⁴ *Ibid.*, pp. 43–44.

⁵⁵ *Ibid.*, p. 45, paragraph (9) of the commentary to article 6.

⁵⁶ *Ibid.*, p. 72.

⁵⁰ *Ibid.*, pp. 64–71.

⁵¹ *Ibid.*, p. 141.

may be understood as covering by analogy also the case where a valid consent to the commission of the act of the State is given by an international organization.

Article 2. Use of terms

For the purposes of the present draft articles:

(a) “international organization” means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities;

(b) “rules of the organization” means, in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization;

(c) “organ of an international organization” means any person or entity which has that status in accordance with the rules of the organization;

(d) “agent of an international organization” means an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts.

Commentary

(1) The definition of “international organization” given in article 2, subparagraph (a), is considered as appropriate for the purposes of the present draft articles and is not intended as a definition for all purposes. It outlines certain common characteristics of the international organizations to which the following articles apply. The same characteristics may be relevant for purposes other than the international responsibility of international organizations.

(2) The fact that an international organization does not possess one or more of the characteristics set forth in article 2, subparagraph (a), and thus is not within the definition for the purposes of the present articles, does not imply that certain principles and rules stated in the following articles do not apply also to that organization.

(3) Starting with the 1969 Vienna Convention,⁵⁷ several codification conventions have succinctly defined the term “international organization” as “intergovernmental organization”.⁵⁸ In each case, the definition was given only for the purposes of the relevant convention and not for all purposes. The text of some of these codification conventions added some further elements to the definition: for instance, the 1986 Vienna Convention only applies to those intergovernmental organizations that

have the capacity to conclude treaties.⁵⁹ No additional element would be required in the case of international responsibility apart from possessing an obligation under international law. However, the adoption of a different definition is preferable for several reasons. First, it is questionable whether by defining an international organization as an intergovernmental organization one provides much information: it is not even clear whether the term “intergovernmental organization” refers to the constituent instrument or to actual membership. Second, the term “intergovernmental” is in any case inappropriate to a certain extent, because several important international organizations have been established with the participation also of State organs other than Governments. Third, an increasing number of international organizations include among their members entities other than States as well as States; the term “intergovernmental organization” might be thought to exclude these organizations, although with regard to international responsibility it is difficult to see why one should reach solutions that differ from those applying to organizations of which only States are members.

(4) Most international organizations are established by treaties. Thus, a reference in the definition to treaties as constituent instruments reflects prevailing practice. However, forms of international cooperation are sometimes established without a treaty. In certain cases, for instance with regard to the Nordic Council of Ministers, a treaty was subsequently concluded.⁶⁰ In order to cover organizations established by States on the international plane without a treaty, article 2 refers, as an alternative to treaties, to any “other instrument governed by international law”. This wording is intended to include instruments such as resolutions adopted by an international organization or by a conference of States. Examples of international organizations that have been so established include the Pan American Institute of Geography and History⁶¹ and the Organization of the Petroleum Exporting Countries.⁶²

(5) The reference to “a treaty or other instrument governed by international law” is not intended to exclude entities other than States from being regarded as members of an international organization. This is unproblematic with regard to international organizations which, so long as they have a treaty-making capacity, may well be a party to a constituent treaty. The situation is likely to be different with regard to entities other than States and international

⁵⁹ See article 6 of the Convention. As the Commission noted with regard to the draft articles on treaties concluded between States and international organizations or between two or more international organizations (paragraph (22) of the commentary to article 2), “Either an international organization has the capacity to conclude *at least* one treaty, in which case the rules in the draft articles will be applicable to it, or, despite its title, it does not have that capacity, in which case it is pointless to state explicitly that the draft articles do not apply to it” (*Yearbook ... 1981*, vol. II (Part Two), p. 124).

⁶⁰ 1962 Agreement concerning co-operation (Finland, Denmark, Iceland, Norway and Sweden), amended in 1971.

⁶¹ See A. J. Peaslee (ed.), *International Governmental Organizations—Constitutional Documents*, 3rd rev. ed., Parts Three and Four, The Hague, Martinus Nijhoff, 1979, pp. 389–403.

⁶² See P. J. G. Kapteyn *et al.* (eds.), *International Organization and Integration—Annotated Basic Documents and Descriptive Directory of International Organizations and Arrangements*, 2nd rev. ed., The Hague, Martinus Nijhoff, 1984, II.K.3.2.a.

⁵⁷ The relevant provision is article 2, paragraph (1) (i).

⁵⁸ See article 1, paragraph 1 (1), of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character; article 2, paragraph 1 (n), of the 1978 Vienna Convention; and article 2, paragraph 1 (i), of the 1986 Vienna Convention.

organizations. However, even if the entity other than a State does not possess treaty-making capacity or cannot take part in the adoption of the constituent instrument, it may be accepted as a member of the organization if the rules of that organization so provide.

(6) The definition in article 2 does not cover organizations that are established through instruments governed by municipal law, unless a treaty or another instrument governed by international law has been subsequently adopted and has entered into force.⁶³ Thus the definition does not include organizations such as the International Union for Conservation of Nature (IUCN), although over 70 States are among its members,⁶⁴ or the Institut du monde arabe, which was established as a foundation under French law by 20 States.⁶⁵

(7) Article 2 also requires the international organization to possess “international legal personality”. The acquisition of legal personality under international law does not depend on the inclusion in the constituent instrument of a provision such as Article 104 of the Charter of the United Nations, which reads as follows:

The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

The purpose of this type of provision in the constituent instrument is to impose on the member States an obligation to recognize the organization’s legal personality under their internal laws. A similar obligation is imposed on the host State when a similar text is included in the headquarters agreement.⁶⁶

(8) The acquisition by an international organization of legal personality under international law is appraised in different ways. According to one view, the mere existence for an organization of an obligation under international law implies that the organization possesses legal personality. According to another view, further elements are required. While the International Court of Justice has not identified particular prerequisites, its *dicta* on the legal personality of international organizations do not appear to set stringent requirements for this purpose. In its advisory opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, the Court stated that

[I]nternational organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.⁶⁷

⁶³ This was the case of the Nordic Council of Ministers (see footnote 60 above).

⁶⁴ See www.iucn.org.

⁶⁵ A description of the status of this organization may be found in a reply by the Minister for Foreign Affairs of France to a parliamentary question, AFDI, vol. 37 (1991), pp. 1024–1025.

⁶⁶ Thus, in its judgment No. 149 of 18 March 1999 in *Istituto Universitario Europeo v. Piette*, the Italian Court of Cassation found that “[t]he provision in an international agreement of the obligation to recognize legal personality to an organization and the implementation by law of that provision only mean that the organization acquires legal personality under the municipal law of the contracting States” (*Giustizia civile*, vol. 49 (1999), p. 1313).

⁶⁷ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 73, at pp. 89–90, para. 37.

In its advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, the Court noted that

[t]he Court need hardly point out that international organizations are subjects of international law which do not, unlike States, possess a general competence.⁶⁸

While it may be held that, when making both these statements, the Court had an international organization of the type of the World Health Organization (WHO) in mind, the wording is quite general and appears to take a liberal view of the acquisition by international organizations of legal personality under international law.

(9) In the passages quoted in the previous paragraph, and more explicitly in its advisory opinion on *Reparation for Injuries*,⁶⁹ the Court appeared to favour the view that when legal personality of an organization exists, it is an “objective” personality. Thus, it would not be necessary to enquire whether the legal personality of an organization has been recognized by an injured State before considering whether the organization may be held internationally responsible according to the present articles.

(10) The legal personality of an organization, which is a precondition of the international responsibility of that organization, needs to be “distinct from that of its member States”.⁷⁰ This element is reflected in the requirement in article 2, subparagraph (a), that the international legal personality should be the organization’s “own”, a term that the Commission considers as synonymous with the phrase “distinct from that of its member States”. The existence for the organization of a distinct legal personality does not exclude the possibility of a certain conduct being attributed both to the organization and to one or more of its members or to all its members.

(11) The second sentence of article 2, subparagraph (a), seeks first of all to emphasize the role that States play in practice with regard to all the international organizations which are covered by the present articles. This key role was expressed by the International Court of Justice, albeit incidentally, in its advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, in the following sentence:

International organizations are governed by the “principle of speciality”, that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.⁷¹

Many international organizations have only States as members. In other organizations, which have a different

⁶⁸ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 66, at p. 78, para. 25.

⁶⁹ *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports 1949*, p. 174, at p. 185.

⁷⁰ This wording was used by G. G. Fitzmaurice in the definition of the term “international organization” that he proposed in his first report on the law of treaties (*Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 108) and by the Institute of International Law in its 1995 Lisbon resolution on “The legal consequences for member states of the non-fulfilment by international organizations of their obligations toward third parties” (Institute of International Law, *Yearbook*, vol. 66, Part II, Session of Lisbon (1995), p. 445; available from www.idi-iiil.org, “Resolutions”).

⁷¹ See footnote 68 above.

membership, the presence of States among the members is essential for the organization to be considered in the present articles.⁷² This requirement is intended to be conveyed by the words “in addition to States”.

(12) The fact that subparagraph (a) considers that an international organization “may include as members, in addition to States, other members” does not imply that a plurality of States as members is required. Thus an international organization may be established by a State and another international organization. Examples may be provided by the Special Court for Sierra Leone⁷³ and the Special Tribunal for Lebanon.⁷⁴

(13) The presence of States as members may take the form of participation as members by individual State organs or agencies. Thus, for instance, the Arab States Broadcasting Union, which was established by a treaty, lists “broadcasting organizations” as its full members.⁷⁵

(14) The reference in the second sentence of article 2, subparagraph (a), to entities other than States—such as international organizations,⁷⁶ territories⁷⁷ or private entities⁷⁸—as additional members of an organization points to a significant trend in practice, in which international organizations increasingly tend to have a mixed membership in order to make cooperation more effective in certain areas.

(15) International organizations within the scope of the present articles are significantly varied in their functions, type and size of membership and resources. However, since the principles and rules set forth in the articles are of a general character, they are intended to apply to all these international organizations, subject to special rules of international law that may relate to one or more international organizations. In the application of these principles and rules, the specific, factual or legal circumstances pertaining to the international organization concerned should be taken into account, where appropriate. It is clear, for example, that most technical organizations are

⁷² Thus, the definition in article 2 does not cover international organizations whose membership only comprises international organizations. An example of this type of organization is the Joint Vienna Institute, which was established on the basis of an agreement between five international organizations. See www.jvi.org.

⁷³ Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone (Freetown, on 16 January 2002), United Nations, *Treaty Series*, vol. 2178, No. 38342, p. 137.

⁷⁴ Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon, annexed to Security Council resolution 1757 (2007) of 30 May 2007.

⁷⁵ See article 4 of the Convention of the Arab States Broadcasting Union.

⁷⁶ For instance, the European Community has become a member of the Food and Agriculture Organization of the United Nations (FAO), whose Constitution was amended in 1991 in order to allow the admission of regional economic integration organizations.

⁷⁷ For instance, article 3 (d)–(e) of the Convention of the World Meteorological Organization (WMO) entitles entities other than States, referred to as “territories” or “groups of territories”, to become members.

⁷⁸ One example is the World Tourism Organization, which includes States as “full members”, “territories or groups of territories” as “associate members” and “international bodies, both intergovernmental and non-governmental” as “affiliate members”. See the Statutes of the World Tourism Organization.

unlikely to be ever in the position of coercing a State, or that the impact of a certain countermeasure is likely to vary greatly according to the specific character of the targeted organization.

(16) The definition of “rules of the organization” in subparagraph (b) is to a large extent based on the definition of the same term that is included in the 1986 Vienna Convention.⁷⁹ Apart from a few minor stylistic changes, the definition in subparagraph (b) differs from the one contained in that codification convention only because it refers, together with “decisions” and “resolutions”, to “other acts of the organization”. This addition is intended to cover more comprehensively the great variety of acts that international organizations adopt. The words “in particular” have nevertheless been retained, since the rules of the organization may also include such instruments as agreements concluded by the organization with third parties and judicial or arbitral decisions binding the organization. For the purpose of attribution of conduct, decisions, resolutions and other acts of the organization are relevant, whether they are regarded as binding or not, insofar as they give functions to organs or agents in accordance with the constituent instruments of the organization. The latter instruments are referred to in the plural, following the wording of the Vienna Convention, although a given organization may well possess a single constituent instrument.

(17) One important feature of the definition of “rules of the organization” in subparagraph (b) is that it gives considerable weight to practice. The influence that practice may have in shaping the rules of the organization was described in a comment by the North Atlantic Treaty Organization (NATO), which noted that NATO was an organization where “the fundamental internal rule governing the functioning of the organization—that of consensus decision-making—is to be found neither in the treaties establishing NATO nor in any formal rules and is, rather, the result of the practice of the organization”.⁸⁰

(18) The definition seeks to strike a balance between the rules enshrined in the constituent instruments and formally accepted by the members of the organization, on the one hand, and the need for the organization to develop as an institution, on the other hand. As the International Court of Justice said in its advisory opinion on *Reparation for Injuries*:

Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.⁸¹

(19) The definition of “rules of the organization” is not intended to imply that all the rules pertaining to a given international organization are placed at the same level.

⁷⁹ Article 2, paragraph 1 (j) states that “‘rules of the organization’ means, in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization”.

⁸⁰ A/CN.4/637 and Add.1 (under the section entitled “Draft article 63 ... North Atlantic Treaty Organization”).

⁸¹ *Reparation for injuries suffered in the service of the United Nations* (see footnote 69 above), p. 180.

The rules of the organization concerned will provide, expressly or implicitly, for a hierarchy among the different kinds of rules. For instance, the acts adopted by an international organization will generally not be able to derogate from its constituent instruments.

(20) A definition of the term “organ [of the organization]” is given in subparagraph (c). International organizations show a variety of approaches with regard to the use of this term. Some constituent instruments contain a list of organs, which may be more or less broad,⁸² while in the rules of certain other organizations the term “organ” is not used.

(21) Notwithstanding this variety of approaches, it is preferable not to adopt a uniform definition which would be at odds with the rules of various organizations. The different scope that the term “organ” may have according to the rules of the organization concerned does not affect attribution of conduct to the organization, given the fact that also the conduct of agents is attributed to the organization according to article 6. Thus, subparagraph (c) refers to the rules of the organization and considers that an organ is “any person or entity which has that status according to the rules of the organization”.

(22) The definition in subparagraph (c) is similar to the one of organ of State, which is given in article 4, paragraph 2, of the articles on responsibility of States for internationally wrongful acts. According to this text, “[a]n organ includes any person or entity which has that status in accordance with the internal law of the State”.⁸³ Subparagraph (c) leaves it to the international organization concerned to define its own organs.

(23) Subparagraph (d) provides a definition of the term “agent” which is based on a passage in the advisory opinion of the International Court of Justice on *Reparation for Injuries*. When considering the capacity of the United Nations to bring a claim in case of an injury, the Court said that it

understands the word “agent” in the most liberal sense, that is to say, any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the organization with carrying out, or helping to carry out, one of its functions—in short, any person through whom it acts.⁸⁴

(24) When the Court referred to one of the functions of the organization, it did not exclude that the agent be

⁸² Examples of broader lists are provided by the constituent instruments of the Organization of American States (OAS) and the International Criminal Police Organization (INTERPOL). Article 53 of the Charter of the Organization of American States lists as organs the General Assembly, the Meeting of Consultation of Ministers of Foreign Affairs, the Councils, the IAJC, the Inter-American Commission on Human Rights, the General Secretariat, the Specialized Conferences and the Specialized Organizations. According to article 5 of the ICPO-INTERPOL Constitution and General Regulations, the organization comprises the General Assembly, the Executive Committee, the General Secretariat, the National Central Bureaus, the Advisers and the Commission for the Control of Files. An example of a very economical list is provided by NATO. Article 9 of the North Atlantic Treaty establishes a single organ, the Council, which is given the competence to create “such subsidiary bodies as may be necessary”.

⁸³ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 40.

⁸⁴ *Reparation for injuries suffered in the service of the United Nations* (see footnote 69 above), p. 177.

charged with carrying out, or helping to carry out, more than one function. The reference to “one of its functions” in subparagraph (d) should be understood in the same way.

(25) International organizations do not act only through natural persons, whether officials or not. Thus, the definition of “agent” also covers all the entities through whom the organization acts.

(26) The definition of “agent” is of particular relevance to the question of attribution of conduct to an international organization. It is therefore preferable to develop the analysis of various aspects of this definition in the context of attribution, especially in article 6 and the related commentary.

(27) In order to avoid a possible overlap between the definition of “organ of an international organization” and that of “agent of an international organization”, the latter phrase only covers persons or entities that do not come within the definition under subparagraph (c).

PART TWO

THE INTERNATIONALLY WRONGFUL ACT OF AN INTERNATIONAL ORGANIZATION

CHAPTER I

GENERAL PRINCIPLES

Article 3. Responsibility of an international organization for its internationally wrongful acts

Every internationally wrongful act of an international organization entails the international responsibility of that organization.

Commentary

(1) The general principle, as stated in article 3, applies to whichever entity commits an internationally wrongful act. The same may be said of the principle stated in article 4.⁸⁵ The formulation of article 3 is modelled on that applicable to States according to the articles on responsibility of States for internationally wrongful acts. There seems to be little reason for formulating these principles in another manner. It is noteworthy that in a report on peacekeeping operations the Secretary-General of the United Nations referred to

the principle of State responsibility—widely accepted to be applicable to international organizations—that damage caused in breach of an international obligation and which is attributable to the State (or to the Organization) entails the international responsibility of the State (or of the Organization).⁸⁶

(2) The wording of article 3 is identical to that of article 1 of the articles on responsibility of States for

⁸⁵ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 and 32–34. The classical analysis that led the Commission to adopt articles 1 and 2 on the responsibility of States for internationally wrongful acts is contained in Roberto Ago’s third report on State responsibility, *Yearbook ... 1971*, vol. II (Part One), document A/CN.4/246 and Add.1–3, pp. 214–223, paras. 49–75.

⁸⁶ A/51/389, p. 4, para. 6.

internationally wrongful acts, but for the replacement of the word “State” with “international organization”.

(3) When an international organization commits a wrongful act, its responsibility is entailed. One may find a statement of this principle in the advisory opinion of the International Court of Justice on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, in which the Court said that it

wishes to point out that the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity.

The United Nations may be required to bear responsibility for the damage arising from such acts.⁸⁷

(4) The meaning of international responsibility is not defined in article 3, nor is it in the corresponding provisions of the draft articles on responsibility of States for internationally wrongful acts. There the consequences of an internationally wrongful act are dealt with in Part Two of the text, which concerns the “content of the international responsibility of a State”.⁸⁸ Also, in the present draft articles, the content of international responsibility is addressed in further articles (Part Three).

(5) Neither for States nor for international organizations is the legal relationship arising out of an internationally wrongful act necessarily bilateral. The breach of the obligation may well affect more than one subject of international law or the international community as a whole. Thus, in appropriate circumstances, more than one subject may invoke, as an injured subject or otherwise, the international responsibility of an international organization.

(6) The fact that an international organization is responsible for an internationally wrongful act does not exclude the existence of parallel responsibility of other subjects of international law in the same set of circumstances. For instance, an international organization may have cooperated with a State in the breach of an obligation imposed on both. Another example may be that of conduct which is simultaneously attributed to an international organization and a State and which entails the international responsibility of both the organization and the State.

Article 4. Elements of an internationally wrongful act of an international organization

There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:

(a) is attributable to that organization under international law; and

(b) constitutes a breach of an international obligation of that organization.

⁸⁷ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999*, p. 62, at pp. 88–89, para. 66.

⁸⁸ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 86–116.

Commentary

(1) Article 4 expresses with regard to international organizations a general principle that applies to every internationally wrongful act, whoever its author. As in the case of States, the attribution of conduct to an international organization is one of the two essential elements for an internationally wrongful act to occur. The term “conduct” is intended to cover both acts and omissions on the part of the international organization. The rules pertaining to attribution of conduct to an international organization are set forth in chapter II.

(2) A second essential element, to be examined in chapter III, is that conduct constitutes the breach of an obligation under international law. The obligation may result either from a treaty binding the international organization or from any other source of international law applicable to the organization. As the International Court of Justice noted in its advisory opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, international organizations are

bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.⁸⁹

A breach is thus possible with regard to any of these international obligations.

(3) Again as in the case of States, damage does not appear to be an element necessary for international responsibility of an international organization to arise. In most cases, an internationally wrongful act will entail material damage. However, it is conceivable that the breach of an international obligation occurs in the absence of any material damage. Whether the damage will be required or not depends on the content of the primary obligation.

Article 5. Characterization of an act of an international organization as internationally wrongful

The characterization of an act of an international organization as internationally wrongful is governed by international law.

Commentary

(1) By setting forth that the characterization of an act of an international organization as internationally wrongful depends on international law, article 5 adapts to international organizations a statement made for States in the first sentence of article 3 on the responsibility of States for internationally wrongful acts.⁹⁰ This statement may appear obvious and already be implied in article 4 of the present draft articles, which refers to international law for determining both whether an action or omission is attributable to an international organization and whether it constitutes a breach of an international obligation. However, the need to refer to international law in order to characterize an act as internationally wrongful is an important point that warrants a specific statement.

⁸⁹ See footnote 67 above.

⁹⁰ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 36.

(2) The second sentence in article 3 on the responsibility of States for internationally wrongful acts cannot easily be adapted to the case of international organizations. When it says that the characterization of an act as wrongful under international law “is not affected by the characterization of the same act as lawful by internal law”,⁹¹ the sentence emphasizes that internal law, which depends on the unilateral will of the State, may never justify what constitutes the breach by that State of an obligation under international law. The difficulty in stating a similar principle for international organizations arises from the fact that the rules of an international organization cannot be sharply differentiated from international law. At least the constituent instrument of the international organization is a treaty or another instrument governed by international law; other rules of the organization may be viewed as part of international law.

(3) When the rules of the organization are part of international law, they may affect the characterization of an act as internationally wrongful under international law. However, while the rules of the organization may affect international obligations for the relations between an organization and its members, they cannot have a similar effect in relation to non-members.

(4) The question of the legal nature and possible effects of the rules of the organization is examined in greater detail in the commentary to article 10, concerning the existence of a breach of an international obligation.

CHAPTER II

ATTRIBUTION OF CONDUCT TO AN INTERNATIONAL ORGANIZATION

Commentary

(1) According to article 4 of the present articles, attribution of conduct under international law to an international organization is one condition for an internationally wrongful act of that international organization to arise, the other condition being that the same conduct constitutes a breach of an obligation that exists under international law for the international organization. Articles 6 to 9 below address the question of attribution of conduct to an international organization. As stated in article 4, conduct is intended to include actions and omissions.

(2) The responsibility of an international organization may in certain cases arise also when conduct is not attributable to that international organization.⁹² In these cases, conduct would be attributed to a State or to another international organization. In the latter case, rules on attribution of conduct to an international organization are also relevant.

(3) Like articles 4 to 11 on the responsibility of States for internationally wrongful acts,⁹³ articles 6 to 9 of the present draft articles deal with attribution of conduct, not with attribution of responsibility. Practice often focuses on attribution of responsibility rather than on attribution

of conduct. This is also true of several legal instruments. For instance, annex IX of the United Nations Convention on the Law of the Sea, after requiring that international organizations and their member States declare their respective competences with regard to matters covered by the Convention, considers in paragraph 1 of article 6 of the annex the question of attribution of responsibility in the following terms:

Parties which have competence under article 5 of this Annex shall have responsibility for failure to comply with obligations or for any other violation of this Convention.

Attribution of conduct to the responsible party is not necessarily implied.

(4) Although it may not frequently occur in practice, dual or even multiple attribution of conduct cannot be excluded. Thus, attribution of a certain conduct to an international organization does not imply that the same conduct cannot be attributed to a State, nor does attribution of conduct to a State rule out attribution of the same conduct to an international organization. One could also envisage conduct being simultaneously attributed to two or more international organizations, for instance when they establish a joint organ and act through that organ.

(5) Like the articles on responsibility of States for internationally wrongful acts, the present draft articles only provide positive criteria of attribution. Thus, they do not point to cases in which conduct cannot be attributed to the organization. For instance, the articles do not say, but only imply, that conduct of military forces of States or international organizations is not attributable to the United Nations when the Security Council authorizes States or international organizations to take necessary measures outside a chain of command linking those forces to the United Nations.

(6) Articles 6 to 9 of the present draft articles cover most issues that are dealt with in regard to States in articles 4 to 11 of the draft articles on responsibility of States for internationally wrongful acts. However, there is no text in the present draft articles covering the issues addressed in articles 9 and 10 on State responsibility.⁹⁴ The latter articles relate to conduct carried out in the absence or default of the official authorities and to conduct of an insurrectional or other movement. These cases are unlikely to arise with regard to international organizations, because they presuppose that the entity to which conduct is attributed exercises control of territory. Although one may find a few examples of an international organization administering territory,⁹⁵ the likelihood of any of the above issues becoming relevant in that context appears too remote to warrant a specific provision. It is, however, understood that, should such an issue nevertheless arise in respect of an international organization, one would have to apply to that organization by analogy the pertinent rule that is applicable to States: either article 9 or article 10 of the draft articles on responsibility of States for internationally wrongful acts.

⁹⁴ *Ibid.*, pp. 49–52.

⁹⁵ For instance, on the basis of Security Council resolution 1244 (1999) of 10 June 1999, which authorized “the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo”.

⁹¹ *Ibid.*

⁹² Some examples are given in chapter IV.

⁹³ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 40–54.

(7) Some of the practice which addresses questions of attribution of conduct to international organizations does so in the context of issues of civil liability rather than of issues of responsibility for internationally wrongful acts. That practice is nevertheless relevant for the purpose of attribution of conduct under international law when it states or applies a criterion that is not intended as relevant only to the specific question under consideration, but rather reflects a general understanding of how acts are attributed to an international organization.

Article 6. Conduct of organs or agents of an international organization

1. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.

2. The rules of the organization apply in the determination of the functions of its organs and agents.

Commentary

(1) According to article 4 on the responsibility of States for internationally wrongful acts,⁹⁶ attribution of conduct to a State is premised on the characterization as “State organ” of the acting person or entity. However, as the commentary makes clear,⁹⁷ attribution could hardly depend on the use of a particular terminology in the internal law of the State concerned. Similar reasoning could be made with regard to the corresponding system of law relating to international organizations.

(2) It is noteworthy that, while some provisions of the Charter of the United Nations use the term “organs”,⁹⁸ the International Court of Justice, when dealing with the status of persons acting for the United Nations, considered relevant only the fact that a person had been conferred functions by an organ of the United Nations. The Court used the term “agent” and did not consider relevant the fact that the person in question had or did not have an official status. In its advisory opinion on *Reparation for Injuries*, the Court noted that the question addressed by the General Assembly concerned the capacity of the United Nations to bring a claim in case of injury caused to one of its agents and said that it

understands the word “agent” in the most liberal sense, that is to say, any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the organization with carrying out, or helping to carry out, one of its functions—in short, any person through whom it acts.⁹⁹

In the later advisory opinion on the *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, the Court noted that

⁹⁶ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 40–42.

⁹⁷ *Ibid.*, at p. 42.

⁹⁸ Article 7 of the Charter of the United Nations refers to “principal organs” and to “subsidiary organs”. This latter term appears also in Articles 22 and 29 of the Charter of the United Nations.

⁹⁹ *Reparation for injuries suffered in the service of the United Nations* (see footnote 69 above), p. 177. This passage was already quoted in the text corresponding to footnote 84 above.

[i]n practice, according to the information supplied by the Secretary-General, the United Nations has had occasion to entrust missions—increasingly varied in nature—to persons not having the status of United Nations officials.¹⁰⁰

With regard to privileges and immunities, the Court also said in the same opinion that

[t]he essence of the matter lies not in their administrative position but in the nature of their mission.¹⁰¹

(3) More recently, in its advisory opinion on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, the Court noted that in case of

damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity ... [t]he United Nations may be required to bear responsibility for the damage arising from such acts.¹⁰²

Thus, according to the Court, conduct of the United Nations includes, apart from that of its principal and subsidiary organs, acts or omissions of its “agents”. This term is intended to refer not only to officials but also to other persons acting for the United Nations on the basis of functions conferred by an organ of the organization.

(4) What was said by the International Court of Justice with regard to the United Nations applies more generally to international organizations, most of which act through their organs (whether so defined or not) and a variety of agents to which the carrying out of the organization’s functions is entrusted. As was stated in a decision of the Swiss Federal Council of 30 October 1996,

[a]s a rule, one attributes to an international organization acts and omissions of its organs of all rank and nature and of its agents in the exercise of their competences.¹⁰³

(5) The distinction between organs and agents does not appear to be relevant for the purpose of attribution of conduct to an international organization. The conduct of both organs and agents is attributable to the organization.

(6) An organ or agent of an international organization may be an organ or agent who has been seconded by a State or another international organization. The extent to which the conduct of the seconded organ or agent has to be attributed to the receiving organization is discussed in the commentary to article 7.

(7) The requirement in paragraph 1 that the organ or agent acts “in the performance of functions of that organ or agent” is intended to make it clear that conduct is attributable to the international organization when the organ or

¹⁰⁰ *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989*, p. 177, at p. 194, para. 48.

¹⁰¹ *Ibid.*, para. 47.

¹⁰² *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (see footnote 87 above), pp. 88–89, para. 66.

¹⁰³ This is a translation from the original French, which reads as follows: *En règle générale, sont imputables à une organisation internationale les actes ou omissions de ses organes de tout rang et de toute nature et de ses agents dans l'exercice de leurs compétences* (document VPB 61.75, published on the Swiss Federal Council’s website: www.vpb.admin.ch).

agent exercises functions that have been given to that organ or agent, and in any event is not attributable when the organ or agent acts in a private capacity. The question of attribution of *ultra vires* conduct is addressed in article 8.

(8) According to draft article 4, paragraph 1, of the articles on responsibility of States for internationally wrongful acts, attribution to a State of conduct of an organ takes place “whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State”.¹⁰⁴ The latter specification could hardly apply to an international organization. The other elements could be retained, but it is preferable to use simpler wording, also in view of the fact that, while all States may be held to exercise all the above-mentioned functions, organizations vary significantly from one another also in this regard. Thus paragraph 1 simply states “whatever position the organ or agent holds in respect of the organization”.

(9) The international organization concerned establishes which functions are entrusted to each organ or agent. This is generally done, as indicated in paragraph 2, by the “rules of the organization”. By not making the rules of the organization the only criterion, the wording of paragraph 2 is intended to leave the possibility open that, in exceptional circumstances, functions may be considered as given to an organ or agent even if this could not be said to be based on the rules of the organization.

(10) Article 5 of the articles on responsibility of States for internationally wrongful acts concerns “[c]onduct of persons or entities exercising elements of governmental authority”.¹⁰⁵ This terminology is generally not appropriate for international organizations. One would have to express in a different way the link that an entity may have with an international organization. It is, however, superfluous to put in the present draft articles an additional provision in order to include persons or entities in a situation corresponding to the one envisaged in article 5 of the articles on responsibility of States for internationally wrongful acts. The term “agent” is given in subparagraph (d) of article 2 a wide meaning that adequately covers these persons or entities.

(11) A similar conclusion may be reached with regard to the persons or groups of persons referred to in article 8 of the articles on responsibility of States for internationally wrongful acts.¹⁰⁶ This provision concerns persons or groups of persons acting in fact on the instructions, or under the direction or control, of a State. Should persons or groups of persons act under the instructions, or the direction or control, of an international organization, they would have to be regarded as agents according to the definition given in subparagraph (d) of article 2. As was noted above in paragraph (9) of the present commentary, in exceptional cases, a person or entity would be considered, for the purpose of attribution of conduct, as entrusted with functions of the organization, even if this was not pursuant to the rules of the organization.

Article 7. Conduct of organs of a State or organs or agents of an international organization placed at the disposal of another international organization

The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.

Commentary

(1) When an organ of a State is placed at the disposal of an international organization, the organ may be fully seconded to that organization. In this case, the organ’s conduct would clearly be attributable only to the receiving organization. The same consequence would apply when an organ or agent of one international organization is fully seconded to another organization. In these cases, the general rule set out in article 6 would apply. Article 7 deals with the different situation in which the seconded organ or agent still acts to a certain extent as organ of the seconding State or as organ or agent of the seconding organization. This occurs for instance in the case of military contingents that a State places at the disposal of the United Nations for a peacekeeping operation, since the State retains disciplinary powers and criminal jurisdiction over the members of the national contingent.¹⁰⁷ There, the problem arises whether a specific conduct of the seconded organ or agent is to be attributed to the receiving organization or to the seconding State or organization.

(2) Since the articles on responsibility of States for internationally wrongful acts do not use the term “agent” within this context, article 7 only considers the case of an organ of a State being placed at the disposal of the organization. However, the term “organ”, with reference to a State, has to be understood in a wide sense, as comprising those entities and persons whose conduct is attributable to a State according to articles 5 to 8 of the articles on responsibility of States for internationally wrongful acts.¹⁰⁸

(3) The seconding State or organization may conclude an agreement with the receiving organization over placing an organ or agent at the latter organization’s disposal. The agreement may state which State or organization would be responsible for conduct of that organ or agent. For example, according to the model contribution agreement relating to military contingents placed at the disposal of the United Nations by one of its Member States, the United Nations is regarded as liable towards third parties, but has a right of recovery from the contributing State under circumstances such as “loss, damage, death or injury [arising] from gross negligence or wilful misconduct of the personnel provided by the Government”.¹⁰⁹ The agreement appears to deal only with distribution of responsibility and not with attribution of conduct. In any

¹⁰⁴ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 40–42; see also paragraphs (6)–(7) of the related commentary, pp. 40–41.

¹⁰⁵ *Ibid.*, pp. 42–43.

¹⁰⁶ *Ibid.*, pp. 47–49.

¹⁰⁷ This is generally specified in the agreement that the United Nations concludes with the contributing State. See the Secretary-General’s report on Command and control of United Nations peace-keeping operations (A/49/681), para. 6.

¹⁰⁸ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 42–49.

¹⁰⁹ Article 9 of the model contribution agreement (A/50/995, annex; A/51/967, annex).

event, this type of agreement is not conclusive because it governs only the relations between the contributing State or organization and the receiving organization and could thus not have the effect of depriving a third party of any right that this party may have towards the State or organization that is responsible under the general rules.

(4) The criterion for attribution of conduct either to the contributing State or organization or to the receiving organization is based, according to article 7, on the factual control that is exercised over the specific conduct taken by the organ or agent placed at the receiving organization's disposal. As was noted in a comment by one State, account needs to be taken of the "full factual circumstances and particular context".¹¹⁰ Article 6 of the articles on responsibility of States for internationally wrongful acts¹¹¹ takes a similar approach, although it is differently worded. According to the latter article, what is relevant is that "the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed". However, the commentary to article 6 on the responsibility of States for internationally wrongful acts explains that, for conduct to be attributed to the receiving State, it must be "under its exclusive direction and control, rather than on instructions from the sending State".¹¹² In any event, the wording of article 6 cannot be replicated here, because the reference to "the exercise of elements of governmental authority" is unsuitable to international organizations.

(5) With regard to States, the existence of control has been mainly discussed in relation to the question whether conduct of persons or of groups of persons, especially irregular armed forces, is attributable to a State.¹¹³ In the context of the placing of an organ or agent at the disposal of an international organization, control plays a different role. It does not concern the issue whether a certain conduct is attributable at all to a State or an international organization, but rather to which entity—the contributing State or organization or the receiving organization—conduct has to be attributed.

(6) The United Nations assumes that in principle it has exclusive control of the deployment of national contingents in a peacekeeping force. This premise led the United Nations Legal Counsel to state that

[a]s a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization, and if committed in violation of an international obligation entails the international responsibility of the Organization and its liability in compensation.¹¹⁴

This statement sums up United Nations practice relating to the United Nations Operation in the Congo,¹¹⁵ the

¹¹⁰ United Kingdom (*Official Records of the General Assembly, Sixty-fourth Session, Sixth Committee, 16th meeting (A/C.6/64/SR.16)*, para. 23).

¹¹¹ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 43–45.

¹¹² *Ibid.*, p. 44, paragraph (2) of the commentary to article 6.

¹¹³ See article 8 of the draft articles on responsibility of States for internationally wrongful acts and commentary thereto (*ibid.*, pp. 47–49).

¹¹⁴ Memorandum of 3 February 2004 by the United Nations Legal Counsel to the Director of the Codification Division, *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/545, p. 28.

¹¹⁵ See the agreements providing for compensation that were concluded by the United Nations with Belgium (United Nations, *Treaty*

United Nations Peacekeeping Force in Cyprus¹¹⁶ and later peacekeeping forces.¹¹⁷ In a recent comment, the United Nations Secretariat observed that "[f]or a number of reasons, notably political", the practice of the United Nations had been that of "maintaining the principle of United Nations responsibility *vis-à-vis* third parties" in connection with peacekeeping operations.¹¹⁸

(7) Practice relating to peacekeeping forces is particularly significant in the present context because of the control that the contributing State retains over disciplinary and criminal matters.¹¹⁹ This may have consequences with regard to attribution of conduct. For instance, the United Nations Office of Legal Affairs took the following line with regard to compliance with obligations under the 1973 Convention on international trade in endangered species of wild fauna and flora:

Since the Convention places the responsibility for enforcing its provisions on the States parties and since the troop-contributing States retain jurisdiction over the criminal acts of their military personnel, the responsibility for enforcing the provisions of the Convention rests with those troop-contributing States which are parties to the Convention.¹²⁰

Attribution of conduct to the contributing State is clearly linked with the retention of some powers by that State over its national contingent and thus on the control that the State possesses in the relevant respect.

(8) As has been held by several scholars,¹²¹ when an organ or agent is placed at the disposal of an international

Series, vol. 535, No. 7779, p. 191), Greece (*ibid.*, vol. 565, No. 8230, p. 3), Italy (*ibid.*, vol. 588, No. 8525, p. 197), Luxembourg (*ibid.*, vol. 585, No. 8487, p. 147) and Switzerland (*ibid.*, vol. 564, No. 621, p. 193).

¹¹⁶ United Nations, *Juridical Yearbook 1980* (Sales No. E.83.V.1), pp. 184–185.

¹¹⁷ See Report of the Secretary-General on financing of United Nations peacekeeping operations (A/51/389), paras. 7–8.

¹¹⁸ A/CN.4/637 and Add.1 (under the section entitled "Draft article 6 ... United Nations"), para. 6.

¹¹⁹ See above, paragraph (1) of the commentary to the present draft article and footnote 107.

¹²⁰ United Nations, *Juridical Yearbook 1994* (Sales No. E.00.V.8), p. 450.

¹²¹ See J.-P. Ritter, "La protection diplomatique à l'égard d'une organisation internationale", *AFDI*, vol. 8 (1962), pp. 427 *et seq.*, at p. 442; R. Simmonds, *Legal Problems Arising from the United Nations Military Operations in the Congo*, The Hague, Martinus Nijhoff, 1968, p. 229; B. Amrallah, "The international responsibility of the United Nations for activities carried out by U.N. peace-keeping forces", *Revue égyptienne de droit international*, vol. 32 (1976), pp. 57 *et seq.*, at pp. 62–63 and 73–79; E. Butkiewicz, "The premises of international responsibility of inter-governmental organizations", *Polish Yearbook of International Law*, vol. 11 (1981–1982), pp. 117 *et seq.*, at pp. 123–125 and 134–135; M. Pérez González, "Les organisations internationales et le droit de la responsabilité", *RGDIP*, vol. 92 (1988), pp. 63 *et seq.*, at p. 83; M. Hirsch, *The Responsibility of International Organizations toward Third Parties*, Dordrecht, Martinus Nijhoff, 1995, pp. 64–67; C. F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, Cambridge University Press, 1996, pp. 241–243; P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens*, Brussels, Bruylant/Éditions de l'Université de Bruxelles, 1998, pp. 379–380; I. Scobbie, "International organizations and international relations", in R.-J. Dupuy (ed.), *A Handbook of International Organizations*, 2nd ed., Dordrecht, Martinus Nijhoff, 1998, p. 891; C. Pitschas, *Die völkerrechtliche Verantwortlichkeit der Europäischen Gemeinschaft und ihrer Mitgliedsstaaten*, Berlin, Duncker and Humblot, 2001, p. 51; and J.-M. Sorel, "La responsabilité des Nations Unies dans les opérations de

organization, the decisive question in relation to attribution of a particular conduct appears to be who has effective control over the conduct in question. For instance, it would be difficult to attribute to the United Nations conduct of forces in circumstances such as those described in the report of the Commission of Inquiry which was established in order to investigate armed attacks on personnel of the United Nations Operation in Somalia II (UNOSOM II):

The Force Commander of UNOSOM II was not in effective control of several national contingents which, in varying degrees, persisted in seeking orders from their home authorities before executing orders of the Forces Command.

Many major operations undertaken under the United Nations flag and in the context of UNOSOM's mandate were totally outside the command and control of the United Nations, even though the repercussions impacted crucially on the mission of UNOSOM and the safety of its personnel.¹²²

Taking the same approach, the Court of First Instance of Brussels found that the decision by the commander of the Belgian contingent of the United Nations Assistance Mission for Rwanda (UNAMIR) to abandon a *de facto* refugee camp at Kigali in April 1994 was "taken under the aegis of Belgium and not of UNAMIR".¹²³

(9) The Secretary-General of the United Nations held that the criterion of the "degree of effective control" was decisive with regard to joint operations:

The international responsibility of the United Nations for combat-related activities of United Nations forces is premised on the assumption that the operation in question is under the exclusive command and control of the United Nations ... In joint operations, international responsibility for the conduct of the troops lies where operational command and control is vested according to the arrangements establishing the modalities of cooperation between the State or States providing the troops and the United Nations. In the absence of formal arrangements between the United Nations and the State or States providing troops, responsibility would be determined in each and every case according to the degree of effective control exercised by either party in the conduct of the operation.¹²⁴

What has been held with regard to joint operations, such as those involving UNOSOM II and the Quick Reaction Force in Somalia, should also apply to peacekeeping

(Footnote 121 continued.)

maintien de la paix", *International Law Forum*, vol. 3, No. 2 (2001), pp. 127 *et seq.*, at p. 129. Some authors refer to "effective control", some others to "operational control". The latter concept was used also by Bothe (see M. Bothe, *Streitkräfte internationaler Organisationen*, Cologne/Berlin, Heymanns Verlag, 1968, p. 87). Difficulties in drawing a line between operational and organizational control were underlined by Condorelli (L. Condorelli, "Le statut des forces de l'ONU et le droit international humanitaire", *Rivista di Diritto Internazionale*, vol. 78 (1995), pp. 881 *et seq.*, at pp. 887–888). The draft suggested by the Committee on Accountability of International Organisations of the International Law Association referred to a criterion of "effective control (operational command and control)" (International Law Association, *Report of the Seventy-first Conference Held in Berlin, 16–21 August 2004*, London, 2004, p. 200).

¹²² S/1994/653, paras. 243–244.

¹²³ *Mukeshimana-Ngulinzira and Others v. Belgium and Others*, RG Nos. 04/4807/A and 07/15547/A, Judgment of 8 December 2010, Court of First Instance of Brussels, *Oxford Reports on International Law in Domestic Courts*, vol. 1604 (BE 2010), para. 38; available from www.oxfordlawreports.com. In the original French the quoted passage reads as follows: *une décision prise sous l'égide de la Belgique et non de la MINUAR*.

¹²⁴ A/51/389, paras. 17–18.

operations, insofar as it is possible to distinguish in their regard areas of effective control respectively pertaining to the United Nations and the contributing State. While it is understandable that, for the sake of efficiency of military operations, the United Nations insists on claiming exclusive command and control over peacekeeping forces, attribution of conduct should also in this regard be based on a factual criterion.

(10) The European Court of Human Rights considered, first in *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*,¹²⁵ its jurisdiction *ratione personae* in relation to the conduct of forces placed in Kosovo at the disposal of the United Nations (United Nations Interim Administration Mission in Kosovo (UNMIK)) or authorized by the United Nations (Kosovo Force (KFOR)). The Court referred to the present work of the International Law Commission and in particular to the criterion of "effective control" that had been provisionally adopted by the Commission. While not formulating any criticism to this criterion, the Court considered that the decisive factor was whether the United Nations Security Council "retained ultimate authority and control so that operational command only was delegated".¹²⁶ While acknowledging "the effectiveness or unity of [the] operational command [of NATO]" concerning KFOR,¹²⁷ the Court noted that the presence of KFOR in Kosovo was based on a resolution adopted by the Security Council and concluded that "KFOR was exercising lawfully delegated Chapter VII [of the Charter of the United Nations] powers of the [United Nations Security Council] so that the impugned action was, in principle, 'attributable' to the [United Nations] within the meaning of the word outlined [in article 4 of the present articles]".¹²⁸ One may note that, when applying the criterion of effective control, "operational" control would seem more significant than "ultimate" control, since the latter hardly implies a role in the act in question.¹²⁹ It is therefore not surprising that in his report

¹²⁵ Grand Chamber decision of 2 May 2007 (Admissibility), Application nos. 71412/01 and 78166/01, European Court of Human Rights (available from the Court's HUDOC database: <http://hudoc.echr.coe.int>).

¹²⁶ *Ibid.*, para. 133.

¹²⁷ *Ibid.*, para. 139.

¹²⁸ *Ibid.*, para. 141.

¹²⁹ Various authors pointed out that the European Court did not apply the criterion of effective control in the way that had been envisaged by the Commission. See C. A. Bell, "Reassessing multiple attribution: the International Law Commission and the *Behrami* and *Saramati* decision", *New York University Journal of International Law and Politics*, vol. 42, No. 2 (2010), p. 501; P. Bodeau-Livinec, G. P. Buzzini and S. Villalpando, Note, *AJIL*, vol. 102, No. 2 (2008), pp. 323 *et seq.*, at pp. 328–329; P. Klein, "Responsabilité pour les faits commis dans le cadre d'opérations de paix et étendue du pouvoir de contrôle de la Cour européenne des droits de l'homme: quelques considérations critiques sur l'arrêt *Behrami* et *Saramati*", *AFDI*, vol. 53 (2007), pp. 43 *et seq.*, at p. 55; P. Lagrange, "Responsabilité des Etats pour actes accomplis en application du chapitre VII de la Charte des Nations Unies", *RGDIP*, vol. 112 (2008), pp. 85 *et seq.*, at pp. 94–95; C. Laly-Chevalier, "Les opérations militaires et civiles des Nations Unies et la Convention européenne des droits de l'homme", *Revue belge de droit international*, vol. 40 (2007), pp. 627 *et seq.*, at pp. 642–644; K. M. Larsen, "Attribution of conduct in peace operations: the 'ultimate authority and control' test", *European Journal of International Law*, vol. 19, No. 3 (2008), pp. 509 *et seq.*, at pp. 521–522; F. Messineo, "The House of Lords in *Al-Jedda* and public international law: attribution of conduct to UN-authorized forces and the power of the Security Council to displace human rights", *Netherlands*

of June 2008 on the UNMIK, the Secretary-General of the United Nations distanced himself from the latter criterion and stated, "It is understood that the international responsibility of the United Nations will be limited in the extent of its effective operational control".¹³⁰

(11) In *Kasumaj v. Greece*¹³¹ and *Gajić v. Germany*,¹³² the European Court of Human Rights reiterated its view concerning the attribution to the United Nations of conduct taken by national contingents allocated to KFOR. Likewise, in *Berić and others v. Bosnia and Herzegovina*,¹³³ the same Court quoted verbatim and at length its previous decision in *Behrami and Saramati* when reaching the conclusion that the conduct of the High Representative for the Implementation of the Peace Agreement on Bosnia and Herzegovina had to be attributed to the United Nations.

(12) Also the decision of the House of Lords in the *Al-Jedda* case¹³⁴ contained ample references to the present work of the Commission. One of the majority opinions stated that "[i]t was common ground between the parties that the governing principle [was] that expressed by the International Law Commission in article [7] of its draft articles on Responsibility of International Organizations".¹³⁵ The House of Lords was confronted with a claim arising from the detention of a person by British troops in Iraq. In its resolution 1546 (2004) of 8 June 2004, the Security Council had previously authorized the presence of the multinational force in that country. The majority opinions appeared to endorse the views expressed by the European Court of Human Rights in *Behrami* and *Saramati*, but distinguished the facts of the case and concluded that it could not "realistically be said that US and UK forces were under the effective

command and control of the [United Nations], or that UK forces were under such command and control when they detained the appellant".¹³⁶ This conclusion appears to be in line with the way in which the criterion of effective control was intended.

(13) After the judgment of the House of Lords, an application was made by Mr. Al-Jedda to the European Court of Human Rights. In *Al-Jedda v. the United Kingdom*, this Court quoted several texts concerning attribution, including the article (identical to the present article) which had been adopted by the Commission on first reading and some paragraphs of the commentary.¹³⁷ The Court considered that "the United Nations Security Council had neither effective control nor ultimate authority and control over the acts and omissions of foreign troops within the Multinational Force and that the applicant's detention was not, therefore, attributable to the United Nations".¹³⁸ The Court unanimously concluded that the applicant's detention had to be attributed to the respondent State.¹³⁹

(14) The question of attribution was also considered in a judgment of the District Court of The Hague concerning the attribution of the conduct of the Dutch contingent in the United Nations Protection Force (UNPROFOR) in relation to the massacre in Srebrenica. This judgment contained only a general reference to the Commission's articles.¹⁴⁰ The Court found that "the reprehended acts of Dutchbat should be assessed as those of an UNPROFOR contingent" and that "these acts and omissions should be attributed strictly, as a matter of principle, to the United Nations".¹⁴¹ The Court then considered that if "Dutchbat was instructed by the Dutch authorities to ignore [United Nations] orders or to go against them, and Dutchbat behaved in accordance with this instruction from the Netherlands, this constitutes a violation of the factual basis on which the attribution to the [United Nations] rests".¹⁴² The Court did not find that there was sufficient evidence for reaching such a conclusion. On appeal from the judgment of the District Court, The Hague Court of Appeal referred to the draft article (identical to the present article) which had been adopted by the Commission on first reading. The Court applied the criterion of "effective control" to the circumstances of the case and reached the conclusion that the respondent State was responsible for

International Law Review, vol. 56, No. 1 (2009), pp. 35 *et seq.*, at pp. 39–43; M. Milanović and T. Papić, "As bad as it gets: the European Court of Human Rights's *Behrami* and *Saramati* decision and general international law", *International and Comparative Law Quarterly*, vol. 58 (2009), pp. 267 *et seq.*, at pp. 283–286; A. Orakhelashvili, Note, AJIL, vol. 102 (2008), pp. 337 *et seq.*, at p. 341; P. Palchetti, "Azioni di forze istituite o autorizzate dalle Nazioni Unite davanti alla Corte europea dei diritti dell'uomo: i casi *Behrami* e *Saramati*", *Rivista di diritto internazionale*, vol. 90 (2007), pp. 681 *et seq.*, at pp. 689–690; A. Sari, "Jurisdiction and international responsibility in peace support operations: the *Behrami* and *Saramati* cases", *Human Rights Law Review*, vol. 8, No. 1 (2008), pp. 151 *et seq.*, at p. 164; L.-A. Sicilianos, "L'(ir)responsabilité des forces multinationales?", in L. Boisson de Chazournes and M. Kohen (eds.), *International Law and the Quest for its Implementation*; Liber Amicorum Vera Gowlland-Debbas, Leiden, Brill, 2010, pp. 95 *et seq.*, at pp. 98–106; and H. Strydom, "The responsibility of international organisations for conduct arising out of armed conflict situations", *South African Yearbook of International Law*, vol. 34 (2009), pp. 101 *et seq.*, at pp. 116–120.

¹³⁰ S/2008/354, para. 16.

¹³¹ Decision of 5 July 2007 on the admissibility of Application no. 6974/05.

¹³² Decision of 28 August 2007 on the admissibility of Application no. 31446/02.

¹³³ Decision of 16 October 2007 on the admissibility of Application nos. 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793/05 and 25496/05.

¹³⁴ *R. (on the application of Al-Jedda) v. Secretary of State for Defence*, Judgment of 12 December 2007, House of Lords, [2007] UKHL 58.

¹³⁵ *Ibid.*, paragraph 5 of the opinion of Lord Bingham of Cornhill.

¹³⁶ See the opinion of Lord Bingham of Cornhill, *ibid.*, paras. 22–24 (the quotation is taken from paragraph 23). Baroness Hale of Richmond (para. 124), Lord Carswell (para. 131) and Lord Brown of Eaton-under-Heywood (paras. 141–149, with his own reasons) concurred on this conclusion, while Lord Rodger of Earlsferry dissented.

¹³⁷ Application no. 27021/08, Judgment of 7 July 2011, Grand Chamber, European Court of Human Rights, *Reports of Judgments and Decisions* 2011, para. 56 (available from the Court's HUDOC database: <http://hudoc.echr.coe.int>).

¹³⁸ *Ibid.*, para. 84. The Court found that Al-Jedda's "internment took place within a detention facility in Basrah City, controlled exclusively by British forces, and [that] the applicant was therefore within the authority and control of the United Kingdom throughout" (para. 85).

¹³⁹ *Ibid.*, paragraph 3 of the operative part.

¹⁴⁰ *H. N. v. the Netherlands*, Case No. 265615/HA ZA 06-1671, Judgment of 10 September 2008, District Court of The Hague, para. 4.8. English translation available from <http://deepink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBSGR:2008:BF0181>.

¹⁴¹ *Ibid.*, para. 4.11.

¹⁴² *Ibid.*, para. 4.14.1.

its involvement in the events at Srebrenica which had led to the killing of three Bosnian Muslim men after they had been evicted from the Dutchbat compound.¹⁴³

(15) The principles applicable to peacekeeping forces may be extended to other State organs placed at the disposal of the United Nations, such as disaster relief units, about which the Secretary-General of the United Nations wrote that

[i]f the disaster relief unit is itself established by the United Nations, the unit would be a subsidiary organ of the United Nations. A disaster relief unit of this kind would be similar in legal status to, for example, the United Nations [Peacekeeping] Force in Cyprus (UNFICYP).¹⁴⁴

(16) Similar conclusions would have to be reached in the rarer case that an international organization places one of its organs at the disposal of another international organization. An example is provided by the Pan American Sanitary Conference, which, as a result of an agreement between WHO and the Pan American Health Organization, serves “respectively as the Regional Committee and the Regional Office of the World Health Organization for the Western Hemisphere, within the provisions of the Constitution of the World Health Organization”.¹⁴⁵ The Legal Counsel of WHO noted that

[o]n the basis of that arrangement, acts of [the Pan American Health Organization] and of its staff could engage the responsibility of WHO.¹⁴⁶

Article 8. Excess of authority or contravention of instructions

The conduct of an organ or agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in an official capacity and within the overall functions of that organization, even if the conduct exceeds the authority of that organ or agent or contravenes instructions.

¹⁴³ *Nuhanović v. Netherlands*, Case No. LJN:BR5388, Judgment of 5 July 2011, The Hague Court of Appeal (Civil Law Section), especially paragraphs 5.8–5.9. English translation available from <http://zoeken.rechtspraak.nl>; also available from www.oxfordlawreports.com (International Law in Domestic Courts (ILDC) 1742 (NL 2011)). The Court argued that the Netherlands had been able to prevent the removal of the victims. When giving a wide meaning to the concept of “effective control” so as to include also the ability to prevent, the Court followed the approach taken by T. Dannenbaum, “Translating the standard of effective control into a system of effective accountability: how liability should be apportioned for violations of human rights by Member State troop contingents serving as United Nations peacekeepers”, *Harvard International Law Journal*, vol. 51, No. 1 (2010), pp. 113 *et seq.*, at p. 157. The Court considered the possibility of a dual attribution of conduct to the State of origin and the United Nations. This solution had been advocated by C. Leck, “International responsibility in United Nations peacekeeping operations: command and control arrangements and the attribution of conduct”, *Melbourne Journal of International Law*, vol. 10 (2009), pp. 346 *et seq.*, at pp. 362–364.

¹⁴⁴ United Nations, *Juridical Yearbook 1971* (Sales No. E.73.V.1), p. 187.

¹⁴⁵ Article 2 of the Agreement concerning the integration of the Pan American Sanitary Organization with the World Health Organization, signed at Washington, D.C. on 24 May 1949 (United Nations, *Treaty Series*, vol. 32, No. 178, p. 387, at p. 388).

¹⁴⁶ Letter of 19 December 2003 from the Legal Counsel of WHO to the United Nations Legal Counsel, *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/545, p. 34.

Commentary

(1) Article 8 deals with *ultra vires* conduct of organs or agents of an international organization. *Ultra vires* conduct may be within the competence of the organization, but exceed the authority of the acting organ or agent. It also may exceed the competence of the organization,¹⁴⁷ in which case it will also exceed the authority of the organ or of the agent who performed it.

(2) Article 8 has to be read in the context of the other provisions relating to attribution, especially article 6. It is to be understood that, in accordance with article 6, organs and agents are persons and entities exercising functions of the organization. Apart from exceptional cases (paragraph (11) of the commentary to article 6), the rules of the organization, as defined in article 2, subparagraph (b), will govern the issue whether an organ or agent has authority to undertake a certain conduct. It is implied that instructions are relevant to the purpose of attribution of conduct only if they are binding the organ or agent. Also in this regard the rules of the organization will generally be decisive.

(3) The wording of article 8 closely follows that of draft article 7 on the responsibility of States for internationally wrongful acts.¹⁴⁸ One textual difference is due to the fact that the latter article takes the wording of draft articles 4 and 5 on State responsibility into account and thus considers the *ultra vires* conduct of “an organ of a State or a person or entity empowered to exercise elements of governmental authority”, while the present article only needs to be aligned with article 6 and thus more simply refers to “an organ or an agent of an international organization”.

(4) The key element for attribution in draft article 7 on the responsibility of States for internationally wrongful acts is the requirement that the organ or agent acts “in that capacity”. This wording is intended to convey the need for a close link between the *ultra vires* conduct and the organ’s or agent’s functions. As was said in the commentary to draft article 7 on State responsibility, the text “indicates that the conduct referred to comprises only the actions and omissions of organs purportedly or apparently carrying out their official functions, and not the private actions or omissions of individuals who happen to be organs or agents of the State”.¹⁴⁹ In order to make this point clearer, the present article expressly specifies the requirement that the organ or agent of an international organization “acts in an official capacity and within the overall functions of that organization”.¹⁵⁰

¹⁴⁷ As the International Court of Justice said in its advisory opinion on *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, “international organizations ... do not, unlike States, possess a general competence. International organizations are governed by the ‘principle of speciality’, that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them” (*Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (see footnote 68 above), p. 78, para. 25).

¹⁴⁸ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 45–47.

¹⁴⁹ *Ibid.*, p. 46, paragraph (8) of the commentary to article 7.

¹⁵⁰ The inclusion of a reference to the functions of the organization was advocated by J. M. Cortés Martín, *Las Organizaciones Internacionales: Codificación y Desarrollo Progresivo de su Responsabilidad Internacional*, Seville, Instituto Andaluz de Administración Pública, 2008, pp. 211–223.

(5) Article 8 only concerns attribution of conduct and does not prejudice the question whether an *ultra vires* act is valid or not under the rules of the organization. Even if the act was considered to be invalid, it may entail the responsibility of the organization. The need to protect third parties requires attribution not to be limited to acts that are regarded as valid.

(6) The possibility of attributing to an international organization acts that an organ takes *ultra vires* has been admitted by the International Court of Justice in its advisory opinion on *Certain expenses of the United Nations*, in which the Court stated as follows:

If it is agreed that the action in question is within the scope of the functions of the Organization but it is alleged that it has been initiated or carried out in a manner not in conformity with the division of functions among the several organs which the Charter [of the United Nations] prescribes, one moves to the internal plane, to the internal structure of the Organization. If the action was taken by the wrong organ, it was irregular as a matter of that internal structure, but this would not necessarily mean that the expense incurred was not an expense of the Organization. Both national and international law contemplate cases in which the body corporate or politic may be bound, as to third parties, by an *ultra vires* act of an agent.¹⁵¹

The fact that the Court considered that the United Nations would have to bear expenses deriving from *ultra vires* acts of an organ reflects policy considerations that appear even stronger in relation to wrongful conduct. Denying attribution of conduct may deprive third parties of all redress, unless conduct could be attributed to a State or to another organization.

(7) A distinction between the conduct of organs and officials and that of other agents would find little justification in view of the limited significance that the distinction carries in the practice of international organizations.¹⁵² The International Court of Justice appears to have asserted the organization's responsibility for *ultra vires* acts also of persons other than officials. In its advisory opinion on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, the Court stated that

it need hardly be said that all agents of the United Nations, in whatever official capacity they act, must take care not to exceed the scope of their functions, and should so comport themselves as to avoid claims against the United Nations.¹⁵³

One obvious reason why an agent—in this case an expert on mission—should take care not to exceed the scope of his or her functions in order to avoid that claims be brought against the organization is that the organization could well be held responsible for the agent's conduct.

¹⁵¹ *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962: I.C.J. Reports 1962, p. 151, at p. 168.

¹⁵² The Committee on Accountability of International Organizations of the International Law Association suggested the following rule: "The conduct of organs, officials, or agents of an [international organization] shall be considered an act of that [international organization] under international law if the organ, official, or agent was acting in its official capacity, even if that conduct exceeds the authority granted or contravenes instructions given (*ultra vires*)" (International Law Association, *Report of the Seventy-first Conference ...* (see footnote 121 above), p. 200).

¹⁵³ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (see footnote 87 above), p. 89, para. 66.

(8) The rule stated in article 8 also finds support in the following statement of the General Counsel of the International Monetary Fund (IMF):

Attribution may apply even though the official exceeds the authority given to him, he failed to follow rules or he was negligent. However, acts of an official that were not performed in his official capacity would not be attributable to the organization.¹⁵⁴

(9) Practice of international organizations confirms that *ultra vires* conduct of an organ or agent is attributable to the organization when that conduct is linked with the organ's or agent's official functions. This appears to underlie the position taken by the Office of Legal Affairs of the United Nations in a memorandum concerning claims involving off-duty acts of members of peacekeeping forces:

United Nations policy in regard to off-duty acts of the members of peace-keeping forces is that the Organization has no legal or financial liability for death, injury or damage resulting from such acts ... We consider the primary factor in determining an "off-duty" situation to be whether the member of a peace-keeping mission was acting in a non-official/non-operational capacity when the incident occurred and not whether he/she was in military or civilian attire at the time of the incident or whether the incident occurred inside or outside the area of operations ... [W]ith regard to United Nations legal and financial liability a member of the Force on a state of alert may nonetheless assume an off-duty status if he/she independently acts in an individual capacity, not attributable to the performance of official duties, during that designated "state-of-alert" period ... [W]e wish to note that the factual circumstances of each case vary and, hence, a determination of whether the status of a member of a peace-keeping mission is on duty or off duty may depend in part on the particular factors of the case, taking into consideration the opinion of the Force Commander or Chief of Staff.¹⁵⁵

While the "off-duty" conduct of a member of a national contingent would not be attributed to the organization,¹⁵⁶ the "on-duty" conduct may be so attributed. One would then have to examine whether the *ultra vires* conduct in question is related to the functions entrusted to the person concerned.

(10) The fact that conduct is taken by an organ or agent off duty does not necessarily exclude the responsibility of the international organization if the latter breached an obligation of prevention that may exist under international law. This is likely to be the situation to which the Office of Legal Affairs of the United Nations referred in 1974 when it considered, with reference to off-duty conduct of members of the United Nations Emergency Force, that "there may well be situations involving actions by Force members off duty which the United Nations could appropriately recognize as engaging its responsibility".¹⁵⁷

¹⁵⁴ *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/545, p. 33.

¹⁵⁵ United Nations, *Juridical Yearbook 1986* (Sales No. E.94.V.2), p. 300.

¹⁵⁶ A clear case of an "off-duty" act of a member of the United Nations Interim Force in Lebanon, who had engaged in moving explosives to the territory of Israel, was considered by the District Court of Haifa in a judgment of 10 May 1979 (see United Nations, *Juridical Yearbook 1979* (Sales No. E.82.V.1), p. 205).

¹⁵⁷ This passage of an unpublished opinion was quoted in the comment of the Secretariat of the United Nations, A/CN.4/637 and Add.1 (in the section "Draft article 7 ... United Nations", para. 4).

Article 9. Conduct acknowledged and adopted by an international organization as its own

Conduct which is not attributable to an international organization under articles 6 to 8 shall nevertheless be considered an act of that organization under international law if and to the extent that the organization acknowledges and adopts the conduct in question as its own.

Commentary

(1) Article 9 concerns the case in which an international organization “acknowledges and adopts” as its own certain conduct which would not be attributable to that organization under the preceding articles. Attribution is then based on the attitude taken by the organization with regard to a certain conduct. The reference to the “extent” reflects the possibility that acknowledgement and adoption relate only to part of the conduct in question.

(2) Article 9 mirrors the content of article 11 on the responsibility of States for internationally wrongful acts,¹⁵⁸ which is identically worded but for the reference to a State instead of an international organization. As the commentary to article 11 explains, attribution can be based on acknowledgement and adoption of conduct also when that conduct “may not have been attributable”.¹⁵⁹ In other words, the criterion of attribution now under consideration may be applied even when it has not been established whether attribution may be effected on the basis of other criteria.

(3) In certain instances of practice, relating both to States and to international organizations, it may not be clear whether what is involved by the acknowledgement is attribution of conduct or responsibility. This is not altogether certain, for instance, with regard to the following statement made on behalf of the European Community in the oral pleading before a World Trade Organization (WTO) panel in the case *European Communities—Customs Classification of Certain Computer Equipment*. The European Community declared that it was

ready to assume the entire international responsibility for all measures in the area of tariff concessions, whether the measure complained about has been taken at the [European Community] level or at the level of Member States.¹⁶⁰

(4) The question of attribution was clearly addressed by a decision of Trial Chamber II of the International Tribunal for the Former Yugoslavia in *Prosecutor v. Dragan Nikolić*. The question was raised whether the arrest of the accused was attributable to the Stabilization Force (SFOR). The Chamber first noted that the Commission’s articles on responsibility of States for internationally wrongful acts were “not binding on States”. It then referred to article 57 and observed that the articles were “primarily directed at the responsibility of States and not at those of international organizations or entities”.¹⁶¹ However, the Chamber found

that, “[p]urely as *general legal guidance*”, it would “use the principles laid down in the draft articles insofar as they may be helpful for determining the issue at hand”.¹⁶² This led the Chamber to quote extensively article 11 and the related commentary.¹⁶³ The Chamber then added:

The Trial Chamber observes that both Parties use the same and similar criteria of “acknowledgement”, “adoption”, “recognition”, “approval” and “ratification”, as used by the [International Law Commission]. The question is therefore whether on the basis of the assumed facts SFOR can be considered to have “acknowledged and adopted” the conduct undertaken by the individuals “as its own”.¹⁶⁴

The Chamber concluded that the conduct of SFOR did not “amount to an ‘adoption’ or ‘acknowledgement’ of the illegal conduct ‘as their own’”.¹⁶⁵

(5) No policy reasons appear to militate against applying to international organizations the criterion for attribution based on acknowledgement and adoption. The question may arise regarding the competence of the international organization in making that acknowledgement and adoption, and concerning which organ or agent would be competent to do so. Although the existence of a specific rule is highly unlikely, the rules of the organization also govern this issue.

CHAPTER III

BREACH OF AN INTERNATIONAL OBLIGATION

Commentary

(1) Articles 6 to 9 of the present draft articles address the question of attribution of conduct to an international organization. According to article 4, attribution of conduct is one of the two conditions for an internationally wrongful act of an international organization to arise. The other condition is that the same conduct “constitutes a breach of an international obligation of that organization”. This condition is examined in the present chapter.

(2) As specified in article 4, conduct of an international organization may consist of “an action or omission”. An omission constitutes a breach when the international organization is under an international obligation to take some positive action and fails to do so. A breach may also consist in an action that is inconsistent with what the international organization is required to do, or not to do, under international law.

(3) To a large extent, the four articles included in the present chapter correspond, in their substance and wording, to draft articles 12 to 15 on the responsibility of

¹⁶² *Ibid.*, para. 61.

¹⁶³ *Ibid.*, paras. 62–63.

¹⁶⁴ *Ibid.*, para. 64.

¹⁶⁵ *Ibid.*, para. 66. The appeal was rejected on a different basis. On the point here at issue, the Appeals Chamber only noted that “the exercise of jurisdiction should not be declined in case of abductions carried out by private individuals whose actions, unless instigated, acknowledged or condoned by a State or an international organization, or other entity, do not necessarily in themselves violate State sovereignty” (*Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-AR73, *Decision on interlocutory appeal concerning legality of arrest*, 5 June 2003, International Tribunal for the Former Yugoslavia, *Judicial Supplement*, No. 42, para. 26).

¹⁵⁸ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 52.

¹⁵⁹ *Ibid.*, paragraph (1) of the commentary to article 11.

¹⁶⁰ Unpublished document.

¹⁶¹ *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-PT, *Decision on defence motion challenging the exercise of jurisdiction by the Tribunal*, 9 October 2002, International Tribunal for the Former Yugoslavia, *Judicial Supplement*, No. 37, para. 60.

States for internationally wrongful acts.¹⁶⁶ Those articles express principles of a general nature that appear to be applicable to the breach of an international obligation on the part of any subject of international law. There would thus be little reason to take a different approach in the present articles, although available practice relating to international organizations is limited with regard to the various issues addressed in the present chapter.

Article 10. Existence of a breach of an international obligation

1. There is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of the origin or character of the obligation concerned.

2. Paragraph 1 includes the breach of any international obligation that may arise for an international organization towards its members under the rules of the organization.

Commentary

(1) The wording of paragraph 1 corresponds to that of article 12 on the responsibility of States for internationally wrongful acts,¹⁶⁷ with the replacement of the term “State” with “international organization”.

(2) As in the case of State responsibility, the term “international obligation” means an obligation under international law “regardless of the origin” of the obligation concerned. As mentioned in the commentary to article 12 on the responsibility of States for internationally wrongful acts, this is intended to convey that the international obligation “may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order”.¹⁶⁸

(3) An international obligation may be owed by an international organization to the international community as a whole, one or several States, whether members or non-members, another international organization or other international organizations and any other subject of international law.

(4) For an international organization many obligations are likely to arise from the rules of the organization, which are defined in article 2, subparagraph (b), of the present articles as meaning “in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization”. While it may seem superfluous to state that obligations arising from the constituent instruments or binding acts that are based on those instruments are indeed international obligations, the practical importance of obligations under the rules of the organization makes it preferable to dispel any doubt that breaches of these obligations are also covered by the present articles. The wording in

paragraph 2 is intended to include any international obligation that may arise from the rules of the organization.

(5) The question may be raised whether all the obligations arising from rules of the organization are to be considered international obligations. The legal nature of the rules of the organization is to some extent controversial. Many consider that the rules of treaty-based organizations are part of international law.¹⁶⁹ Some authors have held that, although international organizations are established by treaties or other instruments governed by international law, the internal law of the organization, once it has come into existence, does not form part of international law.¹⁷⁰ Another view, which finds support in practice, is that international organizations that have achieved a high degree of integration are a special case.¹⁷¹ A further view would draw a distinction according to the source and subject matter of the rules of the organization and exclude, for instance, certain administrative regulations from the domain of international law.

(6) The question of the nature of a particular rule of the organization was addressed by the International Court of Justice in its advisory opinion on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*. In the context of the question referred to it, the Court considered the legal nature of the Constitutional Framework adopted by the Special Representative of the Secretary-General “on the basis of the authority derived from Security Council

¹⁶⁹ The theory that the “rules of the organization” are part of international law has been expounded particularly by M. Decleva, *Il diritto interno delle Unioni internazionali*, Padua, Cedam, 1962, and G. Balladore Pallieri, “Le droit interne des organisations internationales”, *Collected Courses of The Hague Academy of International Law, 1969*, vol. 127 (1969), p. 1. For a recent reassertion, see P. Daillier and A. Pellet, *Droit international public (Nguyen Quoc Dinh)*, 7th ed., Paris, Librairie générale de droit et de jurisprudence, 2002, pp. 576–577.

¹⁷⁰ Among the authors who defend this view are L. Focsaneanu, “Le droit interne de l’Organisation des Nations Unies”, *AFDI*, vol. 3 (1957), pp. 315 *et seq.*; P. Cahier, “Le droit interne des organisations internationales”, *RGDIP*, vol. 67 (1963), pp. 563 *et seq.*; J. A. Barberis, “Nouvelles questions concernant la personnalité juridique internationale”, *Collected Courses of The Hague Academy of International Law, 1983-I*, vol. 179 (1983), pp. 145 *et seq.*, at pp. 222–225; and C. Ahlborn, “The rules of international organizations and the law of international responsibility”, Amsterdam Center for International Law Research Paper No. 2011-03 (SHARES Series); available from www.sharesproject.nl. The distinction between international law and the internal law of international organizations was upheld also by R. Bernhardt, “Qualifikation und Anwendungsbereich des internen Rechts internationaler Organisationen”, *Berichte der Deutschen Gesellschaft für Völkerrecht*, vol. 12 (1973), p. 7.

¹⁷¹ As a model of this type of organization, one could cite the European Community (now the European Union), for which the Court of Justice of the European Communities gave the following description in *Costa v. E.N.E.L.*, in 1964: “By contrast with ordinary treaties, the [Treaty establishing the European Economic Community] has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply. By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves” (Case No. 6/64, Judgment of 15 July 1964, Court of Justice of the European Communities, *European Court Reports 1964*, p. 587, at p. 593).

¹⁶⁶ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 54–64.

¹⁶⁷ *Ibid.*, pp. 54–57.

¹⁶⁸ *Ibid.*, p. 55, paragraph (3) of the commentary to article 12.

resolution 1244 (1999), notably its paragraphs 6, 10 and 11, and thus ultimately from the [Charter of the] United Nations". The Court noted the following:

The Constitutional Framework derives its binding force from the binding character of resolution 1244 (1999) and thus from international law. In that sense it therefore possesses an international legal character.

At the same time, the Court observes that the Constitutional Framework functions as part of a specific legal order, created pursuant to resolution 1244 (1999), which is applicable only in Kosovo and the purpose of which is to regulate, during the interim phase established by resolution 1244 (1999), matters which would ordinarily be the subject of internal, rather than international, law.¹⁷²

The Court concluded on this point that "Security Council resolution 1244 (1999) and the Constitutional Framework form part of the international law which is to be considered in replying to the question posed by the General Assembly in its request for the advisory opinion".¹⁷³

(7) Although the question of the legal nature of the rules of the organization is far from theoretical for the purposes of the present draft articles, since it affects the applicability of the principles of international law with regard to responsibility for breaches of certain obligations arising from the rules of the organization, paragraph 2 does not attempt to express a clear-cut view on the issue. It simply intends to say that, to the extent that an obligation arising from the rules of the organization has to be regarded as an obligation under international law, the principles expressed in the present article apply. Breaches of obligations under the rules of the organization are not always breaches of obligations under international law.

(8) Paragraph 2 refers to the international obligations arising "for an international organization towards its members", because these are the largest category of international obligations flowing from the rules of the organization. This reference is not intended to exclude the possibility that other rules of the organization may form part of international law.

(9) The rules of an organization may prescribe specific treatment of breaches of international obligations, also with regard to the question of the existence of a breach. This does not need to be stated in article 10, because it could be adequately covered by the general provision on *lex specialis* (art. 64), which points to the possible existence of special rules on any of the matters covered by the present draft articles. These special rules do not necessarily prevail over principles set out in the present draft articles. For instance, with regard to the existence of a breach of an international obligation, a special rule of the organization would not affect breaches of obligations that an international organization may owe to a non-member State. Nor would special rules affect obligations arising from a higher source, irrespective of the identity of the subject to whom the international organization owes the obligation.

(10) As explained in the commentary to article 12 on the responsibility of States for internationally wrongful

acts,¹⁷⁴ the reference in paragraph 1 to the character of the obligation concerns the "various classifications of international obligations".

(11) Obligations existing for an international organization may relate in a variety of ways to conduct of its member States or international organizations. For instance, an international organization may have acquired an obligation to prevent its member States from carrying out a certain conduct. In this case, the conduct of member States would not *per se* involve a breach of the obligation. The breach would consist in the failure on the part of the international organization to comply with its obligation of prevention. Another possible combination of the conduct of an international organization with that of its member States occurs when the organization is under an obligation to achieve a certain result, irrespective of whether the necessary conduct will be taken by the organization itself or by one or more of its member States.

Article 11. International obligation in force for an international organization

An act of an international organization does not constitute a breach of an international obligation unless the organization is bound by the obligation in question at the time the act occurs.

Commentary

Given the fact that no specific issue appears to affect the application to international organizations of the principle expressed in draft article 13 on the responsibility of States for internationally wrongful acts,¹⁷⁵ the term "State" is simply replaced by "international organization" in the title and text of the present article.

Article 12. Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of an international organization not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

2. The breach of an international obligation by an act of an international organization having a continuing character extends over the entire period during which the act continues and remains not in conformity with that obligation.

3. The breach of an international obligation requiring an international organization to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

¹⁷⁴ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 56, paragraph (11) of the commentary to article 12.

¹⁷⁵ *Ibid.*, pp. 57–59. A paragraph adopted by the International Law Association is similarly worded: "An act of an [international organization] does not constitute a breach of an international obligation unless the Organisation is bound by the obligation in question at the time the act occurs" (International Law Association, *Report of the Seventy-first Conference ...* (see footnote 121 above), p. 199).

¹⁷² *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403, at pp. 439–440, paras. 88–89.

¹⁷³ *Ibid.*, p. 442, para. 93.

Commentary

Similar considerations to those made in the commentary to article 11 apply in the case of the present article. The text corresponds to that of article 14 on the responsibility of States for internationally wrongful acts,¹⁷⁶ with the replacement of the term “State” with “international organization”.

Article 13. Breach consisting of a composite act

1. The breach of an international obligation by an international organization through a series of actions and omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

Commentary

The observation made in the commentary to article 11 also applies with regard to the present article. This corresponds to article 15 on the responsibility of States for internationally wrongful acts,¹⁷⁷ with the replacement of the term “State” with “international organization” in paragraph 1.

CHAPTER IV

RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION IN CONNECTION WITH THE ACT OF A STATE OR ANOTHER INTERNATIONAL ORGANIZATION*Commentary*

(1) Articles 16 to 18 on the responsibility of States for internationally wrongful acts¹⁷⁸ cover the cases in which a State aids or assists, directs and controls, or coerces another State in the commission of an internationally wrongful act. Article 16 was described as “reflecting a customary rule” by the International Court of Justice in its judgment on the merits in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*.¹⁷⁹ Parallel situations could be envisaged with regard to international organizations. For instance, an international organization may aid or assist a State or another international organization in the commission of an internationally wrongful act. For the purposes of international responsibility, there would be no reason for distinguishing the case of an international organization aiding or assisting a State or another international organization from that of a State aiding or

assisting another State. Thus, even if available practice with regard to international organizations is limited, there is some justification for including in the present articles provisions that are parallel to articles 16 to 18 on the responsibility of States for internationally wrongful acts.

(2) The pertinent provisions of the draft articles on responsibility of States for internationally wrongful acts are based on the premise that aid or assistance, direction and control, and coercion do not affect attribution of conduct to the State which is aided or assisted, under the direction or control, or under coercion. It is that State which commits an internationally wrongful act, although in the case of coercion wrongfulness could be excluded, while the other State is held responsible not for having actually committed the wrongful act but for its causal contribution to the commission of the act.

(3) The relations between an international organization and its member States or international organizations may allow the former organization to influence the conduct of members also in cases that are not envisaged in articles 16 to 18 on the responsibility of States for internationally wrongful acts. Some international organizations have the power to take decisions binding their members, while most organizations may only influence their members’ conduct through non-binding acts. The consequences that this type of relation, which does not have a parallel in the relations between States, may entail with regard to an international organization’s responsibility are also examined in the present chapter.

(4) The question of an international organization’s international responsibility in connection with the act of a State has been discussed in several cases before international tribunals or other bodies, but has not been examined by those tribunals or bodies because of lack of jurisdiction *ratione personae*. Reference should be made in particular to the following cases: *M. & Co. v. Federal Republic of Germany*¹⁸⁰ before the European Commission of Human Rights; *Cantoni v. France*,¹⁸¹ *Matthews v. the United Kingdom*,¹⁸² *Senator Lines GmbH v. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom*,¹⁸³ and *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland*¹⁸⁴ before the European Court of Human Rights;

¹⁸⁰ *M. & Co. v. Federal Republic of Germany*, Application no. 13258/87, Decision of 9 February 1990, European Commission of Human Rights, *Decisions and Reports*, vol. 64, p. 138.

¹⁸¹ *Cantoni v. France*, Judgment of 15 November 1996, Application no. 17862/91, European Court of Human Rights, *Reports of Judgments and Decisions* 1996-V, p. 1614.

¹⁸² *Matthews v. the United Kingdom*, Judgment of 18 February 1999, Application no. 24833/94, Grand Chamber, European Court of Human Rights, *Reports of Judgments and Decisions* 1999-I, p. 251.

¹⁸³ *Senator Lines GmbH v. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom*, Application no. 56672/00, Decision of 10 March 2004, Grand Chamber, European Court of Human Rights, *Reports of Judgments and Decisions* 2004-IV, p. 331.

¹⁸⁴ *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland*, Application no. 45036/98, Decision of 13 September 2001 and Judgment of 30 June 2005, European Court of Human Rights, *Reports of Judgments and Decisions* 2005-VI, p. 107.

¹⁷⁶ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 59–62.

¹⁷⁷ *Ibid.*, pp. 62–64.

¹⁷⁸ *Ibid.*, pp. 65–69.

¹⁷⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, at p. 150, para. 420.

and *H.v.d.P. v. the Netherlands*¹⁸⁵ before the Human Rights Committee. In the latter case, a communication concerning the conduct of the European Patent Office was held to be inadmissible, because that conduct could not, “in any way, be construed as coming within the jurisdiction of the Netherlands or of any other State party to the International Covenant on Civil and Political Rights and the Optional Protocol thereto”.¹⁸⁶

Article 14. Aid or assistance in the commission of an internationally wrongful act

An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if:

(a) the former organization does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that organization.

Commentary

(1) The international responsibility that an entity may incur under international law for aiding or assisting another entity in the commission of an internationally wrongful act does not appear to depend on the nature and character of the entities concerned.¹⁸⁷ Thus, notwithstanding the limited practice specifically relating to international organizations, the rules applicable to the relations between States should also apply when an international organization aids or assists a State or another international organization in the commission of an internationally wrongful act.

(2) Article 14 only introduces a few changes in relation to article 16 on the responsibility of States for internationally wrongful acts.¹⁸⁸ The reference to the case in which a State aids or assists another State has been modified in order to refer to an international organization aiding or assisting a State or another international organization.

(3) Article 14 sets forth certain conditions for aid or assistance to give rise to the international responsibility of an aiding or assisting international organization. The first requirement is “knowledge of the circumstances of the internationally wrongful act”. As was noted in the commentary to article 16 on State responsibility, if the “assisting or aiding State is unaware of the circumstances

in which its aid or assistance is intended to be used by the other State, it bears no international responsibility”.¹⁸⁹

(4) In the commentary to article 16 on the responsibility of States for internationally wrongful acts, it is also stated as a requirement that “the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct and the internationally wrongful conduct is actually committed by the aided or assisted State”.¹⁹⁰ Moreover, for international responsibility to arise, aid or assistance should contribute “significantly” to the commission of the act.¹⁹¹

(5) According to article 14, the aiding or assisting international organization only incurs international responsibility if the “act would be internationally wrongful if committed by that organization”. Responsibility would be thus linked to the breach of an obligation binding on the international organization, when the organization contributed to the breach.

(6) An example of practice of aid or assistance concerning an international organization is provided by an internal document issued on 12 October 2009 by the United Nations Legal Counsel. This concerned the support given by the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) to the Armed Forces of the Democratic Republic of the Congo (FARDC), and the risk, to which an internal memorandum had referred, of violations by the latter forces of international humanitarian law, human rights law and refugee law. The Legal Counsel wrote:

If MONUC has reason to believe that FARDC units involved in an operation are violating one or the other of those bodies of law and if, despite MONUC’s intercession with the FARDC and with the Government of the [Democratic Republic of the Congo], MONUC has reason to believe that such violations are still being committed, then MONUC may not lawfully continue to support that operation, but must cease its participation in it completely ... MONUC may not lawfully provide logistic or “service” support to any FARDC operation if it has reason to believe that the FARDC units involved are violating any of those bodies of law ... This follows directly from the Organization’s obligations under customary international law and from the Charter to uphold, promote and encourage respect for human rights, international humanitarian law and refugee law.¹⁹²

Article 15. Direction and control exercised over the commission of an internationally wrongful act

An international organization which directs and controls a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for that act if:

(a) the former organization does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that organization.

¹⁸⁵ Communication No. 217/1986, Decision of 8 April 1987, Report of the Human Rights Committee, *Official Records of the General Assembly, Forty-second Session, Supplement No. 40 (A/42/40)*, p. 185.

¹⁸⁶ *Ibid.*, p. 186, para. 3.2.

¹⁸⁷ The Committee on Accountability of International Organizations of the International Law Association stated that “[t]here is also an internationally wrongful act of an [international organization] when it aids or assists a State or another [international organization] in the commission of an internationally wrongful act by that State or other [international organization]” (International Law Association, *Report of the Seventy-first Conference ...* (see footnote 121 above), pp. 200–201). This text does not refer to the conditions listed in article 14 under subparagraphs (a) and (b) of the present articles.

¹⁸⁸ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 65–67.

¹⁸⁹ *Ibid.*, p. 66, paragraph (4) of the commentary to article 16.

¹⁹⁰ *Ibid.*, paragraph (5) of the commentary to article 16.

¹⁹¹ *Ibid.*

¹⁹² The documents were published in *The New York Times*, 9 December 2009, www.nytimes.com.

Commentary

(1) The text of article 15 corresponds to article 17 on the responsibility of States for internationally wrongful acts,¹⁹³ for reasons similar to those explained in the commentary to article 14 of the present draft articles. The appropriate modifications to the text have been introduced. Thus, the reference to the directing and controlling State has been replaced by that to an international organization which directs and controls; moreover, the term “State” has been replaced with “State or another international organization” in the reference to the entity which is directed and controlled.

(2) Article 15 provides that international responsibility will arise when an international organization “directs and controls a State or another international organization in the commission of an internationally wrongful act”.

(3) If one assumes that KFOR is an international organization, an example of two international organizations allegedly exercising direction and control in the commission of a wrongful act may be taken from the preliminary objections by the Government of France in *Legality of Use of Force (Yugoslavia v. France)* before the International Court of Justice, when the Government argued that “NATO is responsible for the ‘direction’ of KFOR and the United Nations for ‘control’ of it”.¹⁹⁴ A joint exercise of direction and control was probably envisaged.

(4) In the relations between an international organization and its member States and international organizations, the concept of “direction and control” could conceivably be extended so as to encompass cases in which an international organization takes a decision binding its members. The commentary to article 17 on the responsibility of States for internationally wrongful acts explains that “[a]rticle 17 is limited to cases where a dominant State actually directs and controls conduct which is a breach of an international obligation of the dependent State”,¹⁹⁵ that “the term ‘controls’ refers to cases of domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or concern”,¹⁹⁶ and that “the word ‘directs’ does not encompass mere incitement or suggestion but rather connotes actual direction of an operative kind”.¹⁹⁷ If one interprets the provision in the light of the passages quoted above, the adoption of a binding decision on the part of an international organization could constitute, under certain circumstances, a form of direction or control in the commission of an internationally wrongful act. The assumption is that the State or international organization which is the

addressee of the decision is not given discretion to carry out conduct that, while complying with the decision, would not constitute an internationally wrongful act.

(5) If the adoption of a binding decision were to be regarded as a form of direction and control within the purview of the present article, this provision would overlap with article 17 of the present draft articles. The overlap would only be partial: it is sufficient to point out that article 17 also covers the case where a binding decision requires a member State or international organization to commit an act which is not unlawful for that State or international organization. In any case, the possible overlap between articles 15 and 17 would not create any inconsistency, since both provisions assert, albeit under different conditions, the international responsibility of the international organization which has taken a decision binding its member States or international organizations.

(6) The requirements set forth under subparagraphs (a) and (b) respectively refer to “knowledge of the circumstances of the internationally wrongful act” and to the fact that “the act would be internationally wrongful if committed by that organization”. These requirements are identical to those listed in article 14 concerning aid or assistance in the commission of an internationally wrongful act. The same commentary applies.

Article 16. Coercion of a State or another international organization

An international organization which coerces a State or another international organization to commit an act is internationally responsible for that act if:

(a) the act would, but for the coercion, be an internationally wrongful act of the coerced State or international organization; and

(b) the coercing international organization does so with knowledge of the circumstances of the act.

Commentary

(1) Article 16 envisages coercion on the part of the international organization in the commission of an internationally wrongful act. The nature and character of the coercing or of the coerced entities do not significantly alter the situation. Thus, one may apply also to international organizations a rule similar to article 18 on the responsibility of States for internationally wrongful acts.

(2) The text of the present article corresponds to article 18 on the responsibility of States for internationally wrongful acts,¹⁹⁸ with changes similar to those explained in the commentary to article 14 of the present draft articles. The reference to a coercing State has been replaced with that to an international organization; moreover, the coerced entity is not necessarily a State, but could also be an international organization. Also the title has been modified from “Coercion of another State” to “Coercion of a State or another international organization”.

¹⁹³ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 67–68.

¹⁹⁴ *Legality of Use of Force (Yugoslavia v. France)*, Preliminary objections of the French Republic (5 July 2000), *I.C.J. Reports 2001*, p. 13, at p. 33, para. 46. The argument was made for the purpose of attributing the allegedly wrongful conduct to the international organizations concerned. A similar view with regard to NATO and KFOR was held by Alain Pellet in his article “L’imputabilité d’éventuels actes illicites: responsabilité de l’OTAN ou des États membres”, in C. Tomuschat (ed.), *Kosovo and the International Community: a Legal Assessment*, The Hague, Kluwer Law International, 2002, pp. 193 et seq., at p. 199.

¹⁹⁵ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 68, paragraph (6) of the commentary to article 17.

¹⁹⁶ *Ibid.*, p. 69, paragraph (7) of the commentary to article 17.

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*, pp. 69–70.

(3) An act of coercion need not be wrongful *per se* for international responsibility to arise for a coercing international organization. It is also not necessary that that organization would commit a wrongful act if it acted directly. What is required for international responsibility to arise is that an international organization coerces a State or another international organization in the commission of an act that would be wrongful for the coerced entity and that the coercing organization “does so with knowledge of the circumstances of the act”.

(4) In the relations between an international organization and its member States or international organizations, a binding decision by an international organization could give rise to coercion only under exceptional circumstances. The commentary to article 18 on the responsibility of States for internationally wrongful acts stresses that

[c]oercion for the purpose of article 18 has the same essential character as *force majeure* under article 23. Nothing less than conduct which forces the will of the coerced State will suffice, giving it no effective choice but to comply with the wishes of the coercing State.¹⁹⁹

(5) Should nevertheless an international organization be considered as coercing a member State or international organization when it adopts a binding decision, there could be an overlap between the present article and article 17. The overlap would only be partial, given the different conditions set by the two provisions, and especially the fact that according to article 17 the act committed by the member State or international organization need not be unlawful for that State or that organization. To the extent that there would be an overlap, an international organization could be regarded as responsible under either article 16 or article 17. This would not give rise to any inconsistency.

Article 17. Circumvention of international obligations through decisions and authorizations addressed to members

1. An international organization incurs international responsibility if it circumvents one of its international obligations by adopting a decision binding member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization.

2. An international organization incurs international responsibility if it circumvents one of its international obligations by authorizing member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization and the act in question is committed because of that authorization.

3. Paragraphs 1 and 2 apply whether or not the act in question is internationally wrongful for the member States or international organizations to which the decision or authorization is addressed.

Commentary

(1) The fact that an international organization is a subject of international law distinct from its members opens

¹⁹⁹ *Ibid.*, paragraph (2) of the commentary to article 18.

up the possibility for the organization to try to influence its members in order to achieve through them a result that the organization could not lawfully achieve directly, and thus circumvent one of its international obligations. As was noted by the delegation of Austria during the debate in the Sixth Committee, “an international organization should not be allowed to escape responsibility by ‘outsourcing’ its actors”.²⁰⁰

(2) The Legal Counsel of the World Intellectual Property Organization (WIPO) considered the case of an international organization requiring a member State to commit an internationally unlawful act, and wrote that

in the event a certain conduct, in which a member State engages in compliance with a request on the part of an international organization, appears to be in breach of an international obligation both of that State and of that organization, then the organization should also be regarded as responsible under international law.²⁰¹

(3) The opportunity for circumvention is likely to be higher when the conduct of the member State or international organization would not be in breach of an international obligation, for instance because the circumventing international organization is bound by a treaty with a non-member State and the same treaty does not produce effects for the organization’s members.

(4) The term “circumvention” implies an intention on the part of the international organization to take advantage of the separate legal personality of its members in order to avoid compliance with an international obligation. The evidence of such an intention will depend on the circumstances.

(5) In the case of a binding decision, paragraph 1 does not stipulate as a precondition, for the international responsibility of an international organization to arise, that the required act be committed by member States or international organizations. Since compliance by members with a binding decision is to be expected, the likelihood of a third party being injured would then be high. It appears therefore preferable to hold the organization already responsible and thus allow the third party that would be injured to seek a remedy even before the act is committed. Moreover, if international responsibility arises at the time the decision is taken, the international organization would have to refrain from placing its members in the uncomfortable position of either infringing their obligations under the decision or causing the international responsibility of the international organization, as well as possibly incurring their own responsibility.

(6) A member State or international organization may be given discretion with regard to implementation of a binding decision adopted by an international organization. In its judgment on the merits in *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland*, the European Court of Human Rights considered conduct that member States of the European Community take when implementing binding acts of the European Community and observed that

²⁰⁰ *Official Records of the General Assembly, Fifty-ninth Session, Sixth Committee, 22nd meeting (A/C.6/59/SR.22)*, para. 24.

²⁰¹ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/556, p. 52.

a State would be fully responsible under the Convention for all acts falling outside its strict international legal obligations ... [N]umerous Convention cases ... confirm this. Each case (in particular, *Cantoni*, p. 1626, § 26) concerned a review by this Court of the exercise of State discretion for which Community law provided.²⁰²

(7) Paragraph 1 assumes that compliance with the binding decision of the international organization necessarily entails circumvention of one of its international obligations. As was noted in a statement in the Sixth Committee by the delegation of Denmark on behalf of the five Nordic countries,

it appeared essential to find the point where the member State could be said to have so little “room for manoeuvre” that it would seem unreasonable to make it solely responsible for certain conduct.²⁰³

Should, on the contrary, the decision allow the member State or international organization some discretion to take an alternative course which does not imply circumvention, responsibility could arise for the international organization that has taken the decision only if circumvention actually occurs, as stated in paragraph 2.

(8) Paragraph 2 covers the case in which an international organization circumvents one of its international obligations by authorizing a member State or international organization to commit a certain act. When a member State or organization is authorized to commit an act, it is apparently free not to avail itself of the authorization received. However, this may be only in theory, because an authorization often implies the conferral by an organization of certain functions to the member or members concerned so that they would exercise these functions instead of the organization. Moreover, by authorizing an act, the organization generally expects the authorization to be acted upon.

(9) While paragraph 2 uses the term “authorization”, it does not require an act of an international organization to be so defined under the rules of the organization concerned. The principle expressed in paragraph 2 also applies to acts of an international organization which may be defined by different terms but present a similar character to an authorization as described above.

(10) For international responsibility to arise, the first condition in paragraph 2 is that the international organization authorizes an act that would be wrongful for that organization and moreover would allow it to circumvent one of its international obligations. Since the authorization may not prompt any conduct which conforms to it, a further condition laid out in paragraph 2 is that the act which is authorized is actually committed.

(11) Moreover, it is specified that the act in question be committed “because of that authorization”. This condition requires a contextual analysis of the role that the authorization actually plays in determining the conduct of the member State or international organization.

(12) For the purposes of establishing responsibility, reliance on the authorization should not be unreasonable.

The responsibility of the authorizing international organization cannot arise if, for instance, the authorization is outdated and not intended to apply to the current circumstances, because of substantial changes that have intervened since the adoption.

(13) While the authorizing international organization would be responsible if it requested, albeit implicitly, the commission of an act that would represent a circumvention of one of its obligations, that organization would clearly not be responsible for any other breach that the member State or international organization to which the authorization is addressed might commit. To that extent, the following statement contained in a letter addressed on 11 November 1996 by the United Nations Secretary-General to the Prime Minister of Rwanda appears accurate:

[I]nsofar as “Opération Turquoise” is concerned, although that operation was “authorized” by the Security Council, the operation itself was under national command and control and was not a United Nations operation. The United Nations is, therefore, not internationally responsible for acts and omissions that might be attributable to “Opération Turquoise”.²⁰⁴

(14) Paragraph 3 makes it clear that, unlike articles 14 to 16, the present article does not make the international responsibility of the international organization dependent on the unlawfulness of the conduct of the member State or international organization to which the decision or authorization is addressed.

(15) As was noted in the commentaries to articles 15 and 16, when the conduct is unlawful and other conditions are fulfilled, there is the possibility of an overlap between the cases covered in those provisions and those to which article 17 applies. However, the consequence would only be the existence of alternative bases for holding an international organization responsible.

Article 18. Responsibility of an international organization member of another international organization

Without prejudice to articles 14 to 17, the international responsibility of an international organization that is a member of another international organization also arises in relation to an act of the latter under the conditions set out in articles 61 and 62 for States that are members of an international organization.

Commentary

(1) This article is “[w]ithout prejudice to articles 14 to 17” because the international responsibility of an international organization that is a member of another international organization may arise also in the cases that are envisaged in those articles. For instance, when an organization aids or assists another organization in the commission of an internationally wrongful act, the former organization may be a member of the latter.

(2) The responsibility of an international organization that is a member of another international organization may arise under additional circumstances that specifically

²⁰² *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland*, Judgment of 30 June 2005 (see footnote 184 above), para. 157.

²⁰³ *Official Records of the General Assembly, Fifty-ninth Session, Sixth Committee, 22nd meeting (A/C.6/59/SR.22)*, para. 66.

²⁰⁴ Unpublished letter. “Opération Turquoise” was established by Security Council resolution 929 (1994) of 22 June 1994.

pertain to members. Although there is no known practice relating to the responsibility of international organizations as members of another international organization, there is no reason for distinguishing the position of international organizations as members of another international organization from that of States members of the same international organization. Since there is significant practice relating to the responsibility of member States, it seems preferable to make in the present article simply a reference to articles 61 and 62 and the related commentaries, which examine the conditions under which responsibility arises for a member State.

Article 19. Effect of this chapter

This chapter is without prejudice to the international responsibility of the State or international organization which commits the act in question, or of any other State or international organization.

Commentary

The present article is a “without prejudice” clause relating to the whole chapter. It corresponds in part to article 19 on the responsibility of States for internationally wrongful acts. The latter provision intends to leave unprejudiced “the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other State”.²⁰⁵ References to international organizations have been added in the present article. Moreover, since the international responsibility of States committing a wrongful act is covered by the articles on responsibility of States for internationally wrongful acts and not by the present articles, the wording of the clause has been made more general.

CHAPTER V

CIRCUMSTANCES PRECLUDING WRONGFULNESS

Commentary

(1) Under the heading “Circumstances precluding wrongfulness”, articles 20 to 27 of the articles on responsibility of States for internationally wrongful acts²⁰⁶ consider a series of circumstances that are different in nature but are brought together by their common effect. This is to preclude wrongfulness of conduct that would otherwise be in breach of an international obligation. As the commentary to the introduction to the relevant chapter explains,²⁰⁷ these circumstances apply to any internationally wrongful act, whatever the source of the obligation; they do not annul or terminate the obligation, but provide a justification or excuse for non-performance.

(2) Also with regard to circumstances precluding wrongfulness, available practice relating to international organizations is limited. Moreover, certain circumstances are unlikely to occur in relation to some, or even most, international organizations. However, there would be

little reason for holding that circumstances precluding wrongfulness of the conduct of States could not be relevant also for international organizations: that, for instance, only States could invoke *force majeure*. This does not imply that there should be a presumption that the conditions under which an organization may invoke a certain circumstance precluding wrongfulness are the same as those applicable to States.

Article 20. Consent

Valid consent by a State or an international organization to the commission of a given act by another international organization precludes the wrongfulness of that act in relation to that State or the former organization to the extent that the act remains within the limits of that consent.

Commentary

(1) Like States, international organizations perform several functions that would give rise to international responsibility were they not consented to by a State or another international organization. What is generally relevant is consent by the State on whose territory the organization’s conduct takes place. Also with regard to international organizations, consent could affect the underlying obligation or concern only a particular situation or a particular course of conduct.

(2) The present article corresponds to article 20 on the responsibility of States for internationally wrongful acts.²⁰⁸ As the commentary explains, this article “reflects the basic international law principle of consent”.²⁰⁹ It concerns “consent in relation to a particular situation or a particular course of conduct”, as distinguished from “consent in relation to the underlying obligation itself”.²¹⁰

(3) As an example of consent that renders a specific conduct on the part of an international organization lawful, one could give that of a State allowing an investigation to be carried out on its territory by a Commission of Inquiry set up by the United Nations Security Council.²¹¹ Another example is consent by a State to the verification of the electoral process by an international organization.²¹² A further, and specific, example is consent to the deployment of the European Union Aceh Monitoring Mission in Indonesia, following an invitation addressed in July 2005 by the Government of Indonesia to the European Union and seven contributing States.²¹³

²⁰⁸ *Ibid.*, pp. 72–74.

²⁰⁹ *Ibid.*, p. 72, paragraph (1) of the commentary to article 20.

²¹⁰ *Ibid.*, pp. 72–73, paragraph (2) of the commentary to article 20.

²¹¹ For the requirement of consent, see paragraph 6 of the Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security annexed to General Assembly resolution 46/59 of 9 December 1991.

²¹² With regard to the role of consent in relation to the function of verifying an electoral process, see the report of the Secretary-General on enhancing the effectiveness of the principle of periodic and genuine elections (A/49/675), para. 16.

²¹³ A reference to the invitation by the Government of Indonesia may be found in the preambular paragraph of the European Union Council Joint Action 2005/643/CFSP of 9 September 2005, *Official Journal of the European Union*, No. L 234, 10 September 2005, p. 13.

²⁰⁵ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 70.

²⁰⁶ *Ibid.*, pp. 71–86.

²⁰⁷ *Ibid.*, p. 71, paragraph (2) of the commentary.

(4) Consent given by an international organization concerns compliance with an international obligation that exists towards that organization. It does not affect international obligations to the extent that they may also exist towards the members of the consenting organization, unless that organization has been empowered to express consent also on behalf of the members.

(5) Consent dispensing an international organization with the performance of an obligation in a particular case must be “valid”. This term refers to matters “addressed by international law rules outside the framework of State responsibility”²¹⁴ or of the responsibility of an international organization, such as whether the organ or agent who gave the consent was authorized to do so on behalf of the relevant State or international organization, or whether the consent was vitiated by coercion or some other factor. The competence of the consenting organ or agent will generally depend on the internal law of the State concerned or, as the case may be, on the rules of the organization concerned. The requirement that consent does not affect compliance with peremptory norms is stated in article 26. This is a general provision covering all the circumstances precluding wrongfulness.

(6) The present article follows the wording of article 20 on the responsibility of States for internationally wrongful acts. The only textual changes consist in the addition of a reference to an “international organization” with regard to the entity giving consent and the replacement of the term “State” with “international organization” with regard to the entity to which consent is given.

Article 21. Self-defence

The wrongfulness of an act of an international organization is precluded if and to the extent that the act constitutes a lawful measure of self-defence under international law.

Commentary

(1) According to the commentary to the corresponding article (art. 21) on the responsibility of States for internationally wrongful acts, that article concerns “self-defence as an exception to the prohibition against the use of force”.²¹⁵ The reference in that article to the “lawful” character of the measure of self-defence is explained as follows:

[T]he term “lawful” implies that the action taken respects those obligations of total restraint applicable in international armed conflict, as well as compliance with the requirements of proportionality and of necessity inherent in the notion of self-defence. Article 21 simply reflects the basic principle for the purposes of chapter V, leaving questions of the extent and application of self-defence to the applicable primary rules referred to in the Charter [of the United Nations].²¹⁶

(2) For reasons of coherency, the concept of self-defence which has thus been elaborated with regard to States should be used also with regard to international

organizations, although it is likely to be relevant for precluding wrongfulness only of acts of a small number of organizations, such as those administering a territory or deploying an armed force.

(3) In the practice relating to United Nations forces, the term “self-defence” has often been used in a different sense, with regard to situations other than those contemplated in Article 51 of the Charter of the United Nations. References to “self-defence” have been made also in relation to the “defence of the mission”.²¹⁷ For instance, in relation to UNPROFOR, a memorandum of the Legal Bureau of the Canadian Department of Foreign Affairs and International Trade held that

“[s]elf-defence” could well include the defence of the safe areas and the civilian population in those areas.²¹⁸

While these references to “self-defence” confirm that self-defence represents a circumstance precluding wrongfulness of conduct by an international organization, the term is given a meaning that encompasses cases other than those in which a State or an international organization responds to an armed attack by a State. In any event, the question of the extent to which United Nations forces are entitled to resort to force depends on the primary rules concerning the scope of the mission and need not be discussed here.

(4) Also, the conditions under which an international organization may resort to self-defence pertain to the primary rules and need not be examined in the present context. Those rules will set forth to what extent an international organization may invoke self-defence. One of the issues relates to the “invocability” of collective self-defence on the part of an international organization when one of its member States is the object of an armed attack and the international organization has the power to act in collective self-defence.²¹⁹

(5) In view of the fact that international organizations are not members of the United Nations, the reference to the Charter of the United Nations in article 21 on the responsibility of States for internationally wrongful acts has been replaced here with a reference to international law.

Article 22. Countermeasures

1. Subject to paragraphs 2 and 3, the wrongfulness of an act of an international organization not in conformity with an international obligation towards

²¹⁷ As was noted by the High-level Panel on Threats, Challenges and Change, “the right to use force in self-defence ... is widely understood to extend to the ‘defence of the mission’” (report of the High-level Panel on Threats, Challenges and Change, “A more secure world: our shared responsibility”, document A/59/565 and Corr.1, para. 213).

²¹⁸ *The Canadian Yearbook of International Law*, vol. 34 (1996), p. 389.

²¹⁹ A positive answer is implied in article 25 (a) of the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, adopted on 10 December 1999 by the members of the Economic Community of West African States (ECOWAS), which provides for the application of the “Mechanism” “in cases of aggression or conflict in any Member State or threat thereof”. The text of this provision is reproduced by A. Ayissi (ed.), *Cooperating for Peace in West Africa: an Agenda for the 21st Century*, Geneva, UNIDIR, 2001 (UNIDIR/2001/9, United Nations publication, Sales No. GV.E/F.01.0.19), p. 127.

²¹⁴ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 73, paragraph (4) of the commentary to article 20 of the draft articles on responsibility of States for internationally wrongful acts.

²¹⁵ *Ibid.*, p. 74, paragraph (1) of the commentary to article 21.

²¹⁶ *Ibid.*, p. 75, paragraph (6) of the commentary to article 21.

a State or another international organization is precluded if and to the extent that the act constitutes a countermeasure taken in accordance with the substantive and procedural conditions required by international law, including those set forth in chapter II of Part Four for countermeasures taken against another international organization.

2. Subject to paragraph 3, an international organization may not take countermeasures against a responsible member State or international organization unless:

(a) the conditions referred to in paragraph 1 are met;

(b) the countermeasures are not inconsistent with the rules of the organization; and

(c) no appropriate means are available for otherwise inducing compliance with the obligations of the responsible State or international organization concerning cessation of the breach and reparation.

3. Countermeasures may not be taken by an international organization against a member State or international organization in response to a breach of an international obligation under the rules of the organization unless such countermeasures are provided for by those rules.

Commentary

(1) Countermeasures that an international organization may take against another international organization are dealt with in articles 51 to 57. Insofar as a countermeasure is taken in accordance with the substantive and procedural conditions set forth in those articles, the countermeasure is lawful and represents a circumstance that precludes wrongfulness of an act that, but for the fact that it is a countermeasure, would have been wrongful.

(2) The present draft articles do not examine the conditions for countermeasures to be lawful when they are taken by an injured international organization against a responsible State. Thus paragraph 1, while it refers to articles 51 to 57 insofar as countermeasures are taken against another international organization, only refers to international law for the conditions concerning countermeasures taken against States. However, one may apply by analogy the conditions that are set out for countermeasures taken by a State against another State in articles 49 to 54 on the responsibility of States for internationally wrongful acts.²²⁰ It is to be noted that the conditions for lawful countermeasures in articles 51 to 57 of the present draft articles reproduce to a large extent the conditions in the articles on responsibility of States for internationally wrongful acts.

(3) Paragraphs 2 and 3 address the question of whether countermeasures may be taken by an injured international organization against its members, whether States or international organizations, when they are internationally

responsible towards the former organization. Sanctions, which an organization may be entitled to adopt against its members according to its rules, are *per se* lawful measures and cannot be assimilated to countermeasures. The rules of the injured organization may restrict or forbid, albeit implicitly, recourse by the organization to countermeasures against its members. The question remains whether countermeasures may be taken in the absence of any express or implicit rule of the organization. Paragraph 2 sets forth the residual rule, while paragraph 3 considers countermeasures in relation to a breach by a member State or organization of an international obligation arising under the rules of the organization.

(4) Apart from the conditions that generally apply for countermeasures to be lawful, two additional conditions are listed in paragraph 2 for countermeasures by an injured international organization against its members to be lawful. First, countermeasures cannot be “inconsistent with the rules of the organization”; second, there should not be any available means that may qualify as “appropriate means ... for otherwise inducing compliance with the obligations of the responsible State or international organization concerning cessation of the breach and reparation”. Insofar as the responsible entity is an international organization, these obligations are set out in greater detail in Part Three of the present articles, while the obligations of a responsible State are outlined in Part Two of the draft articles on responsibility of States for internationally wrongful acts.

(5) It is assumed that an international organization would have recourse to the “appropriate means” referred to in paragraph 2 before resorting to countermeasures against its members. The term “appropriate means” refers to those lawful means that are readily available and proportionate, and offer a reasonable prospect for inducing compliance at the time when the international organization intends to take countermeasures. However, failure on the part of the international organization to make timely use of remedies that were available may result in countermeasures becoming precluded.

(6) Paragraph 3 specifically addresses countermeasures by an international organization relating to the breach of an international obligation under the rules of the organization by a member State or international organization. In this case, given the obligations of close cooperation that generally exist between an international organization and its members, countermeasures are allowed only if the rules of the organization so provide. Should they do so, they will set forth the conditions that are required for that purpose.

(7) Article 52 addresses in similar terms the reverse situation of an injured international organization or an injured State taking countermeasures against a responsible international organization of which the former organization or the State is a member.

Article 23. Force majeure

1. The wrongfulness of an act of an international organization not in conformity with an international obligation of that organization is precluded if the act

²²⁰ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 128–139.

is due to *force majeure*, that is, the occurrence of an irresistible force or of an unforeseen event, beyond the control of the organization, making it materially impossible in the circumstances to perform the obligation.

2. Paragraph 1 does not apply if:

(a) the situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the organization invoking it; or

(b) the organization has assumed the risk of that situation occurring.

Commentary

(1) With regard to States, *force majeure* had been defined in article 23 on the responsibility of States for internationally wrongful acts as “an irresistible force or ... an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation”.²²¹ This circumstance precluding wrongfulness does not apply when the situation is due to the conduct of the State invoking it or the State has assumed the risk of that situation occurring.

(2) There is nothing in the differences between States and international organizations that would justify the conclusion that *force majeure* is not equally relevant for international organizations or that other conditions should apply.

(3) One may find a few instances of practice concerning *force majeure*. Certain agreements concluded by international organizations provide examples to that effect. For instance, article XII, paragraph 6, of the Executing Agency Agreement of 1992 between the United Nations Development Programme (UNDP) and WHO stated that

[i]n the event of *force majeure* or other similar conditions or events which prevent the successful execution of a Project by the Executing Agency, the Executing Agency shall promptly notify the UNDP of such occurrence and may, in consultation with the UNDP, withdraw from the execution of the Project. In case of such withdrawal, and unless the Parties agree otherwise, the Executing Agency shall be reimbursed the actual costs incurred up to the effective date of the withdrawal.²²²

Although this paragraph concerns withdrawal from the Agreement, it implicitly considers that non-compliance with an obligation under the Agreement because of *force majeure* does not constitute a breach of the Agreement.

(4) *Force majeure* has been invoked by international organizations in order to exclude wrongfulness of conduct in proceedings before international administrative tribunals.²²³ In Judgment No. 24, *Fernando Hernández de Agüero v. Secretary General of the Organization of American States*, the Administrative Tribunal of the Organization of American States rejected the plea of *force*

majeure, which had been made in order to justify termination of an official’s contract:

The Tribunal considers that in the present case there is no *force majeure* that would have made it impossible for the General Secretariat to fulfil the fixed-term contract, since it is much-explored law that by *force majeure* is meant an irresistible happening of nature.²²⁴

Although the Tribunal rejected the plea, it clearly recognized the invocability of *force majeure*.

(5) A similar approach was taken by the Administrative Tribunal of the International Labour Organization (ILO) in its Judgment No. 664, in the *Barthl* case. The Tribunal found that *force majeure* was relevant to an employment contract and said the following:

Force majeure is an unforeseeable occurrence, beyond the control and independent of the will of the parties, which unavoidably frustrates their common intent.²²⁵

It is immaterial that in the actual case *force majeure* had been invoked by the employee against the international organization instead of by the organization.

(6) The text of the present article differs from that of article 23 on the responsibility of States for internationally wrongful acts only because the term “State” has been replaced once with the term “international organization” and four times with the term “organization”.

Article 24. Distress

1. The wrongfulness of an act of an international organization not in conformity with an international obligation of that organization is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author’s life or the lives of other persons entrusted to the author’s care.

2. Paragraph 1 does not apply if:

(a) the situation of distress is due, either alone or in combination with other factors, to the conduct of the organization invoking it; or

(b) the act in question is likely to create a comparable or greater peril.

²²⁴ *Fernando Hernández de Agüero v. Secretary General of the Organization of American States*, Judgment No. 24 of 16 November 1976, para. 3 (OAS, Sentencias del Tribunal Administrativo, Nos. 1–56 (1971–1980), p. 282). The text is also available from <http://www.oas.org> (decisions of the Administrative Tribunal). In a letter to the United Nations Legal Counsel dated 8 January 2003, the OAS noted that “[t]he majority of claims presented to the OAS Administrative Tribunal allege violations of the OAS General Standards, other resolutions of the OAS General Assembly, violations of rules promulgated by the Secretary-General pursuant to his authority under the OAS Charter and violations of rules established by the Tribunal itself in its jurisprudence. Those standards and rules, having been adopted by duly constituted international authorities, all constitute international law. Thus, the complaints claiming violations of those norms and rules may be characterized as alleging violations of international law” (*Yearbook ... 2004*, vol. II (Part One), document A/CN.4/545, p. 36).

²²⁵ *Barthl* case, Judgment No. 664 of 19 June 1985, para. 3. The Registry’s translation from the original French is available from www.ilo.org (decisions of the Administrative Tribunal).

²²¹ *Ibid.*, p. 76.

²²² Signed at New York on 17 September 1992 and at Geneva on 19 October 1992, United Nations, *Treaty Series*, vol. 1691, No. 1066, p. 325, at p. 331.

²²³ These cases are related to the application of the rules of the organization concerned. The question whether those rules pertain to international law has been discussed in the commentary to article 10.

Commentary

(1) Article 24 on the responsibility of States for internationally wrongful acts includes distress among the circumstances precluding wrongfulness of an act and describes this circumstance as the case in which “the author of the act in question has no other reasonable way, in a situation of distress, of saving the author’s life or the lives of other persons entrusted to the author’s care”.²²⁶ The commentary gives the example from practice of a British military ship entering Icelandic territorial waters to seek shelter during severe weather,²²⁷ and notes that, “[a]lthough historically practice has focused on cases involving ships and aircraft, article 24 is not limited to such cases”.²²⁸

(2) Similar situations could occur, though more rarely, with regard to an organ or agent of an international organization. Notwithstanding the absence of known cases of practice in which an international organization invoked distress, the same rule should apply both to States and to international organizations.

(3) As with regard to States, the borderline between cases of distress and those which may be considered as pertaining to necessity²²⁹ is not always obvious. The commentary to article 24 on the responsibility of States for internationally wrongful acts notes that “general cases of emergencies ... are more a matter of necessity than distress”.²³⁰

(4) Article 24 on the responsibility of States for internationally wrongful acts only applies when the situation of distress is not due to the conduct of the State invoking distress and the act in question is not likely to create a comparable or greater peril. These conditions appear to be equally applicable to international organizations.

(5) The present article is textually identical to the corresponding article on State responsibility, with the only changes being the replacement of the term “State” once with the term “international organization” and twice with the term “organization”.

Article 25. Necessity

1. Necessity may not be invoked by an international organization as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that organization unless the act:

(a) is the only means for the organization to safeguard against a grave and imminent peril an essential interest of its member States or of the international community as a whole, when the organization has, in accordance with international law, the function to protect the interest in question; and

(b) does not seriously impair an essential interest of the State or States towards which the international obligation exists, or of the international community as a whole.

²²⁶ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 78–80.

²²⁷ *Ibid.*, p. 79, paragraph (3) of the commentary to article 24.

²²⁸ *Ibid.*, paragraph (4) of the commentary to article 24.

²²⁹ Necessity is considered in the following article.

²³⁰ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 80, paragraph (7) of the commentary to article 24.

2. In any case, necessity may not be invoked by an international organization as a ground for precluding wrongfulness if:

(a) the international obligation in question excludes the possibility of invoking necessity; or

(b) the organization has contributed to the situation of necessity.

Commentary

(1) Conditions for the invocation of necessity by States have been listed in article 25 on the responsibility of States for internationally wrongful acts.²³¹ In brief, the relevant conditions are as follows: the State’s conduct should be the only means to safeguard an essential interest against a grave and imminent peril; the conduct in question should not impair an essential interest of the State or the States towards which the obligation exists, or of the international community as a whole; the international obligation in question does not exclude the possibility of invoking necessity; the State invoking necessity has not contributed to the situation of necessity.

(2) With regard to international organizations, practice reflecting the invocation of necessity is scarce. One case in which necessity was held to be invocable is Judgment No. 2183 of the ILO Administrative Tribunal in the *T. D.-N. v. CERN* case. This case concerned access to the electronic account of an employee who was on leave. The Tribunal said that

in the event that access to an e-mail account becomes necessary for reasons of urgency or because of the prolonged absence of the account holder, it must be possible for organizations to open the account using appropriate technical safeguards. That state of necessity, justifying access to data which may be confidential, must be assessed with the utmost care.²³²

(3) Even if practice is scarce, as was noted by INTERPOL,

necessity does not pertain to those areas of international law that, by their very nature, are patently inapplicable to international organizations.²³³

The invocability of necessity by international organizations was also advocated in written statements by the European Commission,²³⁴ IMF,²³⁵ WIPO,²³⁶ the World Bank²³⁷ and the Secretariat of the United Nations.²³⁸

²³¹ *Ibid.*, p. 80.

²³² *T. D.-N. v. CERN*, Judgment of 3 February 2003, para. 19. The Registry’s translation from the original French is available from www.ilo.org (decisions of the Administrative Tribunal).

²³³ Letter dated 9 February 2005 from the General Counsel of INTERPOL to the Secretary of the International Law Commission (see the comments and observations received from international organizations on responsibility of international organizations, *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/556, p. 49).

²³⁴ Letter dated 18 March 2005 from the European Commission to the United Nations Legal Counsel (*ibid.*, pp. 48–49).

²³⁵ Letter dated 1 April 2005 from IMF to the United Nations Legal Counsel (*ibid.*, p. 49).

²³⁶ Letter dated 19 January 2005 from the Legal Counsel of WIPO to the United Nations Legal Counsel (*ibid.*, p. 50).

²³⁷ Letter dated 31 January 2006 from the Senior Vice-President and General Counsel of the World Bank to the Secretary of the International Law Commission (*Yearbook ... 2006*, vol. II (Part One), document A/CN.4/568 and Add.1, pp. 138–139).

²³⁸ See A/CN.4/637 and Add.1 (under the section entitled “Draft article 24 ... United Nations”, para. 4).

(4) While the conditions set by article 25 on the responsibility of States for internationally wrongful acts would be applicable also with regard to international organizations, the scarcity of practice and the considerable risk that invocability of necessity entails for compliance with international obligations suggest that, as a matter of policy, necessity should not be invocable by international organizations as widely as by States. This may be achieved by limiting the essential interests which may be protected by the invocation of necessity to those of the member States and of the international community as a whole, to the extent that the organization has, in accordance with international law, the function to protect them. Thus, when an international organization has been given powers over certain matters, it may, in the use of these powers, invoke the need to safeguard an essential interest of the international community or of its member States, provided that this is consistent with the principle of speciality. On the other hand, an international organization may invoke one of its own essential interests only if it coincides with an essential interest of the international community or of its member States. This solution may be regarded as an attempt to reach a compromise between two opposite positions with regard to necessity: the view of those who favour placing international organizations on the same level as States and the opinion of those who would totally rule out the invocability of necessity by international organizations.

(5) There is no contradiction between the reference in subparagraph 1 (a) to the protection of an essential interest of the international community and the condition in subparagraph 1 (b) that the conduct in question should not impair an essential interest of the international community. The latter interest could be different from the interest that is at the basis of the invocation of necessity.

(6) In view of the solution adopted for subparagraph 1 (a), which does not allow the invocation of necessity for the protection of the essential interests of an international organization unless they coincide with those of member States or of the international community, the essential interests of international organizations have not been added in subparagraph 1 (b) to those that should not be seriously impaired.

(7) Apart from the change in subparagraph 1 (a), the text reproduces article 25 on the responsibility of States for internationally wrongful acts, with the replacement of the term “State” with the terms “international organization” or “organization” in the *chapeau* of both paragraphs.

Article 26. Compliance with peremptory norms

Nothing in this chapter precludes the wrongfulness of any act of an international organization which is not in conformity with an obligation arising under a peremptory norm of general international law.

Commentary

(1) Chapter V of Part One of the draft articles on responsibility of States for internationally wrongful acts contains a “without prejudice” provision which applies to all the circumstances precluding wrongfulness considered in that chapter. The purpose of this provision—article 26—is

to “make it clear that the circumstances precluding wrongfulness in chapter V of Part One do not authorize or excuse any derogation from a peremptory norm of general international law”.²³⁹

(2) The commentary to article 26 on the responsibility of States for internationally wrongful acts states that “peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination”.²⁴⁰ In its judgment in the *Armed Activities on the Territory of the Congo* case, the International Court of Justice found that the prohibition of genocide “assuredly” was a peremptory norm.²⁴¹

(3) It is clear that, like States, international organizations could not invoke a circumstance precluding wrongfulness in the case of non-compliance with an obligation arising under a peremptory norm. Thus, there is the need for a “without prejudice” provision matching the one applicable to States.

(4) The present article reproduces the text of article 26 on the responsibility of States for internationally wrongful acts with the replacement of the term “State” by “international organization”.

Article 27. Consequences of invoking a circumstance precluding wrongfulness

The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:

(a) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;

(b) the question of compensation for any material loss caused by the act in question.

Commentary

(1) Article 27 on the responsibility of States for internationally wrongful acts²⁴² makes two points. The first point is that a circumstance precludes wrongfulness only if and to the extent that the circumstance exists. While the wording appears to emphasize the element of time,²⁴³ it is clear that a circumstance may preclude wrongfulness only insofar as it covers a particular situation. Beyond the reach of the circumstance, wrongfulness of the act is not affected.

²³⁹ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 85, paragraph (4) of the commentary to article 26.

²⁴⁰ *Ibid.*, p. 85, paragraph (5) of the commentary to article 26.

²⁴¹ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 6, at p. 32, para. 64. The text of the judgment is also available from www.icj-cij.org.

²⁴² *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 85.

²⁴³ This temporal element may have been emphasized because the International Court of Justice had said in the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* case that “[a]s soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives” (*I.C.J. Reports 1997*, p. 63, para. 101).

(2) The second point is that the question whether compensation is due is left unprejudiced. It would be difficult to set a general rule concerning compensation for losses caused by an act that would be wrongful, but for the presence of a certain circumstance.

(3) Since the position of international organizations does not differ from that of States with regard to both matters covered by article 27 on the responsibility of States for internationally wrongful acts, and no change in the wording is required in the present context, the present article is identical to the corresponding article on the responsibility of States for internationally wrongful acts.

PART THREE

CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION

Commentary

(1) Part Three of the present draft articles defines the legal consequences of internationally wrongful acts of international organizations. This Part is organized in three chapters, which follow the general pattern of the draft articles on responsibility of States for internationally wrongful acts.²⁴⁴

(2) Chapter I (arts. 28 to 33) lays down certain general principles and sets out the scope of Part Three. Chapter II (arts. 34 to 40) specifies the obligation of reparation in its various forms. Chapter III (arts. 41 and 42) considers the additional consequences that are attached to internationally wrongful acts consisting of serious breaches of obligations under peremptory norms of general international law.

CHAPTER I

GENERAL PRINCIPLES

Article 28. Legal consequences of an internationally wrongful act

The international responsibility of an international organization which is entailed by an internationally wrongful act in accordance with the provisions of Part Two involves legal consequences as set out in this Part.

Commentary

This provision has an introductory character. It corresponds to article 28 on the responsibility of States for internationally wrongful acts,²⁴⁵ with the only difference that the term “international organization” replaces the term “State”. There would be no justification for using a different wording in the present article.

Article 29. Continued duty of performance

The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible international organization to perform the obligation breached.

²⁴⁴ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 86–116.

²⁴⁵ *Ibid.*, pp. 87–88.

Commentary

(1) This provision states the principle that the breach of an obligation under international law by an international organization does not *per se* affect the existence of that obligation. This is not intended to exclude that the obligation may terminate in connection with the breach: for instance, because the obligation arises under a treaty and the injured State or organization avails itself of the right to suspend or terminate the treaty in accordance with the rule in article 60 of the 1986 Vienna Convention.

(2) The principle that an obligation is not *per se* affected by a breach does not imply that performance of the obligation will still be possible after the breach occurs. This will depend on the character of the obligation concerned and of the breach. Should, for instance, an international organization be under the obligation to transfer some persons or property to a certain State, that obligation could no longer be performed once those persons or that property have been transferred to another State in breach of the obligation.

(3) The conditions under which an obligation may be suspended or terminated are governed by the primary rules concerning the obligation. The same applies with regard to the possibility of performing the obligation after the breach. These rules need not be examined in the context of the law of responsibility of international organizations.

(4) With regard to the statement of the continued duty of performance after a breach, there is no reason for distinguishing between the situation of States and that of international organizations. Thus the present article uses the same wording as article 29 on the responsibility of States for internationally wrongful acts,²⁴⁶ the only difference being that the term “State” is replaced by the term “international organization”.

Article 30. Cessation and non-repetition

The international organization responsible for the internationally wrongful act is under an obligation:

(a) **to cease that act, if it is continuing;**

(b) **to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.**

Commentary

(1) The principle that the breach of an obligation under international law does not *per se* affect the existence of that obligation, as stated in article 29, has the corollary that, if the wrongful act is continuing, the obligation still has to be complied with. Thus, the wrongful act is required to cease by the primary rule providing for the obligation.

(2) When the breach of an obligation occurs and the wrongful act continues, the main object pursued by the injured State or international organization will often be cessation of the wrongful conduct. Although a claim would refer to the breach, what would actually be sought

²⁴⁶ *Ibid.*, p. 88.

is compliance with the obligation under the primary rule. This is not a new obligation that arises as a consequence of the wrongful act.

(3) The existence of an obligation to offer assurances and guarantees of non-repetition will depend on the circumstances of the case. For this obligation to arise, it is not necessary for the breach to be continuing. The obligation seems justified especially when the conduct of the responsible entity shows a pattern of breaches.

(4) Examples of assurances and guarantees of non-repetition given by international organizations are hard to find. However, there may be situations in which these assurances and guarantees are as appropriate as in the case of States. For instance, should an international organization be found in persistent breach of a certain obligation, guarantees of non-repetition would hardly be out of place.

(5) Assurances and guarantees of non-repetition are considered in the same context as cessation because they all concern compliance with the obligation set out in the primary rule. However, unlike the obligation to cease a continuing wrongful act, the obligation to offer assurances and guarantees of non-repetition may be regarded as a new obligation that arises as a consequence of the wrongful act, when the commission of the act signals the risk of future violations.

(6) Given the similarity of the situation of States and that of international organizations in respect of cessation and of assurances and guarantees of non-repetition, the present article follows the same wording as article 30 on the responsibility of States for internationally wrongful acts,²⁴⁷ with the replacement of the word “State” with “international organization”.

Article 31. *Reparation*

1. The responsible international organization is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of an international organization.

Commentary

(1) The present article sets out the principle that the responsible international organization is required to make full reparation for the injury caused. This principle seeks to protect the injured party from being adversely affected by the internationally wrongful act.

(2) Injury is defined as including “any damage, whether material or moral, caused by the internationally wrongful act”. According to the judgment of the European Court of Justice in *Walz v. Clickair*, this wording, as it appears in paragraph 2 of article 31 on the responsibility of States for internationally wrongful acts,²⁴⁸ expresses a concept which “is common to all the international law

sub-systems” and expresses “the ordinary meaning to be given to the concept of damage in international law”.²⁴⁹

(3) As in the case of States, the principle of full reparation is often applied in practice in a flexible manner. The injured party may be mainly interested in the cessation of a continuing wrongful act or in the non-repetition of the wrongful act. The ensuing claim to reparation may therefore be limited. This especially occurs when the injured State or organization puts forward a claim for its own benefit and not for that of individuals or entities whom it seeks to protect. However, the restraint on the part of the injured State or organization in the exercise of its rights does not generally imply that the same party would not regard itself as entitled to full reparation. Thus, the principle of full reparation is not put in question.

(4) It may be difficult for an international organization to have all the necessary means for making the required reparation. This fact is linked to the inadequacy of the financial resources that are generally available to international organizations for meeting this type of expense. However, that inadequacy cannot exempt a responsible organization from the legal consequences resulting from its responsibility under international law.

(5) The fact that international organizations sometimes grant compensation *ex gratia* is not due to abundance of resources, but rather to a reluctance, which organizations share with States, to admit their own international responsibility.

(6) When an international organization intends to undertake an activity in a country where its international responsibility may be engaged, one option for the organization is to conclude with the territorial State an agreement limiting its responsibility for wrongful acts occurring in relation to that activity. An example may be offered by the United Nations practice concerning peacekeeping operations, to the extent that the agreements with States to whose territory peacekeeping missions are deployed also cover claims arising out of international responsibility.²⁵⁰

(7) In setting out the principle of full reparation, the present article mainly refers to the more frequent case in which an international organization is solely responsible for an internationally wrongful act. The assertion of a duty of full reparation for the organization does not necessarily imply that the same principle applies when the organization is held responsible in connection with a certain act together with one or more States or one or more other organizations: for instance, when the organization aids or assists a State in the commission of the wrongful act.²⁵¹

(8) The present article reproduces article 31 on the responsibility of States for internationally wrongful acts, with the replacement in both paragraphs of the term “State” with “international organization”.

²⁴⁹ *Axel Walz v. Clickair SA*, Case No. C-63/09, Judgment of 6 May 2010, Third Chamber, Court of Justice of the European Union, paras. 27–28.

²⁵⁰ The Secretariat of the United Nations referred in this context to that practice. See A/CN.4/637 and Add.1 (under the section entitled “Draft article 30 ... United Nations”), para. 6.

²⁵¹ See article 14 of the present draft articles.

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.*, p. 91.

Article 32. Relevance of the rules of the organization

1. The responsible international organization may not rely on its rules as justification for failure to comply with its obligations under this Part.

2. Paragraph 1 is without prejudice to the applicability of the rules of an international organization to the relations between the organization and its member States and organizations.

Commentary

(1) Paragraph 1 states the principle that an international organization cannot invoke its rules in order to justify non-compliance with its obligations under international law entailed by the commission of an internationally wrongful act. This principle finds a parallel in the principle that a State may not rely on its internal law as a justification for failure to comply with its obligations under Part Two of the articles on responsibility of States for internationally wrongful acts. The text of paragraph 1 replicates article 32 on State responsibility,²⁵² with two changes: the term “international organization” replaces “State” and the reference to the rules of the organization replaces that to the internal law of the State.

(2) A similar approach was taken by article 27, paragraph 2, of the 1986 Vienna Convention, which parallels the corresponding provision of the 1969 Vienna Convention by saying that “[a]n international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty”.

(3) In the relations between an international organization and a non-member State or organization, it seems clear that the rules of the former organization cannot *per se* affect the obligations that arise as a consequence of an internationally wrongful act. The same principle does not necessarily apply to the relations between an organization and its members. Rules of the organization could affect the application of the principles and rules set out in this Part. They may, for instance, modify the rules on the forms of reparation that a responsible organization may have to make towards its members.

(4) Rules of the organization may also affect the application of the principles and rules set out in Part Two in the relations between an international organization and its members, for instance in the matter of attribution. They would be regarded as special rules and need not be made the object of a special reference in that Part. On the contrary, in Part Three a “without prejudice” provision concerning the application of the rules of the organization in respect of members seems useful in view of the implications that may otherwise be inferred from the principle of irrelevance of the rules of the organization. The presence of such a “without prejudice” provision will serve as a reminder of the fact that the general statement in paragraph 1 may admit exceptions in the relations between an international organization and its member States and organizations.

(5) The provision in question, which is set out in paragraph 2, only applies insofar as the obligations in Part Three relate to the international responsibility that an international organization may have towards its member States and organizations. It cannot affect in any manner the legal consequences entailed by an internationally wrongful act towards a non-member State or organization, nor can it affect the consequences relating to breaches of obligations under peremptory norms as these breaches would affect the international community as a whole.

Article 33. Scope of international obligations set out in this Part

1. The obligations of the responsible international organization set out in this Part may be owed to one or more States, to one or more other organizations, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.

2. This Part is without prejudice to any right, arising from the international responsibility of an international organization, which may accrue directly to any person or entity other than a State or an international organization.

Commentary

(1) In the articles on responsibility of States for internationally wrongful acts, Part One concerns any breach of an obligation under international law that may be attributed to a State, irrespective of the nature of the entity or person to whom the obligation is owed. The scope of Part Two of those articles is limited to obligations that arise for a State towards another State. This seems to be because of the difficulty of considering the consequences of an internationally wrongful act and thereafter the implementation of responsibility in respect of an injured party whose breaches of international obligations are not covered in Part One. The reference to responsibility existing towards the international community as a whole does not raise a similar problem, since it is hardly conceivable that the international community as a whole would incur international responsibility.

(2) Should one take a similar approach with regard to international organizations in the present draft articles, one would have to limit the scope of Part Three to obligations arising for international organizations towards other international organizations or towards the international community as a whole. However, it seems logical to include also obligations that organizations have towards States, given the existence of the articles on responsibility of States for internationally wrongful acts. As a result, Part Three of the present draft articles encompasses obligations that a responsible international organization may have towards one or more other organizations, one or more States, or the international community as a whole. This is meant to include the possibility that an international organization incurs international responsibility, and therefore acquires the obligations set out in Part Three, towards one State and one organization, two or more States and one organization, two or more States and two or more organizations, or one State and two or more organizations.

²⁵² *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 94.

(3) With the change in the reference to the responsible entity and with the addition explained above, paragraph 1 follows the wording of article 33, paragraph 1, on State responsibility.²⁵³

(4) While the scope of Part Three is limited according to the definition in paragraph 1, this does not mean that obligations entailed by an internationally wrongful act do not arise towards persons or entities other than States and international organizations. Like article 33, paragraph 2, on State responsibility, paragraph 2 provides that Part Three is without prejudice to any right that arises out of international responsibility and may accrue directly to those persons and entities.

(5) With regard to the international responsibility of international organizations, one significant area in which rights accrue to persons other than States or organizations is that of breaches by international organizations of their obligations under international law concerning employment. Another area is that of breaches committed by peacekeeping forces and affecting individuals.²⁵⁴ The consequences of these breaches with regard to individuals, as stated in paragraph (1), are not covered by the present draft articles.

CHAPTER II

REPARATION FOR INJURY

Article 34. Forms of reparation

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

Commentary

(1) The above provision is identical to article 34 on the responsibility of States for internationally wrongful acts.²⁵⁵ This seems justified since the forms of reparation consisting of restitution, compensation and satisfaction are applied in practice to international organizations as well as to States. Certain examples relating to international organizations are given in the commentaries to the following articles, which specifically address the various forms of reparation.

(2) A note by the Director General of the International Atomic Energy Agency provides an instance in which the three forms of reparation are considered to apply to a responsible international organization. Concerning the “international responsibility of the Agency in relation to safeguards”, he wrote on 24 June 1970 the following:

Although there may be circumstances when the giving of satisfaction by the Agency may be appropriate, it is proposed to give consideration

²⁵³ *Ibid.*, pp. 94–95.

²⁵⁴ See, for instance, General Assembly resolution 52/247 of 26 June 1998, on “Third-party liability: temporal and financial limitations”.

²⁵⁵ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 95–96.

only to reparation properly so called. Generally speaking, reparation properly so called may be either restitution in kind or payment of compensation.²⁵⁶

Article 35. Restitution

An international organization responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(a) is not materially impossible;

(b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Commentary

(1) Restitution is a form of reparation that involves the re-establishment as far as possible of the situation which existed before the internationally wrongful act was committed by the responsible international organization.

(2) The concept and forms of restitution and the related conditions, as defined in article 35 on the responsibility of States for internationally wrongful acts,²⁵⁷ appear to be applicable also to international organizations. There is no reason that would suggest a different approach with regard to the latter. The text above therefore reproduces article 35 on State responsibility, the only difference being that the term “State” is replaced by “international organization”.

Article 36. Compensation

1. The international organization responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

Commentary

(1) Compensation is the form of reparation most frequently made by international organizations. The best-known instance of practice concerns the settlement of claims arising from the United Nations operation in the Congo. Compensation to nationals of Belgium, Greece, Italy, Luxembourg and Switzerland was granted through exchanges of letters between the Secretary-General and the permanent missions of the respective States in keeping with the United Nations declaration contained in these letters according to which the United Nations stated as follows:

²⁵⁶ GOV/COM.22/27, para. 27. See *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/545, annex. The note is on file with the Codification Division of the Office of Legal Affairs. It has to be noted that, according to the prevailing use, which is reflected in article 34 on the responsibility of States for internationally wrongful acts and the article above, reparation is considered to include satisfaction.

²⁵⁷ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 96–98.

[I]t would not evade responsibility where it was established that United Nations agents had in fact caused unjustifiable damage to innocent parties.²⁵⁸

With regard to the same operation, further settlements were made with France, the United Kingdom of Great Britain and Northern Ireland, the United States of America, and Zambia,²⁵⁹ and also with the International Committee of the Red Cross (ICRC).²⁶⁰

(2) The fact that such compensation was given as reparation for breaches of obligations under international law may be gathered not only from some of the claims but also from a letter, dated 6 August 1965, addressed by the Secretary-General to the Acting Permanent Representative of the Union of Soviet Socialist Republics. In this letter, the Secretary-General said the following:

It has always been the policy of the United Nations, acting through the Secretary-General, to compensate individuals who have suffered damages for which the Organization was legally liable. This policy is in keeping with generally recognized legal principles and with the Convention on Privileges and Immunities of the United Nations. In addition, in regard to the United Nations activities in the Congo, it is reinforced by the principles set forth in the international conventions concerning the protection of the life and property of the civilian population during hostilities as well as by considerations of equity and humanity which the United Nations cannot ignore.²⁶¹

(3) A reference to the obligation on the United Nations to pay compensation was also made by the International Court of Justice in its advisory opinion on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*.²⁶²

(4) There is no reason to depart from the text of article 36 on the responsibility of States for internationally wrongful acts,²⁶³ apart from replacing the term “State” by “international organization”.

²⁵⁸ Exchange of letters constituting an agreement relating to the settlement of claims filed against the United Nations in the Congo by Belgian nationals (New York, 20 February 1965), United Nations, *Treaty Series*, vol. 535, No. 7780, p. 197; exchange of letters (with annex) constituting an agreement relating to the settlement of claims filed against the United Nations in the Congo by Swiss nationals (New York, 3 June 1966), *ibid.*, vol. 564, No. 621, p. 193; exchange of letters constituting an agreement relating to the settlement of claims filed against the United Nations in the Congo by Greek nationals (New York, 20 June 1966), *ibid.*, vol. 565, No. 8230, p. 3; exchange of letters constituting an agreement relating to the settlement of claims filed against the United Nations in the Congo by Luxembourg nationals (New York, 28 December 1966), *ibid.*, vol. 585, No. 8487, p. 147; and exchange of letters constituting an agreement relating to the settlement of claims filed against the United Nations in the Congo by Italian nationals (New York, 18 January 1967), *ibid.*, vol. 588, No. 8525, p. 197.

²⁵⁹ See K. Schmalenbach, *Die Haftung Internationaler Organisationen: im Rahmen von Militäreinsätzen und Territorialverwaltungen*, Frankfurt am Main, Peter Lang, 2004, at pp. 314–321.

²⁶⁰ The text of the agreement was reproduced by K. Ginther, *Die völkerrechtliche Verantwortlichkeit internationaler Organisationen gegenüber Drittstaaten*, Vienna/New York, Springer, 1969, pp. 166–167.

²⁶¹ United Nations, *Juridical Yearbook 1965* (Sales No. 67.V.3), p. 41, footnote 26 (document S/6597). The view that the United Nations placed its responsibility at the international level was maintained by J. J. A. Salmon, “Les accords Spaak–U Thant du 20 février 1965”, *AFDI*, vol. 11 (1965), p. 468, at pp. 483 and 487.

²⁶² *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (see footnote 87 above), pp. 88–89, para. 66.

²⁶³ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 98–105.

Article 37. Satisfaction

1. The international organization responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.

2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.

3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible international organization.

Commentary

(1) Practice offers some examples of satisfaction on the part of international organizations, generally in the form of an apology or an expression of regret. Although the examples that follow do not expressly refer to the existence of a breach of an obligation under international law, they at least imply that an apology or an expression of regret by an international organization would be one of the appropriate legal consequences for such a breach.

(2) With regard to the fall of Srebrenica, the United Nations Secretary-General said:

The United Nations experience in Bosnia was one of the most difficult and painful in our history. It is with the deepest regret and remorse that we have reviewed our own actions and decisions in the face of the assault on Srebrenica.²⁶⁴

(3) On 16 December 1999, upon receiving the report of the Independent Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda, the Secretary-General stated:

All of us must bitterly regret that we did not do more to prevent it. There was a United Nations force in the country at the time, but it was neither mandated nor equipped for the kind of forceful action which would have been needed to prevent or halt the genocide. On behalf of the United Nations, I acknowledge this failure and express my deep remorse.²⁶⁵

(4) Shortly after the NATO bombing of the Chinese embassy in Belgrade, a NATO spokesperson said in a press conference:

I think we have done what anybody would do in these circumstances, first of all we have acknowledged responsibility clearly, unambiguously, quickly; we have expressed our regrets to the Chinese authorities.²⁶⁶

A further apology was addressed on 13 May 1999 by German Chancellor Gerhard Schröder on behalf of Germany, NATO and NATO Secretary General Javier Solana to Foreign Minister Tang Jiaxuan and Premier Zhu Rongji.²⁶⁷

²⁶⁴ Report of the Secretary-General pursuant to General Assembly resolution 53/35: the fall of Srebrenica (A/54/549), para. 503.

²⁶⁵ www.un.org (Press Release SG/SM/7263). See also the report of the Independent Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda, S/1999/1257, Enclosure.

²⁶⁶ www.nato.int/kosovo/press/p990509b.htm.

²⁶⁷ “NATO apologises to Beijing”, <http://news.bbc.co.uk/2/hi/asia-pacific/341533.stm>.

(5) As with regard to other forms of reparation, the rules of the responsible international organization will determine which organ or agent is competent to give satisfaction on behalf of the organization.

(6) The modalities and conditions of satisfaction that concern States are applicable also to international organizations. A form of satisfaction intended to humiliate the responsible international organization may be unlikely, but is not unimaginable. A theoretical example would be that of the request of a formal apology in terms that would be demeaning to the organization or one of its organs. The request could also refer to the conduct taken by one or more member States or organizations within the framework of the responsible organization. Although the request for satisfaction might then specifically target one or more members, the responsible organization would be asked to give it and would necessarily be affected.

(7) Thus, the paragraphs of article 37 on the responsibility of States for internationally wrongful acts²⁶⁸ may be transposed, with the replacement of the term “State” with “international organization” in paragraphs 1 and 3.

Article 38. Interest

1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.

2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

Commentary

The rules contained in article 38 on the responsibility of States for internationally wrongful acts²⁶⁹ with regard to interest are intended to ensure application of the principle of full reparation. Similar considerations in this regard apply to international organizations. Therefore, both paragraphs of article 38 on State responsibility are here reproduced without change.

Article 39. Contribution to the injury

In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or international organization or of any person or entity in relation to whom reparation is sought.

Commentary

(1) No apparent reason would preclude extending to international organizations the provision set out in article 39 on the responsibility of States for internationally wrongful acts.²⁷⁰ Such an extension is made in two directions: first,

international organizations are also entitled to invoke contribution to the injury in order to diminish their responsibility; second, the entities that may have contributed to the injury include international organizations. The latter extension requires the addition of the words “or international organization” after “State” in the corresponding article on State responsibility.

(2) One instance of relevant practice in which contribution to the injury was invoked concerns the shooting of a civilian vehicle in the Congo. In this case compensation by the United Nations was reduced because of the contributory negligence by the driver of the vehicle.²⁷¹

(3) This article is without prejudice to any obligation to mitigate the injury that the injured party may have under international law. The existence of such an obligation would arise under a primary rule. Thus, it does not need to be discussed here.

(4) The reference to “any person or entity in relation to whom reparation is sought” has to be read in conjunction with the definition given in article 33 of the scope of the international obligations set out in Part Three. This scope is limited to obligations arising for a responsible international organization towards States, other international organizations or the international community as a whole. The above reference seems appropriately worded in this context. The existence of rights that directly accrue to other persons or entities is thereby not prejudiced.

Article 40. Ensuring the fulfilment of the obligation to make reparation

1. The responsible international organization shall take all appropriate measures in accordance with its rules to ensure that its members provide it with the means for effectively fulfilling its obligations under this chapter.

2. The members of a responsible international organization shall take all the appropriate measures that may be required by the rules of the organization in order to enable the organization to fulfil its obligations under this chapter.

Commentary

(1) International organizations having a separate legal personality are in principle the only subjects that bear international responsibility for their internationally wrongful acts. When an international organization is responsible for an internationally wrongful act, States and other organizations incur responsibility because of their membership of a responsible organization only according to the conditions stated in articles 18, 61 and 62. The present article does not envisage any further instance in which States and international organizations would be held internationally responsible for the act of the organization of which they are members.

²⁶⁸ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 105–107.

²⁶⁹ *Ibid.*, pp. 107–109.

²⁷⁰ *Ibid.*, pp. 109–110.

²⁷¹ See Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (footnote 121 above), p. 606.

(2) Consistent with the views expressed by several States that responded to a question raised by the Commission in its 2006 report to the General Assembly,²⁷² no subsidiary obligation of members towards the injured party is considered to arise when the responsible organization is not in a position to make reparation.²⁷³ The same opinion was expressed in statements by the IMF and the Organisation for the Prohibition of Chemical Weapons.²⁷⁴ This approach appears to conform to practice, which does not show any support for the existence of such an obligation under international law.

(3) Thus, the injured party would have to rely on the fulfilment by the responsible international organization of its obligations. It is clear that if no budget line is provided for the event that the organization incurs international responsibility, the effective fulfilment of the obligation to make reparation will be at risk. Thus, paragraph 1 stresses the need for an international organization to take all appropriate measures so as to be in a position of complying with its obligations should it incur responsibility. This will generally imply that the members of the organization should be requested to provide the necessary means.

(4) Paragraph 2 is essentially of an expository character. It intends to remind members of a responsible international organization that they are required to take, in accordance with the rules of the organization, all appropriate measures in order to provide the organization with the means for effectively fulfilling its obligation to make reparation.

²⁷² *Yearbook ... 2006*, vol. II (Part Two), p. 21, para. 28.

²⁷³ The delegation of the Netherlands noted that there would be “no basis for such an obligation” (*Official Records of the General Assembly, Sixty-first Session, Sixth Committee*, 14th meeting (A/C.6/61/SR.14), para. 23). Similar views were expressed by Denmark, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (*ibid.*, 13th meeting (A/C.6/61/SR.13), para. 32); Belgium (*ibid.*, 14th meeting (A/C.6/61/SR.14), paras. 41–42); Spain (*ibid.*, paras. 52–53); France (*ibid.*, para. 63); Italy (*ibid.*, para. 66); the United States (*ibid.*, para. 83); Belarus (*ibid.*, para. 100); Switzerland (*ibid.*, 15th meeting (A/C.6/61/SR.15), para. 5); Cuba (*ibid.*, 16th meeting (A/C.6/61/SR.16), para. 13); and Romania (*ibid.*, 19th meeting (A/C.6/61/SR.19), para. 60). The delegation of Belarus, however, suggested that a “scheme of subsidiary responsibility for compensation could be established as a special rule, for example in cases where the work of the organization was connected with the exploitation of dangerous resources” (*ibid.*, 14th meeting (A/C.6/61/SR.14), para. 100). Although sharing the prevailing view, the delegation of Argentina requested the Commission to “analyse whether the special characteristics and rules of each organization, as well as considerations of justice and equity, called for exceptions to the basic rule, depending on the circumstances of each case” (*ibid.*, 13th meeting (A/C.6/61/SR.13), para. 49). More recently, see the statement by Belarus (*ibid.*, *Sixty-fourth Session, Sixth Committee*, 15th meeting (A/C.6/64/SR.15), para. 36), Hungary (*ibid.*, 16th meeting (A/C.6/64/SR.16), para. 40), Portugal (*ibid.*, para. 46) and Greece (*ibid.*, para. 62) and the written comments by Germany (A/CN.4/636 and Add.1–2 (under the section entitled “Draft article 39 ...”), para. 3) and the Republic of Korea (*ibid.*). A similar position was taken by Austria (*ibid.*, para. 4). The Islamic Republic of Iran, while sharing the same view, maintained that “the brunt of responsibility in such cases should be borne by those members which, on account of their decision-making role or overall position within the organization, had contributed to the injurious act” (*Official Records of the General Assembly, Sixty-fourth Session, Sixth Committee*, 16th meeting (A/C.6/64/SR.16), para. 53).

²⁷⁴ *Yearbook ... 2007*, vol. II (Part One), A/CN.4/582, p. 29. Several international organizations suggested that the Commission state an obligation for members as “an exercise in progressive development” (A/CN.4/637 and Add.1 (under the section entitled “Draft article 39 ... ”)).

(5) In both paragraphs, the reference to the rules of the organization is meant to define the basis of the requirements in question.²⁷⁵ While the rules of the organization do not necessarily deal with the matter expressly, an obligation for members to finance the organization as part of the general duty to cooperate with the organization may be implied under the relevant rules. As was noted by Judge Sir Gerald Fitzmaurice in his separate opinion in the *Certain expenses of the United Nations* advisory opinion:

Without finance, the Organization could not perform its duties. Therefore, even in the absence of Article 17, paragraph 2, a general obligation for Member States collectively to finance the Organization would have to be read into the Charter [of the United Nations], on the basis of the same principle as the Court applied in the [*Reparation for Injuries*] case, namely “by necessary implication as being essential to the performance of its [i.e. the Organization’s] duties” (*I.C.J. Reports 1949*, at p. 182).²⁷⁶

CHAPTER III

SERIOUS BREACHES OF OBLIGATIONS UNDER PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW

Article 41. Application of this chapter

1. This chapter applies to the international responsibility which is entailed by a serious breach by an international organization of an obligation arising under a peremptory norm of general international law.

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible international organization to fulfil the obligation.

Commentary

(1) The scope of chapter III corresponds to the scope defined in article 40 on the responsibility of States for internationally wrongful acts.²⁷⁷ The breach of an obligation under a peremptory norm of general international law may be less likely on the part of international organizations than on the part of States. However, the risk of such a breach cannot be entirely ruled out. It is not inconceivable, for example, that an international organization commits an aggression or infringes an obligation under a peremptory norm of general international law relating to the protection of human rights. If a serious breach does occur, it calls for the same consequences as in the case of States.

(2) The two paragraphs of the present article are identical to those of article 40 on the responsibility of States for internationally wrongful acts, but for the replacement of the term “State” with “international organization”.

²⁷⁵ See the statements by the delegations of Denmark, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (*Official Records of the General Assembly, Sixty-first Session, Sixth Committee*, 13th meeting (A/C.6/61/SR.13), para. 32); Belgium (*ibid.*, 14th meeting (A/C.6/61/SR.14), para. 42); Spain (*ibid.*, para. 53); France (*ibid.*, para. 63); and Switzerland (*ibid.*, 15th meeting (A/C.6/61/SR.15), para. 5). Also, the Institute of International Law held that an obligation to put a responsible organization in funds only existed “pursuant to its Rules” (Institute of International Law, *Yearbook*, vol. 66, Part II, Session of Lisbon (1995), p. 451).

²⁷⁶ *Certain expenses of the United Nations* (see footnote 151 above), p. 208.

²⁷⁷ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 112.

Article 42. Particular consequences of a serious breach of an obligation under this chapter

1. States and international organizations shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 41.

2. No State or international organization shall recognize as lawful a situation created by a serious breach within the meaning of article 41, nor render aid or assistance in maintaining that situation.

3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law.

Commentary

(1) This article sets out that, should an international organization commit a serious breach of an obligation under a peremptory norm of general international law, States and international organizations have duties corresponding to those applying to States according to article 41 on the responsibility of States for internationally wrongful acts.²⁷⁸ Therefore, the same wording is used here as in that article, with the addition of the words “and international organizations” in paragraph 1 and “or international organization” in paragraph 2.

(2) In response to a question raised by the Commission in its 2006 report to the General Assembly,²⁷⁹ several States expressed the view that the legal situation of an international organization should be the same as that of a State having committed a similar breach.²⁸⁰ Moreover, several States maintained that international organizations would also be under an obligation to cooperate to bring the breach to an end.²⁸¹

(3) The Organisation for the Prohibition of Chemical Weapons made the following observation:

States should definitely be under an obligation to cooperate to bring such a breach to an end because in the case when an international organization acts in breach of a peremptory norm of general international law, its position is not much different from that of a State.²⁸²

²⁷⁸ *Ibid.*, pp. 113–114.

²⁷⁹ See footnote 272 above.

²⁸⁰ See the interventions by Denmark, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (*Official Records of the General Assembly, Sixty-first Session, Sixth Committee*, 13th meeting (A/C.6/61/SR.13), para. 33); Argentina (*ibid.*, para. 50); the Netherlands (*ibid.*, 14th meeting (A/C.6/61/SR.14), para. 25); Belgium (*ibid.*, paras. 43–46); Spain (*ibid.*, para. 54); France (*ibid.*, para. 64); Belarus (*ibid.*, para. 101); Switzerland (*ibid.*, 15th meeting (A/C.6/61/SR.15), para. 8); Jordan (*ibid.*, 16th meeting (A/C.6/61/SR.16), para. 5); the Russian Federation (*ibid.*, 18th meeting (A/C.6/61/SR.18), para. 68); and Romania (*ibid.*, 19th meeting (A/C.6/61/SR.19), para. 60).

²⁸¹ Thus the interventions by Denmark, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (*ibid.*, 13th meeting (A/C.6/61/SR.13), para. 33); Argentina (*ibid.*, para. 50); the Netherlands (*ibid.*, 14th meeting (A/C.6/61/SR.14), para. 25); Belgium (*ibid.*, para. 45); Spain (*ibid.*, para. 54); France (*ibid.*, para. 64); Belarus (*ibid.*, para. 101); Switzerland (*ibid.*, 15th meeting (A/C.6/61/SR.15), para. 8); and the Russian Federation (*ibid.*, 18th meeting (A/C.6/61/SR.18), para. 68).

²⁸² *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/582, p. 13, para. 56.

With regard to the obligation to cooperate on the part of international organizations, the same organization noted that an international organization “must always act within its mandate and in accordance with its rules”.²⁸³

(4) Paragraph 1 of the present article is not designed to vest international organizations with functions that are outside their respective mandates. On the other hand, some international organizations may be entrusted with functions that go beyond what is required in the present article. This article is without prejudice to any function that an organization may have with regard to certain breaches of obligations under peremptory norms of general international law, as for example the United Nations in respect of aggression.

(5) While practice does not offer examples of cases in which the obligations stated in the present article were asserted in respect of a serious breach committed by an international organization, it is not insignificant that these obligations were considered to apply to international organizations when a breach was allegedly committed by a State.

(6) In this context it may be useful to recall that, in the operative part of its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice first stated the obligation incumbent upon Israel to cease forthwith the works of the construction of the wall and, “[g]iven the character and the importance of the rights and obligations involved”, the obligation for all States “not to recognize the illegal situation resulting from the construction of the wall ... [and] not to render aid or assistance in maintaining the situation created by such construction”.²⁸⁴ The Court then added:

The United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated regime, taking due account of the present Advisory Opinion.²⁸⁵

(7) Some instances of practice relating to serious breaches committed by States concern the duty of international organizations not to recognize as lawful a situation created by one of those breaches. For example, with regard to the annexation of Kuwait by Iraq, the Security Council, in paragraph 2 of its resolution 662 (1990) of 9 August 1990, called upon “all States, international organizations and specialized agencies not to recognize that annexation, and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation”. Another example is provided by the Declaration that the European Community and its member States made in 1991 on the Guidelines on the Recognition of New States

²⁸³ *Ibid.*, p. 14, para. 63. The IMF went one step further in saying that “any obligation of international organizations to cooperate would be subject to, and limited by, provisions of their respective charters” (*ibid.*, p. 30).

²⁸⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 200, para. 159. See also subparagraph (3) B and D of the operative paragraph, *ibid.*, pp. 201–202, para. 163.

²⁸⁵ *Ibid.*, p. 202, para. 163, subparagraph (3) E of the operative paragraph. The same language appears in paragraph 160 of the advisory opinion, *ibid.*, p. 200.

in Eastern Europe and in the Soviet Union.²⁸⁶ This text included the following sentence: “The Community and its member States will not recognize entities which are the result of aggression.”²⁸⁷

(8) The present article concerns the obligations of States and international organizations in the event of a serious breach of an obligation under a peremptory norm of general international law by an international organization. It is not intended to exclude that similar obligations also exist for other persons or entities.

PART FOUR

THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION

Commentary

(1) Part Four of the present articles concerns the implementation of the international responsibility of international organizations. This Part is subdivided into two chapters, according to the general pattern of the articles on responsibility of States for internationally wrongful acts.²⁸⁸ Chapter I deals with the invocation of international responsibility and with certain associated issues. These do not include questions relating to remedies that may be available for implementing international responsibility. Chapter II considers countermeasures taken in order to induce the responsible international organization to cease the unlawful conduct and to provide reparation.

(2) Issues relating to the implementation of international responsibility are here considered insofar as they concern the invocation of the responsibility of an international organization. Thus, while the present draft articles consider the invocation of responsibility by a State or an international organization, they do not address questions relating to the invocation of responsibility of States.²⁸⁹ However, one provision (art. 48) refers to the case in which the responsibility of one or more States is concurrent with that of one or more international organizations for the same wrongful act.

CHAPTER I

INVOCATION OF THE RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION

Article 43. Invocation of responsibility by an injured State or international organization

A State or an international organization is entitled as an injured State or an injured international

²⁸⁶ *Bulletin of the European Communities*, vol. 24, No. 12 (1991), pp. 119–120.

²⁸⁷ European Community, Declaration on Yugoslavia and on the Guidelines on the Recognition of New States, 16 December 1991, reproduced in ILM, vol. 31 (1992), p. 1485, at p. 1487. See also A/46/804, annex.

²⁸⁸ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 116–139.

²⁸⁹ See article 1 and in particular paragraph (10) of the commentary thereto.

organization to invoke the responsibility of another international organization if the obligation breached is owed to:

(a) that State or the former international organization individually;

(b) a group of States or international organizations including that State or the former international organization, or the international community as a whole, and the breach of the obligation:

(i) specially affects that State or that international organization; or

(ii) is of such a character as radically to change the position of all the other States and international organizations to which the obligation is owed with respect to the further performance of the obligation.

Commentary

(1) The present article defines when a State or an international organization is entitled to invoke responsibility as an injured State or international organization. This implies the entitlement to claim from the responsible international organization compliance with the obligations that are set out in Part Three.

(2) Subparagraph (a) addresses the more frequent case of responsibility arising for an international organization: that of a breach of an obligation owed to a State or another international organization individually. This subparagraph corresponds to article 42 (a) on the responsibility of States for internationally wrongful acts.²⁹⁰ It seems clear that the conditions for a State to invoke responsibility as an injured State cannot vary according to the fact that the responsible entity is another State or an international organization. Similarly, when an international organization owes an obligation to another international organization individually, the latter organization has to be regarded as entitled to invoke responsibility as an injured organization in case of breach.

(3) Practice concerning the entitlement of an international organization to invoke international responsibility because of the breach of an obligation owed to that organization individually mainly concerns breaches of obligations that are committed by States. Since the present draft articles do not address questions relating to the invocation of responsibility of States, this practice is here relevant only indirectly. The obligations breached to which practice refers were imposed either by a treaty or by general international law. It was in the latter context that in its advisory opinion on *Reparation for Injuries*, the International Court of Justice stated that it was “established that the Organization has capacity to bring claims on the international plane”.²⁹¹ Also in the context of breaches of obligations under general international law that were committed by a State, the Governing Council of the

²⁹⁰ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 117.

²⁹¹ *Reparation for injuries suffered in the service of the United Nations* (see footnote 69 above), pp. 184–185.

United Nations Compensation Commission envisaged compensation “with respect to any direct loss, damage, or injury to Governments or international organizations as a result of Iraq’s unlawful invasion and occupation of Kuwait”.²⁹² On this basis, several entities that were expressly defined as international organizations were, as a result of their claims, awarded compensation by the Panel of Commissioners: the Arab Planning Institute, the Inter-Arab Investment Guarantee Corporation, the Gulf Arab States Educational Research Center, the Arab Fund for Economic and Social Development, the Joint Program Production Institution for the Arab Gulf Countries and the Arab Towns Organization.²⁹³

(4) According to article 42 (b) on the responsibility of States for internationally wrongful acts, a State may invoke responsibility as an injured State also when the obligation breached is owed to a group of States or to the international community as a whole, and the breach of the obligation “(i) specially affects that State, or (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation”.²⁹⁴ The related commentary gives as an example for the first category a coastal State that is particularly affected by the breach of an obligation concerning pollution of the high seas;²⁹⁵ for the second category, the party to a disarmament treaty or “any other treaty where each party’s performance is effectively conditioned upon and requires the performance of each of the others”.²⁹⁶

(5) Breaches of this type, which rarely affect States, are even less likely to be relevant for international organizations. However, one cannot rule out that an international organization may commit a breach that falls into one or the other category and that a State or an international organization may then be entitled to invoke responsibility as an injured State or international organization. It is therefore preferable to include in the present article the possibility that a State or an international organization may invoke responsibility of an international organization as an injured State or international organization under similar circumstances. This is provided in subparagraph (b) (i) and (ii).

(6) While the *chapeau* of the present article refers to “the responsibility of another international organization”, this is due to the fact that the text cumulatively considers invocation of responsibility by a State or an international organization. The reference to “another” international organization is not intended to exclude the case that a State is injured and only one international organization—the responsible organization—is involved. Nor does the reference to “a State” and to “an international organization” in the same *chapeau* imply that more than one State or international organization may not be injured by the same internationally wrongful act.

²⁹² S/AC.26/1991/7/Rev.1, para. 34.

²⁹³ Report and recommendations made by the Panel of Commissioners concerning the Sixth Instalment of “F1” Claims (S/AC.26/2002/6), paras. 213–371.

²⁹⁴ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 117.

²⁹⁵ *Ibid.*, p. 119, paragraph (12) of the commentary to article 42.

²⁹⁶ *Ibid.*, paragraph (13) of the commentary to article 42.

(7) Similarly, the reference in subparagraph (b) to “a group of States or international organizations” does not necessarily imply that the group should comprise both States and international organizations or that there should be a plurality of States or international organizations. Thus, the text is intended to include the following cases: that the obligation breached is owed by the responsible international organization to a group of States; that it is owed to a group of other organizations; and that it is owed to a group comprising both States and organizations, but not necessarily a plurality of either.

Article 44. Notice of claim by an injured State or international organization

1. An injured State or international organization which invokes the responsibility of another international organization shall give notice of its claim to that organization.

2. The injured State or international organization may specify in particular:

(a) the conduct that the responsible international organization should take in order to cease the wrongful act, if it is continuing;

(b) what form reparation should take in accordance with the provisions of Part Three.

Commentary

(1) This article corresponds to article 43 on the responsibility of States for internationally wrongful acts.²⁹⁷ With regard to notice of claim for invoking international responsibility of an international organization, there would be little reason for envisaging different modalities from those that are applicable when an injured State invokes the responsibility of another State. Moreover, the same rule should apply whether the entity invoking responsibility is a State or an international organization.

(2) Paragraph 1 does not specify what form the invocation of responsibility should take. The fact that, according to paragraph 2, the State or international organization invoking responsibility may specify some elements, and in particular “what form reparation should take”, does not imply that the responsible international organization is bound to conform to those specifications.

(3) While paragraph 1 refers to the responsible international organization as “another international organization”, this does not mean that, when the entity invoking responsibility is a State, more than one international organization needs to be involved.

(4) Although the present article refers to “an injured State or international organization”, according to article 49, paragraph 5, the same rule applies to notice of claim when a State or an international organization is entitled to invoke responsibility without being an injured State or international organization within the definition of article 43.

²⁹⁷ *Ibid.*, pp. 119–120.

Article 45. Admissibility of claims

1. An injured State may not invoke the responsibility of an international organization if the claim is not brought in accordance with any applicable rule relating to the nationality of claims.

2. When the rule of exhaustion of local remedies applies to a claim, an injured State or international organization may not invoke the responsibility of another international organization if any available and effective remedy has not been exhausted.

Commentary

(1) This article corresponds to article 44 on the responsibility of States for internationally wrongful acts.²⁹⁸ It concerns the admissibility of certain claims that States or international organizations may make when invoking the international responsibility of an international organization. Paragraph 1 deals with those claims that are subject to the rule on nationality of claims, while paragraph 2 relates to the claims to which the local remedies rule applies.

(2) Nationality of claims is a requirement applying to States exercising diplomatic protection. Although article 1 of the articles on diplomatic protection adopted by the Commission at its fifty-eighth session defines that institution with regard to the invocation by a State of the responsibility of another State “for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State”, this definition is made “for the purposes of the ... draft articles”.²⁹⁹ The reference only to the relations between States is understandable in view of the fact that generally diplomatic protection is relevant in that context.³⁰⁰ However, diplomatic protection could be exercised by a State also towards an international organization, for instance when an organization deploys forces on the territory of a State and the conduct of those forces leads to a breach of an obligation under international law concerning the treatment of individuals.

(3) The requirement that a person be a national for diplomatic protection to be admissible is already implied in the definition quoted in the previous paragraph. It is expressed in article 3, paragraph 1, on diplomatic protection in the following terms: “The State entitled to exercise diplomatic protection is the State of nationality.”³⁰¹

(4) Paragraph 1 of the present article only concerns the exercise of diplomatic protection by a State. When an international organization prefers a claim against another

international organization, no requirement concerning nationality applies. With regard to the invocation of the responsibility of a State by an international organization, the International Court of Justice stated in its advisory opinion on *Reparation for Injuries* that “the question of nationality is not pertinent to the admissibility of the claim”.³⁰²

(5) Paragraph 2 relates to the local remedies rule. Under international law, this rule does not apply only to claims concerning diplomatic protection, but also to claims relating to respect for human rights.³⁰³ The local remedies rule does not apply in the case of functional protection³⁰⁴ when an international organization acts in order to protect one of its officials or agents in relation to the performance of his or her mission, although an organization may include in its claim also “the damage suffered by the victim or by persons entitled through him”,³⁰⁵ as the International Court of Justice said in its advisory opinion on *Reparation for Injuries*.

(6) With regard to a responsible international organization, the need to exhaust local remedies depends on the circumstances of the claim. Provided that the requirement applies in certain cases, there is no need to define here more precisely when the local remedies rule would be applicable. One clear case appears to be that of a claim in respect of the treatment of an individual by an international organization while administering a territory. The local remedies rule has also been invoked with regard to remedies existing within the European Union. One instance of practice is provided by a statement made on behalf of all the member States of the European Union by the Director-General of the Legal Service of the European Commission before the Council of the International Civil Aviation Organization (ICAO) in relation to a dispute between those States and the United States concerning measures taken for abating noise originating from aircraft. The member States of the European Union contended that the claim of the United States was inadmissible because remedies relating to the controversial European Council regulation had not been exhausted, since the measure was at the time “subject to challenge before the national courts of [European Union] Member States and the European Court of Justice”.³⁰⁶ This practice suggests that, whether a

²⁹⁸ *Ibid.*, pp. 120–121.

²⁹⁹ *Yearbook ... 2006*, vol. II (Part Two), p. 24, para. 49.

³⁰⁰ It was also in the context of a dispute between two States that the International Court of Justice found in its judgment on the preliminary objections in the *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* case that the definition provided in article 1 on diplomatic protection reflected “customary international law” (*Preliminary objections, Judgment, I.C.J. Reports 2007*, p. 582, at p. 599, para. 39). The text of the judgment is available from www.icj-cij.org/en.

³⁰¹ *Yearbook ... 2006*, vol. II (Part Two), p. 24, para. 49.

³⁰² *Reparation for injuries suffered in the service of the United Nations* (see footnote 69 above), p. 186.

³⁰³ See especially A. A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights*, Cambridge University Press, 1983, pp. 46–56; C. F. Amerasinghe, *Local Remedies in International Law*, 2nd ed., Cambridge University Press, 2004, pp. 64–75; and R. Pisillo Mazzeschi, *Esaurimento dei ricorsi interni e diritti umani*, Turin, Giappichelli, 2004. These authors focus on the exhaustion of local remedies with regard to claims based on human rights treaties.

³⁰⁴ This point was stressed by C. F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (footnote 121 above), p. 484, and J. Verhoeven, “Protection diplomatique, épuisement des voies de recours internes et juridictions européennes”, *Droit du pouvoir, pouvoir du droit—Mélanges offerts à Jean Salmon*, Brussels, Bruylant, 2007, p. 1511, at p. 1517.

³⁰⁵ *Reparation for injuries suffered in the service of the United Nations* (see footnote 69 above), p. 184.

³⁰⁶ See the “Oral statement and comments on the US response presented by the Member States of the European Union” of 15 November 2000, before the ICAO Council under its Rules for the Settlement of

claim is addressed to the European Union member States or the responsibility of the European Union is invoked, exhaustion of remedies existing within the European Union would be required.

(7) The need to exhaust local remedies with regard to claims against an international organization has been accepted, at least in principle, by the majority of writers.³⁰⁷ Although the term “local remedies” may seem inappropriate in this context, because it seems to refer to remedies available in the territory of the responsible entity, it has generally been used in English texts as a term of art and as such has been included also in paragraph 2.

(8) As in article 44 on the responsibility of States for internationally wrongful acts, the requirement for local remedies to be exhausted is conditional on the existence of “any available and effective remedy”. This requirement has been elaborated in greater detail by the Commission in articles 14 and 15 on diplomatic protection,³⁰⁸ but for the purpose of the present draft articles the more concise description may prove adequate.

Differences (document 7782/2) in the disagreement with the United States arising under the Convention on International Civil Aviation done at Chicago on 7 December 1944, p. 15. See also *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/545, annex, attachment 18.

³⁰⁷ The applicability of the local remedies rule to claims addressed by States to international organizations was maintained by several authors: J.-P. Ritter (see footnote 121 above), at pp. 454–455; P. de Visscher, “Observations sur le fondement et la mise en œuvre du principe de la responsabilité de l’Organisation des Nations Unies”, *Revue de droit international et de droit comparé*, vol. 40 (1963), p. 165, at p. 174; R. Simmonds (footnote 121 above), p. 238; B. Amrallah (footnote 121 above), at p. 67; L. Gramlich, “Diplomatic protection against acts of intergovernmental organs”, *GYBIL*, vol. 27 (1984), p. 386, at p. 398 (more tentatively); H. G. Schermers and N. M. Blokker, *International Institutional Law: Unity within Diversity*, 3rd rev. ed., The Hague, Martinus Nijhoff, 1995, pp. 1167–1168, para. 1858; P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (footnote 121 above), p. 534 *et seq.*; C. Pitschas (footnote 121 above), p. 250; K. Wellens, *Remedies against International Organizations*, Cambridge University Press, 2002, pp. 66–67; and G. Thallinger, “The rule of exhaustion of local remedies in the context of the responsibility of international organizations”, *Nordic Journal of International Law*, vol. 77 (2008), pp. 401 *et seq.* The same opinion was expressed by the International Law Association in its final report on accountability of international Organizations, *Report of the Seventy-first Conference ...* (see footnote 121 above), p. 213. C. Eagleton, in “International organization and the law of responsibility”, *Recueil des cours de l’Académie de droit international de La Haye, 1950-I*, vol. 76, p. 323, at p. 395, considered that the local remedies rule would not be applicable to a claim against the United Nations, but only because “the United Nations does not have a judicial system or other means of ‘local redress’ such as are regularly maintained by states”. A. A. Cançado Trindade, in “Exhaustion of local remedies and the law of international organizations”, *Revue de droit international et de sciences diplomatiques et politiques*, vol. 57, No. 2 (1979), p. 81, at p. 108, noted that “when a claim for damages is lodged against an international organization, application of the rule is not excluded, but the law here may still develop in different directions”. The view that the local remedies rule should be applied in a flexible manner was expressed by M. Pérez González, “Les organisations internationales ...” (footnote 121 above), at p. 71. C. F. Amerasinghe, in *Principles of the Institutional Law of International Organizations* (footnote 121 above), p. 486, considered that, since international organizations “do not have jurisdictional powers over individuals in general”, it is “questionable whether they can provide suitable internal remedies. Thus, it is difficult to see how the rule of local remedies would be applicable”; this view, which had already been expressed in the first edition of the same book, was shared by F. Vacas Fernández, *La responsabilidad internacional de Naciones Unidas: fundamento y principales problemas de su puesta en práctica*, Madrid, Dykinson, 2002, pp. 139–140.

³⁰⁸ *Yearbook ... 2006*, vol. II (Part Two), para. 49.

(9) While available and effective remedies within an international organization may exist only in the case of a limited number of organizations, paragraph 2, by referring to remedies “provided by that organization”, intends to include also remedies that are available before arbitral tribunals, national courts or administrative bodies when the international organization has accepted their competence to examine claims. The location of the remedies may affect their effectiveness in relation to the individual concerned.

(10) As in other provisions, the reference to “another” international organization in paragraph 2 is not intended to exclude that responsibility may be invoked against an international organization even when no other international organization is involved.

(11) Paragraph 2 is also relevant when, according to article 48, responsibility is invoked by a State or an international organization other than an injured State or international organization. A reference to article 44, paragraph 2, is made in article 48, paragraph 5, to this effect.

Article 46. Loss of the right to invoke responsibility

The responsibility of an international organization may not be invoked if:

(a) the injured State or international organization has validly waived the claim;

(b) the injured State or international organization is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

Commentary

(1) The present article closely follows the text of article 45 on the responsibility of States for internationally wrongful acts,³⁰⁹ with the replacement of “a State” by “an international organization” in the *chapeau* and the addition of “or international organization” in subparagraphs (a) and (b).

(2) It is clear that, for an injured State, the loss of the right to invoke responsibility can hardly depend on whether the responsible entity is a State or an international organization. In principle, also, an international organization should be considered to be in the position of waiving a claim or acquiescing in the lapse of the claim. However, it is to be noted that the special features of international organizations make it generally difficult to identify which organ is competent to waive a claim on behalf of the organization and to assess whether acquiescence on the part of the organization has taken place. Moreover, acquiescence on the part of an international organization may involve a longer period than the one normally sufficient for States.

(3) Subparagraphs (a) and (b) specify that a waiver or acquiescence entails the loss of the right to invoke responsibility only if it is “validly” made. As was stated in the

³⁰⁹ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 121–123.

commentary to article 20 of the present draft articles, this term “refers to matters ‘addressed by international law rules outside the framework of State responsibility’ or of the responsibility of an international organization, such as whether the organ or agent who gave the consent was authorized to do so on behalf of the relevant State or international organization, or whether the consent was vitiated by coercion or some other factor”.³¹⁰ In the case of an international organization, validity generally implies that the rules of the organization have to be respected. However, this requirement may encounter limits such as those stated in article 46, paragraphs 2 and 3, of the 1986 Vienna Convention with regard to the relevance of respecting the rules of the organization relating to competence to conclude treaties in relation to the invalidity of the treaty for infringement of those rules.

(4) When there is a plurality of injured States or injured international organizations, the waiver by one or more State or international organization does not affect the entitlement of the other injured States or organizations to invoke responsibility.

(5) Although subparagraphs (a) and (b) refer to “the injured State or international organization”, a loss of the right to invoke responsibility because of a waiver or acquiescence may occur also for a State or an international organization that is entitled, in accordance with article 49, to invoke responsibility not as an injured State or international organization. This is made clear by the reference to article 46 contained in article 49, paragraph 5.

Article 47. Plurality of injured States or international organizations

Where several States or international organizations are injured by the same internationally wrongful act of an international organization, each injured State or international organization may separately invoke the responsibility of the international organization for the internationally wrongful act.

Commentary

(1) This provision corresponds to article 46 on the responsibility of States for internationally wrongful acts.³¹¹ The following cases, all relating to responsibility for a single wrongful act, are here considered: that there is a plurality of injured States; that there exists a plurality of injured international organizations; that there are one or more injured States and one or more injured international organizations.

(2) Any injured State or international organization is entitled to invoke responsibility independently from any other injured State or international organization. This does not preclude some or all of the injured entities invoking responsibility jointly, if they so wish. Coordination of claims would contribute to avoid the risk of a double recovery.

³¹⁰ Paragraph (5) of the commentary to article 20 above.

³¹¹ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 123–124.

(3) An instance of claims that may be concurrently preferred by an injured State and an injured international organization was envisaged by the International Court of Justice in its advisory opinion on *Reparation for Injuries*. The Court found that both the United Nations and the national State of the victim could claim “in respect of the damage caused ... to the victim or to persons entitled through him” and noted that there was “no rule of law which assigns priority to the one or to the other, or which compels either the State or the Organization to refrain from bringing an international claim. The Court sees no reason why the parties concerned should not find solutions inspired by goodwill and common sense”.³¹²

(4) An injured State or international organization could undertake to refrain from invoking responsibility, leaving other injured States or international organizations to do so. If this undertaking is not only an internal matter between the injured entities, it could lead to the loss for the former State or international organization of the right to invoke responsibility according to article 46.

(5) When an international organization and one or more of its members are both injured as the result of the same wrongful act, the rules of the organization could similarly attribute to the organization or to its members the exclusive function of invoking responsibility.

Article 48. Responsibility of an international organization and one or more States or international organizations

1. Where an international organization and one or more States or other international organizations are responsible for the same internationally wrongful act, the responsibility of each State or organization may be invoked in relation to that act.

2. Subsidiary responsibility may be invoked insofar as the invocation of the primary responsibility has not led to reparation.

3. Paragraphs 1 and 2:

(a) do not permit any injured State or international organization to recover, by way of compensation, more than the damage it has suffered;

(b) are without prejudice to any right of recourse that the State or international organization providing reparation may have against the other responsible States or international organizations.

Commentary

(1) The present article addresses the case where an international organization is responsible for a given wrongful act together with one or more other entities, either international organizations or States. The joint responsibility of an international organization with one or more States is envisaged in articles 14 to 18, which concern the responsibility of an international organization in connection

³¹² *Reparation for injuries suffered in the service of the United Nations* (see footnote 69 above), pp. 184–186.

with the act of a State, and in articles 58 to 62, which deal with the responsibility of a State in connection with the internationally wrongful act of an international organization. Another example is provided by so-called “mixed agreements” that are concluded by the European Union together with its member States, when such agreements do not provide for the apportionment of the responsibility between the Union and its member States. As was stated by the European Court of Justice in the case *European Parliament v. Council of the European Union* relating to a mixed cooperation agreement:

In those circumstances, in the absence of derogations expressly laid down in the [Fourth ACP–EEC {African, Caribbean and Pacific Group of States–European Economic Community}] Convention, the Community and its member States as partners of the [ACP Group of] States are jointly liable to those latter States for the fulfilment of every obligation arising from the commitments undertaken, including those relating to financial assistance.³¹³

(2) Like article 47 on the responsibility of States for internationally wrongful acts,³¹⁴ paragraph 1 provides that the responsibility of each responsible entity may be invoked by the injured State or international organization. However, there may be cases in which a State or an international organization bears only subsidiary responsibility, to the effect that it would have an obligation to provide reparation only if, and to the extent that, the primarily responsible State or international organization fails to do so. Article 62 gives an example of subsidiary responsibility, by providing that, when the responsibility of a member State arises for the wrongful act of an international organization, responsibility is “presumed to be subsidiary”.

(3) An injured State or international organization may address a claim to a subsidiarily responsible entity before the primarily responsible organization fails to provide reparation only if the claim is subject to the condition that the entity whose responsibility is primary fails to provide reparation.

(4) Paragraph 3 corresponds to article 47, paragraph 2, on the responsibility of States for internationally wrongful acts, with the addition of the words “or international organization” in subparagraphs (a) and (b). A slight change in the wording of subparagraph (b) is intended to make it clearer that the right of recourse accrues to the State or international organization “providing reparation”.

Article 49. Invocation of responsibility by a State or an international organization other than an injured State or international organization

1. A State or an international organization other than an injured State or international organization is entitled to invoke the responsibility of another international organization in accordance with paragraph 4 if the obligation breached is owed to a group of States or international organizations, including the State or

organization that invokes responsibility, and is established for the protection of a collective interest of the group.

2. A State other than an injured State is entitled to invoke the responsibility of an international organization in accordance with paragraph 4 if the obligation breached is owed to the international community as a whole.

3. An international organization other than an injured international organization is entitled to invoke the responsibility of another international organization in accordance with paragraph 4 if the obligation breached is owed to the international community as a whole and safeguarding the interest of the international community as a whole underlying the obligation breached is within the functions of the international organization invoking responsibility.

4. A State or an international organization entitled to invoke responsibility under paragraphs 1 to 3 may claim from the responsible international organization:

(a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with draft article 30; and

(b) performance of the obligation of reparation in accordance with Part Three, in the interest of the injured State or international organization or of the beneficiaries of the obligation breached.

5. The requirements for the invocation of responsibility by an injured State or international organization under draft articles 44, 45, paragraph 2, and 46 apply to an invocation of responsibility by a State or international organization entitled to do so under paragraphs 1 to 4.

Commentary

(1) The present article corresponds to article 48 on the responsibility of States for internationally wrongful acts.³¹⁵ It concerns the invocation of responsibility of an international organization by a State or another international organization which, although it is owed the obligation breached, cannot be regarded as injured within the meaning of article 43 of the present draft articles. According to paragraph 4, when that State or the latter international organization is entitled to invoke responsibility, it may claim cessation of the internationally wrongful act, assurances and guarantees of non-repetition and the performance of the obligation of reparation “in the interest of the injured State or international organization or of the beneficiaries of the obligation breached”.

(2) Paragraph 1 concerns the first category of cases in which this limited entitlement arises. The category comprises cases when “the obligation breached is owed to a group of States or international organizations, including the State or organization that invokes responsibility, and is established for the protection of a collective interest

³¹³ *European Parliament v. Council of the European Union*, Judgment of 2 March 1994, Case No. C-316/91, *Reports of Cases before the Court of Justice and the Court of First Instance 1994–3*, pp. I-661–I-662, recital 29.

³¹⁴ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 124–125.

³¹⁵ *Ibid.*, pp. 126–128.

of the group". Apart from the addition of the words "or international organizations" and "or organization", this text reproduces subparagraph (a) of article 48, paragraph 1, on the responsibility of States for internationally wrongful acts.

(3) The reference in paragraph 1 to the "collective interest of the group" is intended to specify that the obligation breached is not only owed, under the specific circumstances in which the breach occurs, to one or more members of the group individually. For instance, should an international organization breach an obligation under a multilateral treaty for the protection of the common environment, the other parties to the treaty may invoke responsibility because they are affected by the breach, even if they are not "specially affected" within the meaning of article 43, subparagraph (b) (i). Each member of the group would then be entitled to request compliance as a guardian of the collective interest of the group.

(4) Obligations that an international organization may have towards its members under its rules do not necessarily fall within this category. Moreover, the rules of the organization may restrict the entitlement of a member to invoke responsibility of that organization.

(5) The wording of paragraph 1 does not imply that the obligation breached should necessarily be owed to a group comprising States and international organizations. That obligation may also be owed to either a group of States or a group of international organizations. As in other provisions, the reference to "another international organization" in the same paragraph does not imply that more than one international organization needs to be involved.

(6) Paragraphs 2 and 3 consider the other category of cases when a State or an international organization that is not injured within the meaning of article 43 may nevertheless invoke responsibility, although to the limited extent provided in paragraph 4. Paragraph 2, which refers to the invocation of responsibility by a State, is identical to article 48, paragraph 1, subparagraph (b) on the responsibility of States for internationally wrongful acts. It seems clear that, should a State be regarded as entitled to invoke the responsibility of another State which has breached an obligation towards the international community as a whole, the same applies with regard to the responsibility of an international organization that has committed a similar breach. As was observed by the Organisation for the Prohibition of Chemical Weapons, "there does not appear to be any reason why States—as distinct from other international organizations—may not also be able to invoke the responsibility of an international organization".³¹⁶

(7) An international organization, when invoking the responsibility of another international organization in the case of breach of an international obligation towards the international community as a whole, would act only in the exercise of functions that have been attributed to it by its member States, which would be entitled to invoke responsibility individually or jointly in relation to a breach.

(8) Legal writings concerning the entitlement of international organizations to invoke responsibility in case of a breach of an obligation owed to the international community as a whole mainly focus on the European Union. The views are divided among authors, but a clear majority favours an affirmative solution.³¹⁷ Although authors generally consider only the invocation by an international organization of the international responsibility of a State, a similar solution would seem to apply to the case of a breach by another international organization.

(9) Practice in this regard is not very indicative. This is not just because practice relates to action taken by international organizations in respect of States. When international organizations respond to breaches committed by their members, they often act only on the basis of their respective rules. It would be difficult to infer from this practice the existence of a general entitlement of international organizations to invoke responsibility. The most significant practice appears to be that of the European Union, which has often stated that non-members committed breaches of obligations which appear to be owed to the international community as a whole. For instance, a common position of the Council of the European Union of 26 April 2000 referred to "severe and systematic violations of human rights in Burma".³¹⁸ A more recent example is the measures taken by the Council of the European Union with regard to the situation in Libya; the European Union "strongly condemned the violence and use of force against civilians and deplored the repression against peaceful demonstrators".³¹⁹ It is not altogether clear whether responsibility was jointly invoked by the member States of the European Union or by the European Union as a distinct organization. In most cases, this type of statement by the European Union led to the adoption of economic measures against the allegedly responsible State. Those measures will be discussed in the next chapter.

³¹⁷ The opinion that at least certain international organizations could invoke responsibility in case of a breach of an obligation *erga omnes* was expressed by C.-D. Ehlermann, "Communautés européennes et sanctions internationales—une réponse à J. Verhoeven", *Belgian Review of International Law*, vol. 18 (1984–1985), p. 96, at pp. 104–105; E. Klein, "Sanctions by international organizations and economic communities", *Archiv des Völkerrechts*, vol. 30 (1992), p. 101, at p. 110; A. Davi, *Comunità europee e sanzioni economiche internazionali*, Naples, Jovene, 1993, pp. 496 et seq.; C. Tomuschat, "Artikel 210", in H. von der Groeben, J. Thiesing and C.-D. Ehlermann (eds.), *Kommentar zum EU-/EG-Vertrag*, 5th ed., Baden-Baden, Germany, Nomos, 1997, vol. 5, pp. 28–29; P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (footnote 121 above), pp. 401 et seq.; and A. Rey Aneiros, *Una aproximación a la responsabilidad internacional de las organizaciones internacionales*, Valencia, Tirant lo Blanch, 2006, p. 166. The opposite view was maintained by J. Verhoeven, "Communautés européennes et sanctions internationales", *Belgian Review of International Law*, vol. 18 (1984–1985), p. 79, at pp. 89–90, and P. Sturma, "La participation de la communauté européenne à des 'sanctions' internationales", *Revue du marché commun et de l'Union européenne*, No. 366 (1993), p. 250, at p. 258. According to P. Palchetti, "Reactions by the European Union to breaches of erga omnes obligations", in E. Cannizzaro (ed.), *The European Union as an Actor in International Relations*, The Hague, Kluwer Law International, 2002, p. 219, at p. 226, "[t]he role of the Community appears to be only that of implementing rights which are owed to its Member States".

³¹⁸ *Official Journal of the European Communities*, No. L 122, 24 May 2000, p. 1.

³¹⁹ Council Decision 2011/137/CFSP of 28 February 2011, *Official Journal of the European Union*, No. L 58, 3 March 2011, p. 53.

³¹⁶ *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/593 and Add.1 (Comments and observations received from international organizations), p. 36.

(10) Paragraph 3 restricts the entitlement of an international organization to invoke responsibility in case of a breach of an international obligation owed to the international community as a whole. It is required that “safeguarding the interest of the international community as a whole underlying the obligation breached [be] within the functions of the international organization invoking responsibility”. Those functions reflect the character and purposes of the organization. The rules of the organization would determine which are the functions of the international organization. There is no requirement of a specific mandate of safeguarding the interest of the international community under those rules.

(11) The solution adopted in paragraph 3 corresponds to the view expressed by several States³²⁰ in the Sixth Committee of the General Assembly, in response to a question raised by the Commission in its 2007 report to the General Assembly.³²¹ A similar view was shared by some international organizations that contributed comments on this question.³²²

(12) It is noteworthy that in its advisory opinion on *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea considered that the entitlement of the International Seabed Authority to claim compensation for breaches of obligations in the Area “is implicit in article 137, paragraph 2, of the [United Nations Convention on the Law of the Sea], which states that the Authority shall act ‘on behalf’ of mankind”.³²³ Although this

conclusion was based on a specific provision of the Convention, it essentially rested—as article 49, paragraph 2—on the functions entrusted to the relevant international organization.

(13) Paragraph 5 is based on article 48, paragraph 3, on the responsibility of States for internationally wrongful acts. It is designed to indicate that the provisions concerning notice of claim, admissibility of claims and loss of the right to invoke responsibility apply also with regard to States and international organizations that invoke responsibility according to the present article. While article 48, paragraph 3, on the responsibility of States for internationally wrongful acts makes a general reference to the corresponding provisions (arts. 43–45), it is not intended to extend the applicability of “any applicable rule relating to the nationality of claims”, which is stated in article 44, subparagraph (a), because that requirement is clearly not relevant to the obligations dealt with in article 48. Although this may be taken as implied, the reference in paragraph 5 of the present article has been expressly limited to the paragraph on admissibility of claims that relates to the exhaustion of local remedies.

Article 50. Scope of this chapter

This chapter is without prejudice to the entitlement that a person or entity other than a State or an international organization may have to invoke the international responsibility of an international organization.

Commentary

(1) Articles 43 to 49 above address the implementation of the responsibility of an international organization only to the extent that responsibility is invoked by a State or another international organization. This accords with article 33, which defines the scope of the international obligations set out in Part Three by stating that these only relate to the breach of an obligation under international law that an international organization owes to a State, another international organization or the international community as a whole. The same article further specifies that this is “without prejudice to any right, arising from the international responsibility of an international organization, which may accrue directly to any person or entity other than a State or an international organization”. Thus, by referring only to the invocation of responsibility by a State or an international organization, the scope of the present chapter reflects that of Part Three. Invocation of responsibility is considered only insofar as it concerns the obligations set out in Part Three.

(2) While it could be taken as implied that the articles concerning invocation of responsibility are without prejudice to the entitlement that a person or entity other than a State or an international organization may have to invoke responsibility of an international organization, an express statement to this effect serves the purpose of conveying more clearly that the present chapter is not intended to exclude any such entitlement.

³²⁰ Thus the interventions of Argentina (*Official Records of the General Assembly, Sixty-second Session, Sixth Committee*, 18th meeting (A/C.6/62/SR.18), para. 64); Denmark, on behalf of the five Nordic countries (*ibid.*, para. 100); Italy (*ibid.*, 19th meeting (A/C.6/62/SR.19), para. 40); Japan (*ibid.*, para. 100); the Netherlands (*ibid.*, 20th meeting (A/C.6/62/SR.20), para. 39); the Russian Federation (*ibid.*, 21st meeting (A/C.6/62/SR.21), para. 70); and Switzerland (*ibid.*, para. 85). See also the intervention of the Czech Republic (*ibid.*, *Sixty-fourth Session, Sixth Committee*, 15th meeting (A/C.6/64/SR.15), para. 58) and the written comments of Germany (A/CN.4/636 and Add.1–2 (under the section entitled “Draft article 48 ...”). Other States appear to favour a more general entitlement for international organizations. See the interventions of Belarus (*Official Records of the General Assembly, Sixty-second Session, Sixth Committee*, 21st meeting (A/C.6/62/SR.21), para. 97); Belgium (*ibid.*, para. 90); Cyprus (*ibid.*, para. 38); Hungary (*ibid.*, para. 16); and Malaysia (*ibid.*, 19th meeting (A/C.6/62/SR.19), para. 75).

³²¹ *Yearbook ... 2007*, vol. II (Part Two), para. 30. The question ran as follows: “Article 48 on responsibility of States for internationally wrongful acts provides that, in case of a breach by a State of an obligation owed to the international community as a whole, States are entitled to claim from the responsible State cessation of the internationally wrongful act and performance of the obligation of reparation in the interest of the injured State or of the beneficiaries of the obligation breached. Should a breach of an obligation owed to the international community as a whole be committed by an international organization, would the other organizations or some of them be entitled to make a similar claim?”

³²² See the views expressed by the Organisation for the Prohibition of Chemical Weapons, the European Commission, WHO and the International Organization for Migration, *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/593 and Add.1 (Comments and observations received from international organizations). See also the reply of WTO, *ibid.*

³²³ *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, pp. 10 *et seq.*, para. 180. Also available from www.itlos.org.

CHAPTER II

COUNTERMEASURES

Article 51. Object and limits of countermeasures

1. An injured State or an injured international organization may only take countermeasures against an international organization which is responsible for an internationally wrongful act in order to induce that organization to comply with its obligations under Part Three.

2. Countermeasures are limited to the non-performance for the time being of international obligations of the State or international organization taking the measures towards the responsible international organization.

3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

4. Countermeasures shall, as far as possible, be taken in such a way as to limit their effects on the exercise by the responsible international organization of its functions.

Commentary

(1) As set forth in article 22, when an international organization incurs international responsibility, it could become the object of countermeasures. An injured State or international organization could then take countermeasures, since there is no convincing reason for categorically exempting responsible international organizations from being possible targets of countermeasures. In principle, the legal situation of a responsible international organization in this regard appears to be similar to that of a responsible State.

(2) This point was made also in the comments of certain international organizations. WHO agreed that “there is no cogent reason why an international organization that breaches an international obligation should be exempted from countermeasures taken by an injured State or international organization to bring about compliance by the former organization with its obligations”.³²⁴ Also the United Nations Educational, Scientific and Cultural Organization (UNESCO) stated that it “[did] not have any objection to the inclusion of draft articles on countermeasures” in a text on the responsibility of international organizations.³²⁵ The Organization for Security and Co-operation in Europe accepted “the possibility of countermeasures by and against international organizations”.³²⁶

(3) In response to a question raised by the Commission, several States expressed the view that rules generally similar to those that were devised for countermeasures taken against States in articles 49 to 53 of the articles on

³²⁴ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/609, p. 101.

³²⁵ *Ibid.*

³²⁶ A/CN.4/637 and Add.1 (under the section entitled “Draft article 50 ... Organization for Security and Cooperation in Europe”).

responsibility of States for internationally wrongful acts³²⁷ should be applied to countermeasures directed against international organizations.³²⁸

(4) Practice concerning countermeasures taken against international organizations is undoubtedly scarce. However, one may find some examples of measures that were defined as countermeasures. For instance, in *United States—Import Measures on Certain Products from the European Communities*, a WTO panel considered that the suspension of concessions or other obligations which had been authorized by the Dispute Settlement Body against the European Communities was “essentially retaliatory in nature”. The panel observed as follows:

Under general international law, retaliation (also referred to as reprisals or counter-measures) has undergone major changes in the course of the [twentieth] century, specially, as a result of the prohibition of the use of force (*jus ad bellum*). Under international law, these types of countermeasures are now subject to requirements, such as those identified by the International Law Commission in its work on State responsibility (proportionality, etc. ... see Article 43 of the Draft). However, in WTO, countermeasures, retaliations and reprisals are strictly regulated and can take place only within the framework of the WTO [Dispute Settlement Understanding].³²⁹

(5) Paragraphs 1 to 3 define the object and limits of countermeasures in the same way as has been done in the corresponding paragraphs of article 49 on the responsibility of States for internationally wrongful acts.³³⁰ There is no apparent justification for a distinction in this regard between countermeasures taken against international organizations and countermeasures directed against States.

(6) One matter of concern that arises with regard to countermeasures affecting international organizations is the fact that countermeasures may hamper the functioning of the responsible international organization and therefore endanger the attainment of the objectives for which that organization was established. While this concern could not justify the total exclusion of countermeasures against international organizations, it may lead to asserting some restrictions. Paragraph 4 addresses the question in general terms. Further restrictions, which specifically pertain to the relations between an international organization and its members, are considered in the following article.

³²⁷ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 129–139.

³²⁸ See the interventions by Denmark, on behalf of the five Nordic countries (*Official Records of the General Assembly, Sixty-second Session, Sixth Committee*, 18th meeting (A/C.6/62/SR.18), para. 101); Malaysia (*ibid.*, 19th meeting (A/C.6/62/SR.19), para. 75, also envisaging some “additional restrictions”); Japan (*ibid.*, para. 100); the Netherlands (*ibid.*, 20th meeting (A/C.6/62/SR.20), para. 40); Switzerland (*ibid.*, 21st meeting (A/C.6/62/SR.21), para. 86); and Belgium (*ibid.*, para. 91). These interventions were made in response to a request for comments made by the Commission, *Yearbook ... 2007*, vol. II (Part Two), p. 14, para. 30 (b).

³²⁹ WTO, report of the Panel, *United States—Import Measures on Certain Products from the European Communities*, WT/DS165/R, 17 July 2000, para. 6.23, footnote 100. The reference made by the Panel to the work of the Commission concerns the first reading of the draft articles on State responsibility. The question whether measures taken within the WTO system may be qualified as countermeasures is controversial. For the affirmative view, see H. Lesaffre, *Le règlement des différends au sein de l'OMC et le droit de la responsabilité internationale*, Paris, Librairie générale de droit et de jurisprudence, 2007, pp. 454–461.

³³⁰ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 129–131.

(7) The exercise of certain functions by an international organization may be of vital interest to its member States and in certain cases to the international community. However, it would be difficult to define restrictions to countermeasures on the basis of this criterion, because the distinction would not always be easy to make and, moreover, the fact of impairing a certain function may have an impact on the exercise of other functions. Thus, paragraph 4 requires an injured State or international organization to select countermeasures that would affect in as limited a manner as possible the exercise by the targeted international organization of any of its functions. A qualitative assessment of the functions that would be likely to be affected may nevertheless be taken as implied.

Article 52. Conditions for taking countermeasures by members of an international organization

1. Subject to paragraph 2, an injured State or international organization which is a member of a responsible international organization may not take countermeasures against that organization unless:

- (a) the conditions referred to in article 51 are met;
- (b) the countermeasures are not inconsistent with the rules of the organization; and
- (c) no appropriate means are available for otherwise inducing compliance with the obligations of the responsible international organization concerning cessation of the breach and reparation.

2. Countermeasures may not be taken by an injured State or international organization which is a member of a responsible international organization against that organization in response to a breach of an international obligation under the rules of the organization unless such countermeasures are provided for by those rules.

Commentary

(1) The adoption of countermeasures against an international organization by its members may be precluded by the rules of the organization. The same rules may on the contrary allow countermeasures, but only on certain conditions that may differ from those applying under general international law. Those conditions are likely to be more restrictive. As was noted by WHO,

for international organizations of quasi-universal membership such as those of the United Nations system, the possibility for their respective Member States to take countermeasures against them would either be severely limited by the operation of the rules of those organizations, rendering it largely virtual, or would be subject to a *lex specialis*—thus outside the scope of the draft articles—to the extent that the rules of the organization concerned do not prevent the adoption of countermeasures by its Member States.³³¹

(2) In one of its comments, UNESCO, “considering that often countermeasures are not specifically provided for by the rules of international organizations, [supported]

³³¹ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/609, p. 101.

the possibility for an injured member of an international organization to resort to countermeasures which are not explicitly allowed by the rules of the organization”.³³² However, as UNESCO also noted, some specific restrictions are called for.³³³ These restrictions would be consonant with the principle of cooperation underlying the relations between an international organization and its members.³³⁴

(3) The restrictions in question are meant to be additional to those that are generally applicable to countermeasures that are taken against an international organization. It is probably not necessary to state expressly that the restrictions set forth in the present article are additional to those that appear in the other articles included in the chapter.

(4) The present article makes a distinction between countermeasures by injured member States or international organizations against the organization of which they are members in general, and those that are taken in response to a breach by that organization of an international obligation arising under the rules of the organization. Paragraph 1 sets forth the residual rule, while paragraph 2 addresses the latter case.

(5) Paragraph 1 (b) requires countermeasures not to be inconsistent with the rules of the organization. This implies that the taking of countermeasures need not be based on the rules of the organization, but should not run counter to any restriction provided for in these rules.

(6) Paragraph 1 (c) further provides that countermeasures may not be resorted to when some “appropriate means” for inducing compliance are available. The term “appropriate means” refers to those lawful means that are proportionate and offer a reasonable prospect for inducing compliance when the member intends to take countermeasures. However, failure on the part of the member to make timely use of remedies that were available could result in countermeasures becoming precluded.

(7) An example of the relevance of appropriate means existing in accordance with the rules of the organization is offered by a judgment of the Court of Justice of the European Communities. Two member States had argued that, although they had breached an obligation under the constituent instrument, their infringement was excused by the fact that the Council of the European Economic Community had previously failed to comply with one of its obligations. The Court of Justice said that

except where otherwise expressly provided, the basic concept of the [Treaty establishing the European Economic Community] requires that the Member States shall not take the law into their own hands.

³³² *Ibid.*

³³³ *Ibid.* UNESCO expressed its agreement with the terms “only if this is not inconsistent with the rules of the injured organization”, which had been proposed by the Special Rapporteur in his sixth report (*Yearbook ... 2008*, vol. II (Part One), document A/CN.4/597, para. 48).

³³⁴ This principle was expressed by the International Court of Justice in its advisory opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* as follows: “The very fact of Egypt’s membership of the Organization entails certain mutual obligations of co-operation and good faith incumbent upon Egypt and upon the Organization” (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (see footnote 67 above), p. 93, para. 43).

Therefore the fact that the Council failed to carry out its obligations cannot relieve the defendants from carrying out theirs.³³⁵

The existence of judicial remedies within the European Communities appears to be the basic reason for this statement.

(8) Paragraph 2 considers the taking of countermeasures by injured States or international organizations against the organization of which they are members when the latter has breached an international obligation arising under the rules of the organization. In this case, in view of the special ties existing between an international organization and its members,³³⁶ countermeasures are allowed only if they are provided for by these rules.

(9) As was stated in article 22, paragraphs 2 and 3, restrictions similar to the ones here envisaged apply in the reverse case of an international organization intending to take countermeasures against one of its members.

Article 53. Obligations not affected by countermeasures

1. Countermeasures shall not affect:

(a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;

(b) obligations for the protection of human rights;

(c) obligations of a humanitarian character prohibiting reprisals;

(d) other obligations under peremptory norms of general international law.

2. An injured State or international organization taking countermeasures is not relieved from fulfilling its obligations:

(a) under any dispute settlement procedure applicable between it and the responsible international organization;

(b) to respect any inviolability of organs or agents of the responsible international organization and of the premises, archives and documents of that organization.

Commentary

(1) With the exception of the last subparagraph, the present article reproduces the list of obligations not affected by countermeasures that is contained in article 50 on the responsibility of States for internationally wrongful acts.³³⁷ Most of these obligations are obligations that the

injured State or international organization has towards the international community. With regard to countermeasures taken against an international organization, the breaches of these obligations are relevant only insofar as the obligation in question is also owed to the international organization concerned, since the existence of an obligation towards the targeted entity is a condition for a measure to be defined a countermeasure. Thus, the use of force could be considered a countermeasure taken against an international organization only if the prohibition to use force is owed to that organization. This occurs if the organization is considered to be a component of the international community to which the obligation is owed or if the obligation breached is owed to the organization because of special circumstances, for instance because force is used in relation to a territory that the organization administers.

(2) Article 50, paragraph 2 (b), on the responsibility of States for internationally wrongful acts provides that obligations concerning the “inviolability of diplomatic or consular agents, premises, archives and documents” are not affected by countermeasures. Since those obligations cannot be owed to an international organization, this case is clearly inapplicable to international organizations and has not been included in the present article. However, the rationale underlying that restriction, namely the need to protect certain persons and property that could otherwise become an easy target of countermeasures,³³⁸ also applies to international organizations and their agents. Thus a restriction concerning obligations that protect international organizations and their agents has been set forth in paragraph 2 (b). The content of obligations concerning the inviolability of the agents and of the premises, archives and documents of international organizations may vary considerably according to the applicable rules. Therefore, the paragraph refers to “any” inviolability. The term “agent” is wide enough to include any mission that an international organization would send, permanently or temporarily, to a State or another international organization.

(3) While article 50, paragraph 1 (b), on the responsibility of States for internationally wrongful acts refers to “fundamental human rights”, the corresponding text of the present article does not qualify the term “human rights”. This omission conforms to the tendency not to make a distinction among human rights according to their relative importance.

Article 54. Proportionality of countermeasures

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

Commentary

(1) The text of the present article is identical to article 51 on the responsibility of States for internationally wrongful acts.³³⁹ It reproduces, with a few additional words, the requirement stated by the International Court of Justice in the *Gabčíkovo-Nagymaros Project* case, that “the effects of

³³⁵ *Commission of the European Economic Community v. Grand Duchy of Luxembourg and Kingdom of Belgium*, Joined cases 90/63 and 91/63, Judgment of 13 November 1964, *European Court of Justice Reports 1964*, p. 626, at p. 636.

³³⁶ The same reason is given in paragraph (6) of the commentary to article 22.

³³⁷ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 131–134.

³³⁸ *Ibid.*, p. 134, paragraph (15) of the commentary to article 50.

³³⁹ *Ibid.*, pp. 134–135.

a countermeasure must be commensurate with the injury suffered, taking account of the rights in question”.³⁴⁰

(2) As was stated by the Commission in its commentary to article 51 on State responsibility, “[p]roportionality is concerned with the relationship between the internationally wrongful act and the countermeasure”; “a countermeasure must be commensurate with the injury suffered, including the importance of the issue of principle involved and this has a function partly independent of the question whether the countermeasure was necessary to achieve the result of ensuring compliance”.³⁴¹ The commentary further explained that “[t]he reference to ‘the rights in question’ has a broad meaning, and includes not only the effect of a wrongful act on the injured State but also on the rights of the responsible State”.³⁴² In the present context, this reference would apply to the effects on the injured State or international organization and to the rights of the responsible international organization.

(3) One aspect that is relevant when assessing proportionality of a countermeasure is the impact that it may have on the targeted entity. One and the same countermeasure may affect a State or an international organization in a different way according to the circumstances. For instance, an economic measure that might hardly affect a large international organization may severely hamper the functioning of a smaller organization and for that reason not meet the test of proportionality.

(4) When an international organization is injured, it is only the organization and not its members that is entitled to take countermeasures. Should the international organization and its members both be injured, as in other cases of a plurality of injured entities, both would be entitled to resort to countermeasures. In this case, however, there would be the risk of a reaction that is excessive in terms of proportionality.³⁴³

Article 55. Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State or international organization shall:

(a) call upon the responsible international organization, in accordance with draft article 44, to fulfil its obligations under Part Three;

(b) notify the responsible international organization of any decision to take countermeasures and offer to negotiate with that organization.

2. Notwithstanding paragraph 1 (b), the injured State or international organization may take such urgent countermeasures as are necessary to preserve its rights.

³⁴⁰ *Gabčíkovo-Nagymaros Project* (see footnote 243 above), p. 56, para. 85.

³⁴¹ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 135, paragraph (7) of the commentary to article 51.

³⁴² *Ibid.*, paragraph (6) of the commentary to article 51.

³⁴³ Belgium referred to the need of preventing “countermeasures adopted by an international organization from exerting an excessively destructive impact” (*Official Records of the General Assembly, Sixty-second Session, Sixth Committee, 21st meeting (A/C.6/62/SR.21)*, para. 92).

3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:

(a) the internationally wrongful act has ceased; and

(b) the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.

4. Paragraph 3 does not apply if the responsible international organization fails to implement the dispute settlement procedures in good faith.

Commentary

(1) Procedural conditions relating to countermeasures have been developed mainly in relations between States. Those conditions are not, however, related to the nature of the targeted entity. Thus the rules that are set forth in article 52 on the responsibility of States for internationally wrongful acts³⁴⁴ appear to be equally applicable when the responsible entity is an international organization. The conditions stated in article 52 have been reproduced in the present article with minor adaptations.

(2) Paragraph 1 sets forth the requirement that the injured State or international organization call on the responsible international organization to fulfil its obligations of cessation and reparation, and notify the intention to take countermeasures, while offering to engage in negotiations. The responsible international organization is thus given an opportunity to appraise the claim made by the injured State or international organization and become aware of the risk of being the target of countermeasures. By allowing urgent countermeasures, paragraph 2 makes it possible, however, for the injured State or international organization to apply immediately those measures that are necessary to preserve its rights, in particular those that would lose their potential impact if delayed.

(3) Paragraphs 3 and 4 concern the relations between countermeasures and the applicable procedures for the settlement of disputes. The idea underlying these two paragraphs is that, when the parties to a dispute concerning international responsibility have agreed to entrust the settlement of the dispute to a body which has the authority to make binding decisions, the task of inducing the responsible international organization to comply with its obligations under Part Three will rest with that body. These paragraphs are likely to be of limited importance in practice in relations with a responsible international organization, in view of the reluctance of most international organizations to accept methods for the compulsory settlement of disputes.³⁴⁵

³⁴⁴ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 135–137.

³⁴⁵ Even if mechanisms for the compulsory settlement of disputes are considered to include those involving the request for an advisory opinion of the International Court of Justice, which the parties agree to be “decisive” as in the Convention on the privileges and immunities of the United Nations (sect. 30).

Article 56. Termination of countermeasures

Countermeasures shall be terminated as soon as the responsible international organization has complied with its obligations under Part Three in relation to the internationally wrongful act.

Commentary

(1) The content of this article follows from the definition of the object of countermeasures in article 51. Since the object of countermeasures is to induce an international organization to comply with its obligations under Part Three with regard to an internationally wrongful act for which that organization is responsible, countermeasures are no longer justified and have to be terminated once the responsible organization has complied with those obligations.

(2) The wording of this article closely follows that of article 53 on the responsibility of States for internationally wrongful acts.³⁴⁶

Article 57. Measures taken by States or international organizations other than an injured State or organization

This chapter does not prejudice the right of any State or international organization, entitled under article 49, paragraphs 1 to 3, to invoke the responsibility of another international organization, to take lawful measures against that organization to ensure cessation of the breach and reparation in the interest of the injured State or organization or of the beneficiaries of the obligation breached.

Commentary

(1) Countermeasures taken by States or international organizations that are not injured within the meaning of article 43, but are entitled to invoke responsibility of an international organization according to article 49 of the present draft articles, could have as an object only cessation of the breach and reparation in the interest of the injured State or international organization or of the beneficiaries of the obligation breached. Restrictions provided for in articles 51 to 56 would in any event apply, but the question may be asked whether States or international organizations that are not injured within the meaning of article 43 may resort to countermeasures at all.

(2) Article 54 on the responsibility of States for internationally wrongful acts³⁴⁷ leaves “without prejudice” the question whether a non-injured State that is entitled to invoke responsibility of another State would have the right to resort to countermeasures. The basic argument given by the Commission in its commentary to article 54 was that State practice relating to countermeasures taken in the collective or general interest was “sparse and involve[d] a limited number of States”.³⁴⁸ No doubt, this argument

would be even stronger when considering the question whether a non-injured State or international organization may take countermeasures against a responsible international organization. In fact, practice does not offer examples of countermeasures taken by non-injured States or international organizations against a responsible international organization. On the other hand, in the context of the rarity of cases in which countermeasures against an international organization could have been taken by a non-injured State or international organization, the absence of practice relating to countermeasures cannot lead to the conclusion that countermeasures by non-injured States or international organizations would be inadmissible.³⁴⁹ It seems therefore preferable to leave equally “without prejudice” the question whether countermeasures by a non-injured State or international organization are allowed against a responsible international organization.

PART FIVE

RESPONSIBILITY OF A STATE IN CONNECTION WITH THE CONDUCT OF AN INTERNATIONAL ORGANIZATION

Commentary

(1) In accordance with article 1, paragraph 2, the present draft articles are intended to fill a gap that was deliberately left in the articles on responsibility of States for internationally wrongful acts. As stated in article 57 on the responsibility of States for internationally wrongful acts, those articles are “without prejudice to any question of the responsibility ... of any State for the conduct of an international organization”.³⁵⁰

(2) Not all the questions that may affect the responsibility of a State in connection with the act of an international organization are examined in the present draft articles. For instance, questions relating to attribution of conduct to a State are covered only in the articles on responsibility of States for internationally wrongful acts. Thus, if an issue arises as to whether certain conduct is to be attributed to a State or to an international organization or to both, the present articles will provide criteria for ascertaining whether conduct is to be attributed to the international organization, while the articles on responsibility of States for internationally wrongful acts will regulate attribution of conduct to the State.

(3) The present Part assumes that there exists conduct attributable to an international organization. In most cases, that conduct will also be internationally wrongful. However, exceptions are provided for the cases envisaged in articles 60 and 61, which deal respectively with coercion of an international organization by a State and with international responsibility in case of a member State circumventing one of its international obligations by taking advantage of the competence of an international organization.

³⁴⁶ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 137–139.

³⁴⁷ *Ibid.*, p. 137.

³⁴⁸ *Ibid.*, p. 139, paragraph (6) of the commentary to article 54.

³⁴⁹ It is to be noted that practice includes examples of a non-injured international organization taking countermeasures against an allegedly responsible State. See, for instance, the measures taken by the Council of the European Union against Burma/Myanmar in view of “severe and systematic violations of human rights in Burma” (*Official Journal of the European Communities* (see footnote 318 above), pp. 1 and 29).

³⁵⁰ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 141.

(4) According to articles 61 and 62, the State that incurs responsibility in connection with the act of an international organization is necessarily a member of that organization. In the cases envisaged in articles 58, 59 and 60, the responsible State may or may not be a member.

(5) The present Part does not address the question of responsibility that may arise for entities other than States that are also members of an international organization. Chapter IV of Part Two of the present draft articles already considers the responsibility that an international organization may incur when it aids or assists or directs and controls the commission of an internationally wrongful act of another international organization of which the former organization is a member. The same chapter also deals with coercion by an international organization that is a member of the coerced organization. Article 18 considers further cases of responsibility of international organizations as members of another international organization. Questions relating to the responsibility of entities, other than States or international organizations, that are also members of international organizations fall outside the scope of the present draft articles.

Article 58. Aid or assistance by a State in the commission of an internationally wrongful act by an international organization

1. A State which aids or assists an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) the State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that State.

2. An act by a State member of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of that State under the terms of this article.

Commentary

(1) The present article addresses a situation parallel to the one covered in article 14, which concerns aid or assistance by an international organization in the commission of an internationally wrongful act by another international organization. Both articles closely follow the text of article 16 on the responsibility of States for internationally wrongful acts.³⁵¹

(2) Aid or assistance by a State could constitute a breach of an obligation that the State has acquired under a primary norm. For example, a nuclear-weapon State party to the Treaty on the Non-Proliferation of Nuclear Weapons would have to refrain from assisting a non-nuclear-weapon State in the acquisition of nuclear weapons, and the same would seem to apply to assistance given to an international organization of which some non-nuclear-weapon States are members.

(3) The present article uses the same wording as article 16 on the responsibility of States for internationally wrongful acts, because it would be hard to find reasons for applying a different rule when the aided or assisted entity is an international organization rather than a State. Paragraph 1 sets in subparagraphs (a) and (b) the conditions for international responsibility to arise for the aiding or assisting State. It is to be noted that no distinction is made with regard to the temporal relation between the conduct of the State and the internationally wrongful act of the international organization.

(4) A State aiding or assisting an international organization in the commission of an internationally wrongful act may or may not be a member of that organization. Should the State be a member, the possibility that aid or assistance could result from conduct taken by the State within the framework of the organization cannot be totally excluded. However, as specified in paragraph 2, an act by a member State which is done in accordance with the rules of the organization does not as such engage the international responsibility of that State for aid or assistance. These criteria could entail some difficulties in ascertaining whether aid or assistance has taken place in borderline cases. The factual context such as the size of membership and the nature of the involvement will probably be decisive.

(5) The fact that a State does not *per se* incur international responsibility for aiding or assisting an international organization of which it is a member when it acts in accordance with the rules of the organization does not imply that the State would then be free to ignore its international obligations. These obligations may well encompass the conduct of a State when it acts within an international organization. Should a breach of an international obligation be committed by a State in this capacity, the State would not incur international responsibility under the present article, but rather under the articles on responsibility of States for internationally wrongful acts.

(6) The heading of article 16 on the responsibility of States for internationally wrongful acts has been slightly adapted, by adding “by a State” to the words “aid or assistance”, in order to distinguish the heading of the present article from that of article 14 of the present draft articles.

Article 59. Direction and control exercised by a State over the commission of an internationally wrongful act by an international organization

1. A State which directs and controls an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

(a) the State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that State.

2. An act by a State member of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of that State under the terms of this draft article.

³⁵¹ *Ibid.*, p. 65.

Commentary

(1) While article 15 relates to direction and control exercised by an international organization in the commission of an internationally wrongful act by another international organization, the present article considers the case in which direction and control are exercised by a State. Both articles closely follow the text of article 17 on the responsibility of States for internationally wrongful acts.³⁵²

(2) The State directing and controlling an international organization in the commission of an internationally wrongful act may or may not be a member of that organization. As in the case of aid or assistance, which is considered in article 58 and the related commentary, a distinction has to be made between participation by a member State in the decision-making process of the organization according to its pertinent rules, and direction and control which would trigger the application of the present article. Since the latter conduct could take place within the framework of the organization, in borderline cases one would face the same problems that have been referred to in the commentary on the previous article.

(3) Paragraph 1 sets in (a) and (b) the conditions for the responsibility of the State to arise with the same wording that is used in article 17 on the responsibility of States for internationally wrongful acts. There are no reasons for making a distinction between the case in which a State directs and controls another State in the commission of an internationally wrongful act and the case in which the State similarly directs and controls an international organization.

(4) As in article 58, paragraph 2 of the present draft article specifies that an act of a member State done in accordance with the rules of the organization does not as such cause the responsibility of that State for direction and control in the commission of an internationally wrongful act.

(5) The heading of the present article has been slightly adapted from article 17 on the responsibility of States for internationally wrongful acts by adding the words “by a State”, in order to distinguish it from the heading of article 15 of the present articles.

Article 60. Coercion of an international organization by a State

A State which coerces an international organization to commit an act is internationally responsible for that act if:

(a) the act would, but for the coercion, be an internationally wrongful act of the coerced international organization; and

(b) the coercing State does so with knowledge of the circumstances of the act.

Commentary

(1) Article 16 deals with coercion by an international organization in the commission of what would be, but

for the coercion, a wrongful act of another international organization. The present article concerns coercion by a State in a similar situation. Both articles closely follow article 18 on the responsibility of States for internationally wrongful acts.³⁵³ The existence of a direct link between the act of coercion and the act of the coerced State or international organization is in any event assumed.

(2) The conditions that the present article sets forth for international responsibility to arise are identical to those that are listed in article 18 on the responsibility of States for internationally wrongful acts. Also with regard to coercion, there is no reason to provide a different rule from that which applies in the relations between States.

(3) The State coercing an international organization may be a member of that organization. The present article does not contain a paragraph similar to paragraph 2 of articles 58 and 59 because it seems highly unlikely that an act of coercion could be taken by a State member of an international organization in accordance with the rules of the organization. However, one cannot assume that the act of coercion will necessarily be unlawful.

(4) The heading of the present article slightly adapts that of article 18 on the responsibility of States for internationally wrongful acts by introducing the words “by a State”, in order to distinguish it from the heading of article 16 of the present draft.

Article 61. Circumvention of international obligations of a State member of an international organization

1. A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.

2. Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization.

Commentary

(1) The present article concerns a situation which is to a certain extent analogous to those considered in article 17. According to that article, an international organization incurs international responsibility when it circumvents one of its international obligations by adopting a decision binding a member State or international organization to commit an act that would be internationally wrongful if committed by the former organization. Article 17 also covers circumvention through authorizations given to member States or international organizations. The present article concerns circumvention by a State of one of its international obligations when it avails itself of the separate legal personality of an international organization of which it is a member.

³⁵² *Ibid.*, pp. 67–69.

³⁵³ *Ibid.*, pp. 69–70.

(2) As the commentary to article 17 explains, the existence of an intention to avoid compliance is implied in the use of the term “circumvention”.³⁵⁴ International responsibility will not arise when the act of the international organization, which would constitute a breach of an international obligation if done by the State, has to be regarded as the unintended result of the member State’s conduct. On the other hand, the present article does not refer only to cases in which the member State may be said to be abusing its rights.³⁵⁵

(3) The jurisprudence of the European Court of Human Rights provides a few examples of *dicta* affirming the possibility of States being held responsible when they fail to ensure compliance with their obligations under the European Convention on Human Rights in a field where they have attributed competence to an international organization. In *Waite and Kennedy v. Germany*, the Court examined the question of whether the right of access to justice had been unduly impaired by a State that granted immunity to the European Space Agency, of which it was a member, in relation to claims concerning employment. The Court said that

where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to protection of fundamental rights. It would be incompatible with the purpose and object of the [European Convention on Human Rights], however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution.³⁵⁶

(4) In *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland*, the Court took a similar approach with regard to a State measure implementing a regulation of the

³⁵⁴ See above, paragraph (4) of the commentary to article 17.

³⁵⁵ In article 5 (b) of a resolution adopted in 1995 at Lisbon on “The legal consequences for member States of the non-fulfilment by international organizations of their obligations toward third parties”, the Institute of International Law stated the following: “In particular circumstances, members of an international organization may be liable for its obligations in accordance with a relevant general principle of law, such as ... the abuse of rights.” (Institute of International Law, *Yearbook*, vol. 66, Part II (see footnote 70 above), p. 449).

³⁵⁶ *Waite and Kennedy v. Germany*, Application no. 26083/94, Judgment of 18 February 1999, Grand Chamber, European Court of Human Rights, *Reports of Judgments and Decisions* 1999-I, p. 393, at p. 410, para. 67. The Court concluded that the “essence of [the applicant’s] ‘right to a court’” under the Convention had not been impaired (p. 412, para. 73). After examining the *dictum* in this case, Ian Brownlie noted that, “[w]hilst the context is that of human rights, the principle invoked would seem to be general in its application” (I. Brownlie, “The responsibility of States for the acts of international organizations”, in M. Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter*, Leiden/Boston, Martinus Nijhoff, 2005, p. 355, at p. 361). Views similar to those of the European Court of Human Rights were expressed by A. Di Blase, “Sulla responsabilità internazionale per attività dell’ONU”, *Rivista di Diritto Internazionale*, vol. 57 (1974), p. 250, at pp. 275–276; M. Hirsch, *The Responsibility of International Organizations toward Third Parties* (footnote 121 above), p. 179; K. Zemanek, Institute of International Law, *Yearbook*, vol. 66, Part I, Session of Lisbon (1995), p. 329; P. Sands, in P. Sands and P. Klein (eds.), *Bowett’s Law of International Institutions*, London, Sweet and Maxwell, 2001, p. 524; D. Sarooshi, *International Organizations and their Exercise of Sovereign Powers*, Oxford University Press, 2005, p. 64; and O. De Schutter, “Human rights and the rise of international organisations: the logic of sliding scales in the law of international responsibility”, in J. Wouters et al. (eds.), *Accountability for Human Rights Violations by International Organizations*, Antwerp, Intersentia, 2010, p. 51.

European Community. The Court said that a State could not free itself from its obligations under the European Convention on Human Rights by transferring functions to an international organization, because

absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention; the guarantees of the Convention could be limited or excluded at will, thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards ... The State is considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention.³⁵⁷

(5) In a more recent case before the European Court of Human Rights, *Gasparini v. Italy and Belgium*, an application had been made against these two States by two employees of NATO alleging the inadequacy of the settlement procedure concerning employment disputes with NATO. The Court said that States, when they transfer part of their sovereign powers to an organization of which they are members, are under an obligation to see that the rights guaranteed by the Convention receive within the organization an “equivalent protection” to that ensured by the Convention mechanism. As in the two previous decisions referred to in the preceding paragraphs, the Court found that this obligation had not been breached, in this case because the procedure within NATO was not tainted with “manifest insufficiency”.³⁵⁸

(6) According to the present article, three conditions are required for international responsibility to arise for a member State circumventing one of its international obligations. The first one is that the international organization has competence in relation to the subject matter of an international obligation of a State. This could occur through the transfer of State functions to an organization of integration. However, the cases covered are not so limited. Moreover, an international organization could be established in order to exercise functions that States may not have. What is relevant for international responsibility to arise under the present article is that the international obligation covers the area in which the international organization is provided with competence. The obligation may specifically relate to that area or be more general, as in the case of obligations under treaties for the protection of human rights.

(7) A second condition for international responsibility to arise according to the present article is that there be a significant link between the conduct of the circumventing member State and that of the international organization. The act of the international organization has to be caused by the member State.

(8) The third condition for international responsibility to arise is that the international organization commits an

³⁵⁷ *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland*, Application no. 45036/98, Judgment of 30 June 2005 (see footnote 184 above), para. 154. The Court found that the defendant State had not incurred responsibility because the relevant fundamental rights were protected within the European Community “in a manner which can be considered at least equivalent to that for which the Convention provides” (para. 155).

³⁵⁸ *Gasparini v. Italy and Belgium*, Application no. 10750/03, Decision of 12 May 2009, European Court of Human Rights (issued in French). The text is available from <http://hudoc.echr.coe.int/?i=001-92899>.

act that, if committed by the State, would have constituted a breach of the obligation. An act that would constitute a breach of the obligation has to be committed.

(9) Paragraph 2 explains that the present article does not require the act to be internationally wrongful for the international organization concerned. Circumvention is more likely to occur when the international organization is not bound by the international obligation. However, the mere existence of an international obligation for the organization does not necessarily exempt the State from international responsibility.

(10) Should the act of the international organization be wrongful and be caused by the member State, there could be an overlap between the cases covered in article 61 and those considered in articles 58, 59 and 60. This would occur when the conditions set by one of these articles are fulfilled. However, such an overlap would not be problematic, because it would only imply the existence of a plurality of bases for holding the State responsible.

Article 62. Responsibility of a State member of an international organization for an internationally wrongful act of that organization

1. A State member of an international organization is responsible for an internationally wrongful act of that organization if:

(a) it has accepted responsibility for that act towards the injured party; or

(b) it has led the injured party to rely on its responsibility.

2. Any international responsibility of a State under paragraph 1 is presumed to be subsidiary.

Commentary

(1) A State member of an international organization may be held responsible in accordance with articles 58 to 61. The present article envisages two additional cases in which member States incur responsibility. Member States may furthermore be responsible according to the articles on responsibility of States for internationally wrongful acts,³⁵⁹ but this lies beyond the scope of the present draft articles.

(2) Consistently with the approach generally taken by the present draft articles as well as by the articles on responsibility of States for internationally wrongful acts, article 62 positively identifies those cases in which a State incurs responsibility and does not say when responsibility is not deemed to arise. While it would thus be inappropriate to include in the draft a provision stating a residual, and negative, rule for those cases in which responsibility

³⁵⁹ This would apply to the case envisaged by the Institute of International Law in article 5 (c) (ii) of its resolution on “The legal consequences for member States of the non-fulfilment by international organizations of their obligations toward third parties” that “the international organization has acted as the agent of the State, in law or in fact” (Institute of International Law, *Yearbook*, vol. 66, Part II (see footnote 70 above), p. 449).

is not considered to arise for a State in connection with the act of an international organization, such a rule is clearly implied. Therefore, membership does not as such entail for member States international responsibility when the organization commits an internationally wrongful act.

(3) The view that member States cannot generally be regarded as internationally responsible for the internationally wrongful acts of the organization has been defended by several States in contentious cases. The Government of Germany recalled in a written comment that it had

advocated the principle of separate responsibility before the European Commission of Human Rights (*M. & Co.*), the European Court of Human Rights (*Senator Lines*) and the [International Court of Justice] (*Legality of Use of Force*) and [had] rejected responsibility for reason of membership for measures taken by the European Community, NATO and the United Nations.³⁶⁰

(4) A similar view was taken by the majority opinions in the British courts in the litigation concerning the International Tin Council, albeit incidentally, in disputes concerning private contracts. The clearest expressions were given by Lord Kerr in the Court of Appeal and by Lord Templeman in the House of Lords. Lord Kerr said that he could not

find any basis for concluding that it has been shown that there is any rule of international law, binding upon the member States of the [International Tin Council], whereby they can be held liable—let alone jointly and severally—in any national court to the creditors of the [International Tin Council] for the debts of the [International Tin Council] resulting from contracts concluded by the [International Tin Council] in its own name.³⁶¹

With regard to an alleged rule of international law imposing on “States members of an international organization, joint and several liability for the default of the organization in the payment of its debts unless the treaty which establishes the international organization clearly disclaims any liability on the part of the members”, Lord Templeman found that

[n]o plausible evidence was produced of the existence of such a rule of international law before or at the time of [the Sixth International Tin Agreement] in 1982 or afterwards.³⁶²

(5) Although writers are divided on the question of responsibility of States when an international organization of which they are members commits an internationally wrongful act, it is noteworthy that the Institute of International Law adopted in 1995 a resolution in which it took the position that

[s]ave as specified in article 5, there is no general rule of international law whereby States members are, due solely to their membership,

³⁶⁰ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/556, p. 61.

³⁶¹ *Maclaine Watson and Co. Ltd. v. Department of Trade and Industry; J. H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry and others, and related appeals*, Judgment of 27 April 1988, England, Court of Appeal, ILR, vol. 80, p. 109.

³⁶² *Australia and New Zealand Banking Group Ltd. and Others v. Commonwealth of Australia and 23 Others; Amalgamated Metal Trading Ltd. and Others v. Department of Trade and Industry and Others; Maclaine Watson and Co. Ltd. v. Department of Trade and Industry; Maclaine Watson and Co. Ltd. v. International Tin Council*, Judgment of 26 October 1989, House of Lords, ILM, vol. 29 (1990), p. 674, at p. 675.

liable, concurrently or subsidiarily, for the obligations of an international organization of which they are members.³⁶³

(6) The view that member States are not in general responsible does not rule out that there are certain cases, other than those considered in the previous articles, in which a State would be responsible for the internationally wrongful act of the organization. The least controversial case is that of acceptance of international responsibility by the States concerned. This case is stated in subparagraph (a). No qualification is given to acceptance. This is intended to mean that acceptance may be expressly stated or implied and may occur either before or after the time when responsibility arises for the organization.

(7) In his judgment in the Court of Appeal concerning the International Tin Council, Lord Ralph Gibson referred to acceptance of responsibility in the “constituent document”.³⁶⁴ One can certainly envisage that acceptance results from the constituent instrument of the international organization or from other rules of the organization. However, member States would then incur international responsibility towards a third party only if their acceptance produced legal effects in their relations to the third party.³⁶⁵ It could well be that member States only bind themselves towards the organization or agree to provide the necessary financial resources as an internal matter.³⁶⁶ Thus, paragraph 1 (a) specifies that acceptance of responsibility only operates if it is made “towards the injured party”.

(8) Paragraph 1 (b) envisages a second case of responsibility of member States: when the conduct of member States has led the third party to rely on the responsibility of member States. This occurs, for instance, when the members lead a third party reasonably to assume that they would stand in if the responsible organization did not have the necessary funds for making reparation.³⁶⁷

³⁶³ Article 6 (a). Article 5 reads as follows: “(a) The question of the liability of the members of an international organization for its obligations is determined by reference to the Rules of the organization. (b) In particular circumstances, members of an international organization may be liable for its obligations in accordance with a relevant general principle of law, such as acquiescence or the abuse of rights. (c) In addition, a member State may incur liability to a third party (i) through undertakings by the State, or (ii) if the international organization has acted as the agent of the State, in law or in fact” (Institute of International Law, *Yearbook*, vol. 66, Part II (see footnote 70 above), p. 449).

³⁶⁴ *Maclaine Watson and Co. Ltd. v. Department of Trade and Industry; J. H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry and others, and related appeals* (see footnote 361 above), p. 172.

³⁶⁵ The conditions set by article 36 of the 1969 Vienna Convention would then apply.

³⁶⁶ For instance, article 300, paragraph 7, of the Treaty establishing the European Economic Community reads as follows: “Agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States.” The Court of Justice pointed out that this provision did not imply that member States were bound towards non-member States and would as a consequence incur responsibility towards them under international law. See *French Republic v. Commission of the European Communities*, Case C-327/91, Judgment of 9 August 1994, *Reports of Cases before the Court of Justice and the Court of First Instance, 1994–8*, p. I-3641, at p. I-3674, para. 25.

³⁶⁷ Amerasinghe held, on the basis of “policy reasons”, that “the presumption of nonliability could be displaced by evidence that members (some or all of them) or the organization with the approval of members gave creditors reason to assume that members (some or all of them) would accept concurrent or secondary liability even without

(9) An example of responsibility of member States based on reliance engendered by the conduct of member States was provided by the second arbitral award in the dispute concerning *Westland Helicopters*. The panel found that the special circumstances of the case invited

the trust of third parties contracting with the organization as to its ability to cope with its commitments because of the constant support of the member States.³⁶⁸

(10) Reliance is not necessarily based on an implied acceptance. It may also reasonably arise from circumstances which cannot be taken as an expression of an intention of the member States to bind themselves. Among the factors that have been suggested as relevant is the small size of membership,³⁶⁹ although this factor would have to be considered globally, together with all the other pertinent factors. There is clearly no presumption that a third party should be able to rely on the responsibility of member States.

(11) Subparagraphs (a) and (b) use the term “injured party”. In the context of international responsibility, this injured party would in most cases be another State or another international organization. However, it could also be a subject of international law other than a State or an international organization. While Part One of the articles on responsibility of States for internationally wrongful acts covers the breach of any obligation that a State may have under international law, Part Two, which concerns the content of international responsibility, only deals with relations between States, but contains in article 33 a saving clause concerning the rights that may arise for “any person or entity other than a State”.³⁷⁰ Similarly, subparagraph (b) is intended to cover any State, international organization, person or entity with regard to whom a member State may incur international responsibility.

(12) According to subparagraphs (a) and (b), international responsibility arises only for those member States who accepted that responsibility or whose conduct led to reliance. Even when acceptance of responsibility results from the constituent instrument of the organization, this could provide for the responsibility only of certain member States.

(13) Paragraph 2 addresses the nature of the responsibility that is entailed in accordance with paragraph 1. The international responsibility of the international organization

an express or implied intention to that effect in the constituent instrument” (C. F. Amerasinghe, “Liability to third parties of member States of international organizations: practice, principle and juridical precedent”, *AJIL*, vol. 85 (1991), p. 280. Klein also considered that conduct of member States may imply that they provide a guarantee for the respect of obligations arising for the organization (see P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens*, Bruxelles, Bruylant/Éditions de l’Université, 1998, pp. 509–510).

³⁶⁸ *Westland Helicopters Ltd. v. Arab Organization for Industrialization*, Award of 21 July 1991, para. 56, cited by Rosalyn Higgins in “The legal consequences for member states of non-fulfilment by international organizations of their obligations toward third parties: provisional report” (Institute of International Law, *Yearbook*, vol. 66, Part I (1995), pp. 393–394).

³⁶⁹ See in this respect the comment made by Belarus (*Official Records of the General Assembly, Sixtieth Session, Sixth Committee*, 12th meeting (A/C.6/60/SR.12) and corrigendum, para. 52).

³⁷⁰ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 94–95.

of which the State is a member remains unaffected. Acceptance of responsibility by a State could entail either subsidiary responsibility or joint and several responsibility. The same applies to responsibility based on reliance. As a general rule, only a rebuttable presumption may be stated. In view of the exceptional character of the cases in which responsibility arises according to the present article, it is reasonable to presume that, when member States accept responsibility, only subsidiary responsibility, which has a supplementary character, is intended.³⁷¹

Article 63. Effect of this Part

This Part is without prejudice to the international responsibility of the international organization which commits the act in question, or of any State or other international organization.

Commentary

(1) The present article finds a parallel in article 19, according to which the chapter on responsibility of an international organization in connection with the act of a State or another international organization is “without prejudice to the international responsibility of the State or international organization which commits the act in question, or of any other State or international organization”.

(2) The present article is a saving clause relating to the whole Part. It corresponds to article 19 on the responsibility of States for internationally wrongful acts.³⁷² The purpose of that provision, which concerns only relations between States, is first to clarify that the responsibility of the State aiding or assisting, or directing and controlling another State in the commission of an internationally wrongful act is without prejudice to the responsibility that the State committing the act may incur. Moreover, as the commentary to article 19 on the responsibility of States for internationally wrongful acts explains, the article is also intended to make it clear “that the provisions [of the chapter] are without prejudice to any other basis for establishing the responsibility of the assisting, directing or coercing State under any rule of international law defining particular conduct as wrongful” and to preserve “the responsibility ‘of any other State’ to whom the internationally wrongful conduct might also be attributable under other provisions of the articles”.³⁷³

(3) There appears to be less need for an analogous “without prejudice” provision in Part Five. It is hardly necessary to save responsibility that may arise for States according to the articles on responsibility of States for internationally wrongful acts and not according to the present draft articles. On the contrary, a “without prejudice” provision analogous to that of article 19 on the

responsibility of States for internationally wrongful acts would have some use if it concerned international organizations. The omission in this Part of a provision analogous to article 19 on the responsibility of States for internationally wrongful acts could have raised doubts. Moreover, at least in the case of a State aiding or assisting or directing and controlling an international organization in the commission of an internationally wrongful act, there is some use in setting forth that the responsibility of the State is without prejudice to the responsibility of the international organization that commits the act.

(4) In the present article the references to the term “State” in article 19 on the responsibility of States for internationally wrongful acts have been replaced by references to the term “international organization”.

PART SIX

GENERAL PROVISIONS

Commentary

This Part comprises general provisions that are designed to apply to issues concerning both the international responsibility of an international organization (Parts Two, Three and Four) and the responsibility of a State in connection with the conduct of an international organization (Part Five).

Article 64. Lex specialis

These draft articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or of a State in connection with the conduct of an international organization, are governed by special rules of international law. Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members.

Commentary

(1) Special rules relating to international responsibility may supplement more general rules or may replace them, in whole or in part. These special rules may concern the relations that certain categories of international organizations or one specific international organization have with some or all States or other international organizations. They may also concern matters addressed in Part Five of the present articles.

(2) It would be impossible to try and identify each of the special rules and their scope of application. By way of illustration, it may be useful to refer to one issue which has given rise in practice to a variety of opinions concerning the possible existence of a special rule: that of the attribution to the European Community (now European Union) of conduct of States members of the Community when they implement binding acts of the Community. According to the European Commission,

³⁷¹ In the judgment of 27 April 1988 in *Maclaine Watson and Co. Ltd. v. Department of Trade and Industry; J. H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry and others, and related appeals* (see footnote 361 above), Lord Ralph Gibson held that, in case of acceptance of responsibility, “direct secondary liability has been assumed by the members” (p. 172).

³⁷² *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 70–71.

³⁷³ *Ibid.*, paragraphs (2) and (3) of the commentary to article 19.

that conduct would have to be attributed to the Community; the same would apply to “other potentially similar organizations”.³⁷⁴

(3) Several cases concern the relations between the European Community and its member States. In *M. & Co. v. Federal Republic of Germany*, the European Commission of Human Rights held that

[t]he Commission first recalls that it is in fact not competent *ratione personae* to examine proceedings before or decisions of organs of the European Communities ... This does not mean, however, that by granting executive power to a judgment of the European Court of Justice the competent German authorities acted quasi as Community organs and are to that extent beyond the scope of control exercised by the Convention organs.³⁷⁵

(4) A different view was taken in *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* by a WTO panel, which

accepted the European Communities’ explanation of what amounts to its *sui generis* domestic constitutional arrangements that Community laws are generally not executed through authorities at Community level but rather through recourse to the authorities of its member States which, in such a situation, “act *de facto* as organs of the Community, for which the Community would be responsible under WTO law and international law in general”.³⁷⁶

This approach implies admitting the existence of a special rule on attribution, to the effect that, in the case of a European Community act binding a member State, State authorities would be considered as acting as organs of the Community.

(5) The issue came before the European Court of Human Rights in *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland*. The Court said in its decision on admissibility in this case that it would examine at a later stage of the proceedings

whether the impugned acts can be considered to fall within the jurisdiction of the Irish State within the meaning of Article 1 of the [European Convention on Human Rights], when that State claims that it was obliged to act in furtherance of a directly effective and obligatory [European Community] Regulation.³⁷⁷

³⁷⁴ *Official Records of the General Assembly, Fifty-ninth Session, Sixth Committee*, 21st meeting (A/C.6/59/SR.21), para. 18. This view was developed by P. J. Kuijper and E. Paasivirta, “Further exploring international responsibility: the European Community and the ILC’s project on responsibility of international organizations”, *International Organizations Law Review*, vol. 1, No. 1 (2004), pp. 111–138, at p. 127, and by S. Talmon, “Responsibility of international organizations: Does the European Community require special treatment?”, in M. Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter* (footnote 356 above), pp. 405 *et seq.*, especially pp. 412–414; and by F. Hoffmeister, “Litigating against the European Union and its member States: who responds under the ILC’s draft articles on international responsibility of international organizations?”, *European Journal of International Law*, vol. 21, No. 3 (2010), pp. 723–747.

³⁷⁵ *M. & Co. v. Federal Republic of Germany* (see footnote 180 above), p. 152.

³⁷⁶ WTO, report of the Panel, *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS174/R, 20 April 2005, para. 7.725. With regard to a claim brought against the European Communities, the Panel report on *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R and Corr.1, WT/DS292/R and Corr.1 and WT/DS293/R and Corr.1, 21 November 2006, para. 7.101, reiterated the same view.

³⁷⁷ *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland*, Decision of 13 September 2001 (see footnote 184 above), p. 24.

In its unanimous judgment of 30 June 2005 on the merits, the Grand Chamber of the Court held that

[i]n the present case it is not disputed that the act about which the applicant complained, the detention of the aircraft leased by it for a period of time, was implemented by the authorities of the respondent State on its territory following a decision made by the Irish Minister for Transport. In such circumstances the applicant company, as the addressee of the impugned act fell within the “jurisdiction” of the Irish State, with the consequence that its complaint about that act is compatible *ratione loci, personae* and *materiae* with the provisions of the Convention.³⁷⁸

(6) The decision of the European Court of Human Rights in *Kokkelvisserij U.A. v. the Netherlands* considered “the guarantees offered by the European Community—especially the [European Court of Justice]—in discharging its own jurisdictional tasks” with regard to a preliminary reference by a court in the Netherlands. The Court reiterated its view that the conduct of an organ of a member State should in any event be attributed to that State. The Court stated as follows:

A Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations.³⁷⁹

(7) The present article is modelled on article 55 on the responsibility of States for internationally wrongful acts.³⁸⁰ It is designed to make it unnecessary to add to many of the preceding articles a proviso such as “subject to special rules”.

(8) Given the particular importance that the rules of the organization are likely to have as special rules concerning international responsibility in the relations between an international organization and its members, a specific reference to the rules of the organization has been added at the end of the present article. The rules of the organization may, expressly or implicitly, govern various aspects of the issues dealt with in Parts Two to Five. For instance, they may affect the consequences of a breach of international law that an international organization may commit when the injured party is a member State or international organization. The relevance of special rules with regard to the issue of countermeasures has been considered in articles 22 and 52 and the related commentaries.

Article 65. Questions of international responsibility not regulated by these draft articles

The applicable rules of international law continue to govern questions concerning the responsibility of an international organization or a State for an internationally wrongful act to the extent that they are not regulated by these draft articles.

³⁷⁸ *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland*, Judgment of 30 June 2005 (see footnote 184 above), para. 137.

³⁷⁹ *Kokkelvisserij U.A. v. the Netherlands*, Application no. 13645/05, Decision of 20 January 2009, European Court of Human Rights, *Reports of Judgments and Decisions* 2009.

³⁸⁰ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 140–141.

Commentary

(1) Like article 56 on the responsibility of States for internationally wrongful acts,³⁸¹ the present article points to the fact that the present articles do not address all the issues that may be relevant in order to establish whether an international organization or a State is responsible and what international responsibility entails. This also is in view of possible developments on matters that are not yet governed by international law.

(2) Since issues relating to the international responsibility of a State are considered in the present draft articles only to the extent that they are addressed in Part Five, it may seem unnecessary to specify that other matters concerning the international responsibility of a State—for instance, questions relating to attribution of conduct to a State—continue to be governed by the applicable rules of international law, including the principles and rules set forth in the articles on responsibility of States for internationally wrongful acts. However, if the present article only mentioned international organizations, the omission of a reference to States could lead to unintended implications. Therefore, the present article reproduces article 56 on the responsibility of States for internationally wrongful acts with the addition of a reference to “an international organization”.

Article 66. Individual responsibility

These draft articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of an international organization or a State.

Commentary

(1) With the addition of the reference to “an international organization”, the present article reproduces article 58 on the responsibility of States for internationally wrongful acts.³⁸² The statement may appear obvious, since the scope of the present draft articles, as defined in article 1, only concerns the international responsibility of an international organization or a State. However, it may not be superfluous as a reminder of the fact that issues of individual responsibility may arise under international law in connection with a wrongful act of an international organization or a State and that these issues are not regulated in the present draft articles.

(2) Thus, the fact that the conduct of an individual is attributed to an international organization or a State does not exempt that individual from the international criminal responsibility that he or she may incur for his or her conduct. On the other hand, when an internationally wrongful act of an international organization or a State is committed, the international responsibility of individuals that have been instrumental to the wrongful act cannot be taken as implied. However, in certain cases the international criminal responsibility of some individuals may arise, for instance when they have been

instrumental to the serious breach of an obligation under a peremptory norm in the circumstances envisaged in article 41.

(3) Individual responsibility could also relate to damage caused by an act of a person acting on behalf of an international organization. For instance, when the victims of an international crime suffer damage, the responsible individual may have an obligation to make reparation.

Article 67. Charter of the United Nations

These draft articles are without prejudice to the Charter of the United Nations.

Commentary

(1) The present article reproduces article 59 on the responsibility of States for internationally wrongful acts,³⁸³ which sets forth a “without prejudice” provision concerning the Charter of the United Nations. The reference to the Charter of the United Nations includes obligations that are directly stated therein as well as those flowing from binding decisions of the Security Council, which, according to the International Court of Justice, similarly prevail over other obligations under international law on the basis of Article 103 of the Charter of the United Nations.³⁸⁴ According to Article 103, “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail”.

(2) Insofar as issues of State responsibility are covered in the present draft articles, there could be no reason to query the applicability of the same “without prejudice” provision as the corresponding article on the responsibility of States for internationally wrongful acts. A question may be raised with regard to the responsibility of international organizations, since they are not members of the United Nations and therefore have not formally agreed to be bound by the Charter of the United Nations. However, even if the prevailing effect of obligations under the Charter of the United Nations may have a legal basis for international organizations that differs from the legal basis applicable to States,³⁸⁵ one may reach the conclusion that the Charter of the United Nations has a prevailing effect also with regard to international organizations. For instance, when establishing an arms embargo which requires all its addressees not to comply with an obligation to supply arms that they may have accepted under a treaty, the Security Council does not distinguish between

³⁸³ *Ibid.*, p. 143.

³⁸⁴ See the orders on provisional measures in the cases *Questions of Interpretation and Application of the 1971 Montreal Convention [for the suppression of unlawful acts against the safety of civil aviation] arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom; Libyan Arab Jamahiriya v. United States of America)*, Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992, at pp. 15 and 126.

³⁸⁵ One explanation is that Article 103 of the Charter of the United Nations prevails over the constituent instruments of the international organizations. See R. H. Lauwaars, “The interrelationship between United Nations law and the law of other international organizations”, *Michigan Law Review*, vol. 82 (1983–1984), pp. 1604 *et seq.*

³⁸¹ *Ibid.*, p. 141.

³⁸² *Ibid.*, pp. 142–143.

States and international organizations.³⁸⁶ It is in any event not necessary, for the purpose of the present draft articles,

³⁸⁶ As was noted by B. Fassbender, “The United Nations Charter as constitution of the international Community”, *Columbia Journal of Transnational Law*, vol. 36, No. 3 (1998), pp. 529 *et seq.*, at p. 609, “intergovernmental organizations are generally required to comply with Council resolutions”.

to determine the extent to which the international responsibility of an international organization is affected, directly or indirectly, by the Charter of the United Nations.

(3) The present article is not intended to exclude the applicability of the principles and rules set forth in the preceding articles to the international responsibility of the United Nations.