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Comments and observations received from Governments

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Introduction

1. In its 2002 report, the International Law Commission invited Governments to comment "on the proposed scope and orientation of the study on the responsibility of international organizations".[1] In its 2003 report, the Commission sought the views of Governments, especially on three questions relating to rules for the attribution of conduct to international organizations.[2]

2. Subsequently, on 9 December 2003, the General Assembly adopted resolution 58/77, entitled "Report of the International Law Commission on the work of its fifty-fifth session". In paragraph 5 of that resolution, the Assembly invited "States and international organizations to submit information concerning their practice relevant

[1] *Yearbook … 2002*, vol. II (Part Two), p. 14, para. 31.

[2] "(*a*) Whether a general rule on attribution of conduct to international organizations should contain a reference to the 'rules of the organization';

(*b*) If the answer to subparagraph (*a*) is in the affirmative, whether the definition of 'rules of the organization', as it appears in article 2, paragraph 1 (*j*), of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations … is adequate;

(*c*) The extent to which the conduct of peacekeeping forces is attributable to the contributing State and the extent to which it is attributable to the United Nations."
(*Yearbook ... 2003*, vol. II (Part Two), p. 14, para. 27)

to the topic 'Responsibility of international organizations', including cases in which States members of an international organization may be regarded as responsible for acts of the organization". This invitation was transmitted by the Secretariat to Governments by note verbale on 30 December 2003.

3. As at 1 May 2004, written comments had been received from the following four States (dates of submission in parentheses): Austria (20 April 2004), Italy (30 April 2004), Mexico (16 December 2003) and Poland (21 April 2004). These comments are reproduced below, in a topic-by-topic manner.

Comments and observations received from Governments

A. General remarks

1. Mexico

1. Mexico expresses its sincere thanks to the Special Rapporteur on responsibility of international organizations, Mr. Giorgio Gaja, and the rest of the Working Group for its excellent work. In a little more than a year since the task was initiated, there are already some highly satisfactory results.

2. The topic being dealt with is largely a reflection of the development of international law. Cooperation among States has become one of the most important factors—if not the key factor—in international relations. In that regard, the role of international organizations on the world scene has assumed increasing significance.

3. The most ordinary matters of daily life have an international dimension. No longer can the illusion be maintained that environmental threats or organized crime can be combated effectively from a purely national standpoint. States have come to realize that only through the joint and coordinated action made possible by international organizations can these threats be confronted, while at the same time promoting ties of friendship and cooperation among peoples. Only through such action can full advantage be taken of the benefits that globalization offers.

4. In keeping with this development, the legal and actual capacities of international organizations to take action have been strengthened. As a logical consequence, the likelihood that their conduct (whether actions or omissions) may generate international responsibility has also increased. There is no doubt that the work undertaken by the Commission fills a real need for the development of international law, and Mexico wishes to express its firm commitment to do all it can to contribute to that work.

2. Poland

1. With reference to the topic "Responsibility of international organizations", Poland welcomes the intention of the Special Rapporteur to address in his next report the complex issue of attribution of conduct to international organizations.

2. Found below are Poland's comments on the specific questions on this issue raised by the Commission in chapter III of its report,[3] though it is not easy to respond precisely to them since Poland does not know the real background to these questions, and also because it was not presented with the Commission's initial views on them.

B. Draft article 1. Scope of the draft articles

Draft article 1, as provisionally adopted by the Commission at its fifty-fifth session, in 2003, reads as follows:

Article 1. Scope of the present draft articles

1. The present draft articles apply to the international responsibility of an international organization for an act that is wrongful under international law.

2. The present draft articles also apply to the international responsibility of a State for the internationally wrongful act of an international organization.[4]

Mexico

Mexico is pleased with the wording of draft article 1, paragraph 1, comprising as it does a number of possibilities under an open-ended formulation without resorting to an exhaustive list. The formulation of the provision in question covers not only the international responsibility of an international organization whose conduct (action or omission) is the direct cause of an internationally wrongful act, but also the international responsibility of an organization arising out of other situations, such as conduct giving rise to an internationally wrongful act by another organization of which the first is a member.

C. Draft article 2. Use of terms

Draft article 2, as provisionally adopted by the Commission at its fifty-fifth session, in 2003, reads as follows:

Article 2. Use of terms

For the purposes of the present draft articles, the term "international organization" refers to 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.[5]

Mexico

1. This leads to one of the many sound points of the draft articles proposed by the Special Rapporteur on the responsibilty of international organizations: objectivity as a fundamental criterion for determining the legal personality under international law of an international organization, as reflected in draft article 2. There is an

[3] *Yearbook ... 2003*, vol. II (Part Two), pp. 14–16.

[4] *Ibid*., p. 18, para. 53.

[5] *Ibid*.

analytical link between the fundamental legal concepts of "capacity", "personality" and "responsibility", and that is because the three terms are defined in terms of rights and obligations. The international organization has the capacity to act legally (to exercise rights and contract obligations), and that makes it able to incur international responsibility (for failure to fulfil its obligations) as a legal person under international law (a subject of international rights and obligations). The liberal view of the acquisition of legal personality under international law is, therefore, much more suitable for the purposes of the draft articles than a strict hypothesis whereby legal personality can be acquired only by virtue of a specific provision of a constituent instrument.[6] The determining factor with respect to legal personality, as the Commission's report indicates, is the status of subject of international law, with all that that implies, namely, personality, capacity to act and ability to be held responsible.

2. Hence, Mexico believes that the definition of international organization contained in draft article 2 is appropriate for the purposes of the draft articles. Although the "traditional" international organization has only States as members, the intergovernmental element has ceased to be defining, and that reality cannot be ignored in an instrument that aims at codifying current practice. What must now be taken as a starting point is the concept that States are a necessary but not sufficient component; in other words, in addition to States, other entities may also be members.

3. Mexico agrees completely with the Commission that there is no reason to exclude those many "non-traditional" international organizations—if I may use the term—from the scope of application of an instrument whose main concern is to establish responsibility for internationally wrongful acts committed within the framework of the main subjects of international law, apart from States.

4. With regard to the establishment of international organizations by means other than treaties, Mexico agrees with the content of draft article 2 for the reason stated above. Mexico believes that, for the sake of legal certainty, any organization should be established by means of a treaty, as the most suitable instrument for setting its constituent rules. Nonetheless, since there are international organizations established in other ways, such as by mandate conferred pursuant to the resolutions of wider organizations or by virtue of conferences of States, they should not be excluded from a regime of responsibility for internationally wrongful acts, which they, like the other organizations, may commit. Mexico is convinced that the general approach that has guided the elaboration of these draft articles, namely, that they should be applicable to all existing international organizations, is the right one.

D. Draft article 3. General principles

Draft article 3, as provisionally adopted by the Commission at its fifty-fifth session, in 2003, reads as follows:

Article 3. General principles

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

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

(*a*) Is attributable to the international organization under international law; and

(*b*) Constitutes a breach of an international obligation of that international organization.[7]

Mexico

1. Draft article 3 appears to contradict what is said in draft article 2, since it seems to limit the scope of application to international responsibility for the conduct of the particular organization alone. However, the Commission's report clarifies the matter by explaining that draft article 3 "has an introductory character" and that its provisions are to be understood "without prejudice to the existence of cases in which an organization's international responsibility may be established for conduct of a State or of another organization".[8]

2. On that understanding, Mexico wishes to express its satisfaction with draft articles 1–3 as contained in the Commission's report, and looks forward to the elaboration of the other rules governing material and personal application of this important set of draft articles.

E. Reference to the "rules of the organization"

1. Mexico

In the articles on responsibility of States for internationally wrongful acts,[9] the main factors determining the attribution of conduct to a State are status as a State organ and the exercise of public functions, that is, conduct endowed with State authority. Both aspects are determined in accordance with the internal law of the State in question. The question of when "an action or omission … [i]s attributable to the international organization under international law" (draft art. 3, para. 2) should be determined, therefore, in accordance with the internal law of the international organization in question.

2. Poland

1. Poland believes that reference to the "rules of the organization" would be useful when it comes to the elaboration of a general rule on attribution of conduct of international organizations. This might facilitate decisions on competency and hence the field of responsibility of a given organization.

2. Such a general rule on attribution of conduct to international organizations should not, however, be elaborated on the basis of a simple analogy of internal law of a State

[6] *Ibid*., p. 21, paras. (7)–(9) of the commentary to article 2.

[7] *Ibid*., p. 18, para. 53.

[8] *Ibid.*, p. 22, para. (1) of the commentary to article 3.

[9] *Yearbook … 2001*, vol. II (Part Two), p. 26, para. 76.

and rules of an international organization, since there are obvious differences between them.

3. At the same time, Poland is of the opinion that such a reference to rules of international organizations should not be construed as narrowing the scope of responsibility of international organizations.

4. The attribution means that the organization is to be held responsible for specific internationally wrongful acts committed by different organs/agencies of the organization. The general rule of responsibility of an international organization is that it is responsible exclusively for the acts committed within its powers (competence).

5. This rule has an important consequence. The organization is not responsible for acts which are *ultra vires*, and that view seems to dominate in international legal writing. The notion of *ultra vires* could be interpreted in a double way: as excluding the responsibility for acts committed out of the powers of the organization, and as limiting the responsibility to acts committed by the officials of the organization within their powers.

6. The division of powers among different organs of the organization is governed by the rules of the organization mentioned above. A question arises: if the attribution of international delicts is limited to the acts committed within the competence of specific organs of the organization, should the position also be accepted that the organization is not responsible for the acts committed by its organs acting within the scope of the powers of that organization as defined in its statute, but in violation of the division of powers as formulated in the statute?

F. Definition of "rules of the organization"

1. Mexico

The internal law of an international organization would consist, first of all, of the treaty, charter or other instrument governed by international law constituting it, such as a resolution of the General Assembly. Secondarily, it would consist of the rules derived from such constituent instruments, including the established practice of the organization. As will be obvious, Mexico is referring to "rules of the organization" as defined in article 2, paragraph 1 (*j*), of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter the 1986 Vienna Convention).[10]

2. Poland

In the light of its answer given above, Poland considers that the definition of "rules of the organization", as it appears in article 2, paragraph 1 (*j*), of the 1986 Vienna Convention, might be a useful starting point for further deliberations.

G. Attribution of the conduct of a peacekeeping force to the United Nations or to contributing States

1. Mexico

1. With respect to the question of the extent to which the conduct of peacekeeping forces should be attributable to the contributing State or to the United Nations, the issue deserves fuller study, but some preliminary comments can be made.

2. Mexico considers article 6 of the articles on the responsibility of States for internationally wrongful acts helpful in that respect. It provides that the "conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed".[11]

3. The key elements of the provision are "disposal" and "the exercise of elements of the governmental authority". In the draft articles on responsibility of international organizations the same guidelines should be followed. Although in the latter case "elements of the governmental authority" cannot be spoken of, nothing prevents the drawing of an analogy with the powers of the United Nations in the matter of peacekeeping and international security under the Charter of the United Nations and the practice of the Security Council and the General Assembly in that regard.

4. In the case of peacekeeping operations, all conduct should be carried out within the framework of Chapter VII of the Charter of the United Nations, that is, under a mandate contained in a Security Council or General Assembly resolution. That could be the first criterion for attribution of conduct: to determine whether the acts or omissions of a given force contributed by a State were carried out pursuant to such a mandate or not. If the actions or omissions were committed outside that normative framework—which could easily happen—they would cease to form part of a peacekeeping operation and, in consequence, it would be seriously questionable whether the personnel contributed by a State could be considered a United Nations peacekeeping force.

5. The term "disposal" should certainly be understood as hierarchical subordination. If a State contributes personnel to a peacekeeping operation, it would have to be asked to what extent such personnel are under the control of the United Nations or under the control of the military authorities of their own country or even of another State, which might be the coordinator of a specific mission. That would be another criterion for attribution of conduct. Reference to the recent practice of the Security Council will be essential in order to elucidate these issues.

6. To sum up, attribution of conduct to the United Nations would be the general rule when (*a*) the forces involved are under United Nations control; (*b*) the actions and omissions are committed within the framework of a United Nations mandate, including *ultra vires* acts; and (*c*) the conduct derives from a status-of-forces or status-of-mission agreement.

[10] Signed in Vienna on 21 March 1986 (A/CONF.129/15).

[11] See footnote 9 above.

7. Mexico is aware that it has only thrown out some preliminary ideas, which may simply have added further doubts to the debate. However, Mexico has full confidence in the superior legal abilities of the members of the Working Group, its Chairman, Mr. Gaja, and the Commission as a whole, and is sure that in another year highly satisfactory solutions to these and other interesting problems will have been found.

2. Poland

1. As to the third question,[12] Poland takes the position that at this stage of the Commission's work it is premature to give a final and precise answer.

2. From the beginning, the general problem of the scope of responsibility of the member State for acts of the organization should be elucidated. Furthermore, current international practice does not indicate the existence of any rules of general (customary) international law showing a clear solution to the question posed. It seems, therefore, that the Commission must propose a rule expressing a progressive development of international law. That rule must be drafted very carefully, and *prima facie* it will be relatively casuistic.

3. At this moment Poland would suggest postponing the final solution of the question until a later stage. According to primary theoretical analysis, the responsibility of an international organization should be restricted to cases in which peacekeeping forces act on the basis of a specific resolution of the organization, and under the command of the organization. However, the responsibility of member States cannot be absolutely excluded if the armed forces are acting on behalf of the sending States and/or are directly controlled by officers (commanders) from the respective States.

4. The term "peacekeeping" encompasses a wide range of activities under a wide range of authorities and mandates, and often there is a special agreement between the troop-contributing State and the organization which outlines the basic relationship of the parties, including provisions on the issue of attribution of responsibility.

5. Therefore, Poland believes that the Commission should undertake, first of all, a careful examination of existing practice in the United Nations and in other international organizations on this matter.

H. Practice relating to the attribution of conduct

1. Austria

Austria has the honour to communicate the following treaty provisions in force for Austria concerning the issue of the responsibility of international organizations.

Treaty	*Article*	*Text*
Agreement between the Republic of Austria and the United Nations regarding the seat of the United Nations in Vienna (Vienna, 29 November 1995)[13]	Art. II, sect. 9	Whenever the United Nations has concluded an insurance contract to cover its liability for damages arising from the use of the seat of the United Nations and suffered by juridical or natural persons who are not officials of the United Nations, any claim concerning the United Nations' liability for such damages may be brought directly against the insurer before Austrian courts, and the insurance contract shall so provide.
	Art. XV, sect. 47	The Republic of Austria shall not incur by reason of the location of the seat of the United Nations within its territory any international responsibility for acts or omissions of the United Nations or of its officials acting or abstaining from acting within the scope of their functions, other than the international responsibility which the Republic of Austria would incur as a Member of the United Nations.
Agreement between the United Nations Industrial Development Organization and the Republic of Austria regarding the headquarters of the United Nations Industrial Development Organization (Vienna, 29 November 1995)[14]	Art. II, sect. 9	Whenever the UNIDO has concluded an insurance contract to cover its liability for damages arising from the use of the headquarters seat and suffered by juridical or natural persons who are not officials of the UNIDO, any claim concerning the UNIDO's liability for such damages may be brought directly against the insurer before Austrian courts, and the insurance contract shall so provide.
	Art. XV, sect. 47	The Republic of Austria shall not incur by reason of the location of the headquarters seat within its territory any international responsibility for acts or omissions of the UNIDO or of its officials acting or abstaining from acting within the scope of their functions, other than the international responsibility which the Republic of Austria would incur as a member of the UNIDO.

[12] See footnote 2 above.

[13] United Nations, *Treaty Series*, vol. 2023, No. 34923, p. 255.

[14] UNIDO, Financial and administrative matters: headquarters agreement between UNIDO and the Republic of Austria (G.C.6/20), annex, p. 5.

Treaty	*Article*	*Text*
Agreement between the Republic of Austria and the International Atomic Energy Agency regarding the Headquarters of the International Atomic Energy Agency (Vienna, 11 December 1957)[15]	Art. XVIII, sect. 46	The Republic of Austria shall not incur by reason of the location of the headquarters seat of the IAEA within its territory any international responsibility for acts or omissions of the IAEA or of its officials acting or abstaining from acting within the scope of their functions, other than the international responsibility which the Republic of Austria would incur as a Member of the IAEA.
Agreement between the Republic of Austria and the Preparatory Commission for the Comprehensive Nuclear Test-Ban Treaty Organization regarding the seat of the Commission (Vienna, 18 March 1997)[16]	Art. III, sect. 9	Whenever the Commission has concluded an insurance contract to cover its liability for damages arising from the use of the seat of the Commission and suffered by juridical or natural persons who are not officials of the Commission, any claim concerning the Commission's liability for such damages may be brought directly against the insurer before Austrian courts, and the insurance contract shall so provide.
	Art. XIX, sect. 56	Austria shall not incur by reason of the location of the seat of the Commission within its territory any international responsibility for acts or omissions of the Commission or of its officials acting or abstaining from acting within the scope of their functions, other than the international responsibility which Austria would incur as a Signatory.
Exchange of letters constituting an agreement between the United Nations and the Republic of Austria concerning the service of the national contingent provided by the Government of Austria with the United Nations Peacekeeping Force in Cyprus;[17] annex II, Regulations for the United Nations Force in Cyprus (New York, 21 and 24 February 1966)	Art. 39 of the Regulations	In the event of death, injury or illness of a member of the Force attributable to service with the Force, the respective State from whose military services the member has come will be responsible for such benefits or compensation awards as may be payable under the laws and regulations applicable to service in the armed forces of that State. The Commander shall have responsibility for arrangements concerning the body and personal property of a deceased member of the Force.
Agreement between the International Atomic Energy Agency and the Republic of Austria regarding the Laboratories at Seibersdorf (Vienna, 1 March 1982)[18]	Art. VI	(1) All questions concerning liability for nuclear damage shall be governed by Austrian law. (2) The IAEA shall take out adequate insurance to cover its financial liability for nuclear damage which insurance shall also provide that any claim concerning the IAEA's liability for nuclear damage may be brought directly against the insurer. Austrian courts shall have jurisdiction over such cases. (3) Without prejudice to the liability of the IAEA for nuclear damage the Republic of Austria shall assume the guarantee for compensation (Bürge und Zahler in accordance with Austrian law) in respect of any such nuclear damage. (4) Insofar as a payment which the Republic of Austria is ordered to make in accordance with paragraph 3 by virtue of a decision of an Austrian court is not reimbursed by the insurer to the Republic of Austria, the Republic of Austria shall be entitled to claim indemnification directly from the IAEA.
Exchange of letters constituting an agreement between Austria and the North Atlantic Treaty Organization concerning the transit for the purpose of the multinational peace operation in Bosnia (IFOR) (Brussels, 14 and 16 December 1995) [19]	Art. 11	NATO will have appropriate insurance coverage and shall provide compensation for damage or injury to private persons or any property inflicted by NATO personnel and vehicles during transit through Austria. Claims for damage or injury to private persons or property shall be submitted by Austrian governmental authorities to the designated NATO Representatives.

[15] United Nations, *Treaty Series*, vol. 339, No. 4849, p. 110.

[16] *Ibid.*, vol. 1998, No. 34224, p. 3.

[17] *Ibid.*, vol. 557, No. 8131, p. 129.

[18] *Ibid.*, vol. 1404, No. 23473, p. 129.

[19] *Ibid.*, vol. 1912, No. 32622, p. 261.

2. Italy

1. The problem of identifying the organs of an international organization has been addressed by Italian courts in some cases. While these cases dealt with the question of immunity of international organizations, it may be argued that the principles applied by the judges in solving that problem would also apply in the field of responsibility of international organizations. In *Cristiani* v. *Istituto italo-latino-americano*,[20] the Court of Cassation held that the organs of an international organization which is endowed with international legal personality are to be distinguished for legal purposes from the organs of member States, and at the same time they cannot be equated with joint organs of the member States. In *Paradiso* v. *Istituto di Bari del Centro internazionale di alti studi agronomici mediterranei*,[21] the Court of Cassation referred to the constituent instrument of the International Centre for Advanced Mediterranean Agronomic Studies, and to an agreement adopted in accordance with that instrument, in order to find that the Mediterranean Agronomic Institute in Bari, Italy, was an organ of that organization.

2. With regard to cases concerning wrongful acts committed by international organizations against Italy, reference could be made to an agreement concluded between Italy and the United Nations relating to the settlement of claims filed against the United Nations in the Congo by Italian nationals.[22] The agreement related to claims lodged with the United Nations on behalf of Italian nationals in relation to damage arising from the operations of the United Nations force in the Congo.

3. Together with other States, Italy was sued by the Federal Republic of Yugoslavia before ICJ in relation to the military action led by NATO in 1999. The case on *Legality of Use of Force* is still pending.[23] Yugoslav nationals have also sued the Italian Head of Government before an Italian court in relation to damages suffered as a consequence of the death of their relatives caused by air bombing conducted by NATO. According to the plaintiffs, Italy would be responsible because, *inter alia*, as a member of NATO it participated in the planning of the military actions conducted against the Federal Republic of Yugoslavia. The Court of Cassation dismissed the claim for lack of jurisdiction.[24]

4. On several occasions Italy supplied military contingents to peacekeeping forces established by international organizations. In most cases, peacekeeping forces to which Italy contributed were those set up at the initiative of the Security Council. However, Italy also contributed to forces operating within the context of other international organizations. In this regard, it may be mentioned that Italy provided a naval contingent to the Multinational Force and Observers, an international organization established by a protocol to the Treaty of Peace between Egypt and Israel (Washington, D.C., 26 March 1979).[25]

5. Together with the other member States of the European Community, Italy was sued before the European Court of Human Rights by a private company (Senator Lines GmbH) which claimed that the EC member States were individually and collectively responsible for the acts of Community institutions. Italy objected to this claim by submitting, *inter alia*, that, as the European Community has a distinct international legal personality, its member States could not be held liable for acts of the Community institutions. This the more so, in the view of Italy, since those acts were adopted by organs, such as the Court of First Instance and the Court of Justice, which are independent from member States. Italy referred to the developments on this point contained in the written observations of France. In its decision of 10 March 2004 the European Court declared the application inadmissible.[26]

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[20] Court of Cassation, 23 November 1985, No. 5819 (*Rivista di diritto internazionale*, vol. LXIX, 1986, p. 146).

[21] Court of Cassation, 4 June 1986, No. 3733 (*ibid*., vol. LXX, 1987, p. 190).

[22] Exchange of letters constituting an agreement between the United Nations and Italy relating to the settlement of claims filed against the United Nations in the Congo by Italian nationals (New York, 18 January 1967), United Nations, *Treaty Series*, vol. 588, No. 8525, p. 197).

[23] *Legality of Use of Force (Yugoslavia* v. *Italy), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 481.

[24] Court of Cassation, 5 June 2002, No. 8157, *Presidenza del Consiglio ministri* v. *Markoviç e altri*, *Rivista di diritto internazionale*, vol. LXXXV, 2002, p. 799.

[25] Protocol relating to the establishment and maintenance of a Multinational Force and Observers (Washington, D.C., 3 August 1981), United Nations, *Treaty Series*, vol. 1335, No. 22403, p. 327. The Treaty of Peace is reproduced in ibid., vol. 1138, No. 17855, p. 59. See also the exchange of letters between Italy and the Multinational Force and Observers on Italy's participation in the Force (16 March 1982), Rivista di diritto internazionale, vol. LXV, 1982, p. 983.

[26] See the Italian written observations in *DSR Senator Lines GmbH* v. *Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom*; decision of the Grand Chamber of the European Court of Human Rights as to the Admissibility of the Claim.