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Comments and observations received from Governments and international organizations

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Multilateral instruments cited in the present report

	Source
Convention respecting the Bank for International Settlements (The Hague, 20 January 1930)	League of Nations, *Treaty Series*, vol. CIV, No. 2398, p. 441.
Constitution of the United Nations Educational, Scientific and Cultural Organisation (London, 16 November 1945)	United Nations, *Treaty Series*, vol. 4, No. 52, p. 275.
Articles of Agreement of the International Monetary Fund and Articles of Agreement of the International Bank for Reconstruction and Development (Bretton Woods Agreements) (Washington, D.C., 27 December 1945)	*Ibid*., vol. 2, No. 20, p. 39.
Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948)	*Ibid.*, vol. 78, No. 1021, p. 277.
Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950)	*Ibid.*, vol. 213, No. 2889, p. 221.
Agreement between the Parties to the North Atlantic Treaty regarding the status of their forces (London, 19 June 1951)	*Ibid.*, vol. 199, No. 2678, p. 67.
Protocol on the Status of International Military Headquarters Set Up Pursuant to the North Atlantic Treaty (Paris, 28 August 1952)	AJIL, vol. 48, No. 4 (October 1954), p. 163.
Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany (Bonn, 3 August 1959)	United Nations, *Treaty Series*, vol. 481, No. 6986, p. 329.
Convention for the establishment of a European Organization for Nuclear Research (Paris, 1 July 1953)	*Ibid.*, vol. 200, No. 2701, p. 149.
Articles of Agreement of the International Finance Corporation (Washington, D.C., 25 May 1955)	*Ibid.*, vol. 264, No. 3791, p. 117.
Articles of Agreement of the International Development Association (IBRD, 26 January 1960)	*Ibid.*, vol. 439, No. 6333, p. 249.
Convention on the Liability of Operators of Nuclear Ships (Brussels, 25 May 1962)	IAEA, *International Conventions on Civil Liability for Nuclear Damage*, Legal Series No. 4, rev. ed. (Vienna, 1976), p. 34. See also AJIL, vol. 57, No. 1 (January 1963), p. 268.
Constitution of the Universal Postal Union (Vienna, 10 July 1964)	United Nations, *Treaty Series*, vol. 611, No. 8844, p. 63.
Agreement establishing the African Development Bank (Khartoum, 10 September 1964)	*Ibid.*, vol. 1276, No. 21052, p. 3.

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Treaty on principles governing the activities of States in the exploration and use of outer space, including the moon and other celestial bodies (London, Moscow and Washington, D.C., 27 January 1967)	*Ibid.*, vol. 610, No. 8843, p. 205.
International Wheat Agreement, 1971 (Washington, D.C., 3 May 1971)	*Ibid.*, vol. 800, No. 11400, p. 45.
Agreement relating to the International Telecommunications Satellite Organization "INTELSAT" (Washington, D.C., 20 August 1971)	*Ibid.*, vol. 1220, No. 19677, p. 21.
Convention on the international liability for damage caused by space objects (London, Moscow and Washington, D.C., 29 March 1972)	*Ibid.*, vol. 961, No. 13810, p. 187.
Agreement establishing the African Development Fund (Abidjan, 29 November 1972)	*Ibid.*, vol. 1197, No. 19019, p. 13.
Convention on the Grant of European Patents (Munich, 5 October 1973)	*Ibid.*, vol. 1065, No. 16208, p. 199.
Convention establishing the European Centre for Medium-Range Weather Forecasts (Brussels, 11 October 1973)	*Ibid.*, vol. 1000, No. 14669, p. 17.
Convention for the establishment of a European Space Agency Agency (Paris, 30 May 1975)	*Ibid.*, vol. 1297, No. 21524, p. 186.
Agreement establishing the International Fund for Agricultural Development (Rome, 13 June 1976)	*Ibid.*, vol. 1059, No. 16041, p. 191. See also ILM, vol. 15 (1976), p. 922.
International Olive Oil Agreement, 1979 (Geneva, 30 March 1979)	United Nations, *Treaty Series*, vol. 1219. No. 19674, p. 135.
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Agreement establishing the Common Fund for Commodities (Geneva, 27 June 1980)	*Ibid.*, vol. 1538. No. 26691, p. 3.
Sixth International Tin Agreement (Geneva, 26 June 1981)	*Ibid.*, vol. 1282, No. 21139, p. 239.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	*Ibid.*, vol. 1833, No. 31363, p. 3.
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International Tropical Timber Agreement, 1994 (Geneva, 26 January 1994)	*Ibid.*, vol. 1955. No. 33484, p. 81.
International Natural Rubber Agreement, 1994 (Geneva, 17 February 1995)	*Ibid.*, vol. 1964, No. 33546, p. 3.
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Introduction

1. 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 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".[1] In addition, the Commission sought comments on specific issues of particular interest to it in paragraph 27 of its 2003 report[2] and paragraph 25 of its 2004 report.[3]

[1] The replies received prior to 1 May 2004 appear in document A/CN.4/547, reproduced in the present volume.

[2] *Yearbook ... 2003*, vol. II (Part Two), p. 14. In 2003, the Commission invited comments on the following issues:

"(*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."

[3] *Yearbook … 2004*, vol. II (Part Two). In 2004, the Commission invited comments on the following issues:

"(*a*) Relations between an international organization and its member States and between an international organization and its agents are mostly governed by the rules of the organization, which are defined in draft article 4, paragraph 4, as comprising 'in particular: the constituent instruments, decisions, resolutions and other acts taken by the organization in accordance with those instruments; and established practice of the organization' … The legal nature of the rules of the organization in relation to international law is controversial. It is at any event debatable to what extent the Commission should, in its study of responsibility of international organizations under international law, consider breaches of obligations that an international organization may have towards its member States or its agents. What scope should the Commission give to its study in this regard?

"(*b*) Among the circumstances precluding wrongfulness, article 25 of the draft articles on responsibility of States for internationally wrongful acts refers to 'necessity', which may be invoked by a State under certain conditions: first of all, that the 'act not in conformity with an international obligation of that State … is the only way for the State to safeguard an essential interest against a grave and imminent peril'. Could necessity be invoked by an international organization under a similar set of circumstances?

"(*c*) In the event that a certain action, which a member State takes 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, would the organization also be regarded as responsible under international law? Would the answer be the same if the State's wrongful conduct was not requested, but only authorized, by the organization?"

2. Moreover, at its fifty-fifth session, in 2003, the Commission requested that the Secretariat of the United Nations circulate, on an annual basis, the portions of its report relevant to this topic to international organizations for their comments. Pursuant to this request, selected international organizations were invited to submit their comments on the relevant portions of the Commission's 2003 and 2004 reports.[4]

3. As at 9 May 2005, written comments had been received from the following two States (dates of submission in parentheses): Democratic Republic of the Congo (17 May 2004) and Germany (4 April 2005). Written comments have also been received from the following eight international organizations (dates of submission in parentheses): European Commission (18 March 2005), INTERPOL (9 February 2005), IMF (1 April 2005), International Seabed Authority (7 February 2005), OPCW (1 February 2005), United Nations Secretariat (9 March 2005), WIPO (19 January 2005) and WTO (1 February 2005). These comments are reproduced below, in a topic-by-topic manner.

[4] The replies received prior to 20 April 2004 are contained in *Yearbook … 2004*, vol. II (Part One), document A/CN.4/545.

Comments and observations received from Governments and international organizations

A. General remarks

1. European Commission

The general view of the European Commission on the work of the International Law Commission in 2004 was expressed in the European Union statement to the Sixth Committee of the General Assembly on 5 November 2004.

The European Commission believes that the International Law Commission should carefully consider the large diversity among international organizations when adapting the articles on responsibility of States for internationally wrongful acts to the topic of responsibility of international organizations. The European Union and the European Community are themselves testimony to this diversity. In particular, the European Community is an international organization with special features as envisaged in the founding treaties. According to those treaties, member States have transferred some of their competencies to the organization. However, the European Community cannot be assimilated to a State, even if its institutions can enforce regulations or other European Community acts that are directly applicable in member States' legal orders. For the application of those acts, the European Community relies on its member States and their authorities.

According to article 3, paragraph 2, of the draft articles, there is an international 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.[5]

Therefore, the normal situation described in draft article 3, paragraph 2, is that conduct is attributed to the organization that is the bearer of the obligation. However, there could be cases in which the European Community could be considered responsible for the infringement of international obligations because of the conduct of the organs of member States.

The European Community is the bearer of many international obligations (especially because it has concluded many treaties). However, sometimes not only the behaviour of its own organs, but also organs of its member States, may breach such obligations. Such behaviour would therefore be *prima facie* attributable to those member States.

This is an example of this situation: the European Community has contracted a certain tariff treatment with third States through an agreement or within the framework of WTO. The third States concerned find that this agreement is being breached, but by whom? Not by the European Community's organs, but by the member States' customs authorities that are charged with implementing Community law. Hence their natural reaction is to blame the member States concerned. In short, there is separation between responsibility and attribution: the responsibility trail leads to the European Community, but the attribution trail leads to one or more member States.

[5] *Yearbook … 2003*, vol. II (Part Two), p. 18, para. 53.

This example illustrates why the European Commission feels that there is a need to address the special situation of the Community within the framework of the draft articles. One could think of the following ways to accommodate the special situation of the European Community and other potentially similar organizations:

(*a*) Special rules of attribution, so that actions of member States' organs can be attributed to the organization;

(*b*) Special rules for responsibility, so that responsibility can be charged to the organization, even if member States' organs were the prime actors of a breach of an obligation borne by the organization;

(*c*) Consideration of the possibility that the European Community and organizations like it should benefit from a special exception or of a kind of special savings clause for such an organization.

The European Commission would rather not contemplate the last possibility at this early stage. It favours continuing to work for one of the two other solutions.

2. International Criminal Police Organization

Created in 1923, INTERPOL is an international police organization in which 182 countries are represented. It facilitates international police cooperation, and supports and assists all organizations, authorities and services whose mission is to prevent or combat crime. Its headquarters is in Lyon, France. INTERPOL also has five regional bureaux, in Abidjan, Buenos Aires, Harare, Nairobi and San Salvador, a liaison office in Bangkok and a Special Representative accredited to the United Nations. Each INTERPOL country provides a National Central Bureau (NCB) staffed by national law enforcement officers. NCB is the designated contact point for the General Secretariat, regional bureaux and other INTERPOL countries requiring assistance with transborder investigations and the location and apprehension of fugitives.

The intention is to facilitate international police cooperation even where diplomatic relations do not exist between particular countries.

Interpol focuses on three areas, referred to as its core functions:

(*a*) *Secure global police communications services*. The fundamental condition for international police cooperation is for police forces to be able to communicate with each other securely throughout the world. In response, INTERPOL has developed a global police communications system known as I–24/7 (INTERPOL, 24 hours a day, 7 days a week).

(*b*) *Operational data services and databases for police*. Once police can communicate internationally, they need access to information to assist in their investigations or allow them to prevent crime. INTERPOL has therefore developed and maintains a range of global databases, covering key data such as names of individuals, fingerprints, photographs, DNA, identification and travel documents and INTERPOL notices.

(*c*) *Operational police support services*. INTERPOL currently prioritizes crime-fighting programmes on fugitives, terrorism, drugs and organized crime, trafficking in human beings and financial and high-tech crime. Other projects deal with child pornography on the Internet, stolen vehicles, stolen works of art, bioterrorism, police training and cooperation with other international organizations. A further function is to alert police in INTERPOL countries to wanted persons, missing persons, criminal *modus operandi*, etc. via INTERPOL notices. The most widely known of these is the Red Notice, which is an international request for the provisional arrest of an individual, pending extradition. It is based on a valid arrest warrant in the requesting member State. It is not an international arrest warrant. INTERPOL has also created a number of working groups which bring together experts from around the world who specialize in a variety of fields to develop and promote best practice and training in crime investigation and analysis.

INTERPOL is primarily financed by the affiliated countries whose Governments pay annual contributions. The General Assembly is the INTERPOL supreme governing body. It meets once a year to take all major decisions affecting general policy. It is composed of delegates appointed by the Governments of the affiliated countries. Each country represented has one vote, and all votes have equal standing. The Executive Committee verifies the execution of the decisions of the General Assembly and the work of the Secretary-General. It has 13 members: the President (who chairs the Committee), three Vice-Presidents and nine delegates. Members are elected by the General Assembly, should come from different countries and represent their regions. The President and three Vice-Presidents should each belong to a different region. The President is elected for four years and the Vice-Presidents for three. The Secretary General is the organization's chief administrative officer and senior full-time official. The Executive Committee nominates a candidate to serve a five-year term of office who is confirmed by a two-thirds majority of the General Assembly. The Secretary General is responsible for overseeing the day-to-day work of international police cooperation at the General Secretariat, and the implementation of the decisions of the General Assembly and Executive Committee.

3. International Monetary Fund

IMF appreciates being invited to comment on the draft articles and assures the Commission of its continued interest in this important project.

IMF hopes that its general observations, the responses to the questions posed and its comments on the specific draft articles will be helpful to the Commission in its important endeavour and that the Commission will give serious consideration to its concerns in its work.

Furthermore, given the fundamental nature of the issues identified in its general comments, IMF believes it would be apposite if the Commission were to explain its reasons for continuing to rely extensively on the draft articles on responsibility of States for internationally wrongful acts, given the basic differences between States and international organizations and between international organizations *inter se*. As the work of the Commission develops, IMF may feel the need to return to the earlier draft articles and hope that the Commission would be

amenable to receiving additional comments on these provisions. IMF looks forward to its continuing involvement in this project.

4. International Seabed Authority

Having gone through paragraph 25 and chapter V of the Commission report,[6] ISA finds the issue of responsibility of international organizations currently tackled by the Commission not only important but complicated as well. While ISA is willing to contribute to the work of the Commission as much as it possibly can in the future, it would like to reproduce, for the information of the Commission in respect to the scope of its study on the issue, the following relevant provisions under the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area adopted by the ISA Assembly in 2000 (ISBA/6/A/18, annex):

Regulation 35

Proprietary data and information and confidentiality

1. Data and information submitted or transferred to the Authority or to any person participating in any activity or programme of the Authority pursuant to these Regulations or a contract issued under these Regulations, and designated by the contractor, in consultation with the Secretary-General, as being of a confidential nature, shall be considered confidential unless it is data and information which:

(*a*) Is generally known or publicly available from other sources;

(*b*) Has been previously made available by the owner to others without an obligation concerning its confidentiality; or

(*c*) Is already in the possession of the Authority with no obligation concerning its confidentiality.

2. Confidential data and information may only be used by the Secretary-General and staff of the Secretariat, as authorized by the Secretary-General, and by the members of the Legal and Technical Commission as necessary for and relevant to the effective exercise of their powers and functions. The Secretary-General shall authorize access to such data and information only for limited use in connection with the functions and duties of the staff of the Secretariat and the functions and duties of the Legal and Technical Commission.

3. Ten years after the date of submission of confidential data and information to the Authority or the expiration of the contract for exploration, whichever is the later, and every five years thereafter, the Secretary-General and the contractor shall review such data and information to determine whether they should remain confidential. Such data and information shall remain confidential if the contractor establishes that there would be a substantial risk of serious and unfair economic prejudice if the data and information were to be released. No such data and information shall be released until the contractor has been accorded a reasonable opportunity to exhaust the judicial remedies available to it pursuant to Part XI, section 5, of the [United Nations] Convention [on the Law of the Sea].

4. If, at any time following the expiration of the contract for exploration, the contractor enters into a contract for exploitation in respect of any part of the exploration area, confidential data and information relating to that part of the area shall remain confidential in accordance with the contract for exploitation.

5. The contractor may at any time waive confidentiality of data and information.

Regulation 36

Procedures to ensure confidentiality

1. The Secretary-General shall be responsible for maintaining the confidentiality of all confidential data and information and shall not, except with the prior written consent of the contractor, release such data and information to any person external to the Authority. To ensure the confidentiality of such data and information, the Secretary-General shall establish procedures, consistent with the provisions of the Convention, governing the handling of confidential information by members of the Secretariat, members of the Legal and Technical Commission and any other person participating in any activity or programme of the Authority. Such procedures shall include:

(*a*) Maintenance of confidential data and information in secure facilities and development of security procedures to prevent unauthorized access to or removal of such data and information;

(*b*) Development and maintenance of a classification, log and inventory system of all written data and information received, including its type and source and routing from the time of receipt until final disposition.

2. A person who is authorized pursuant to these Regulations to have access to confidential data and information shall not disclose such data and information except as permitted under the Convention and these Regulations. The Secretary-General shall require any person who is authorized to have access to confidential data and information to make a written declaration witnessed by the Secretary-General or his or her authorized representative to the effect that the person so authorized:

(*a*) Acknowledges his or her legal obligation under the Convention and these Regulations with respect to the non-disclosure of confidential data and information;

(*b*) Agrees to comply with the applicable regulations and procedures established to ensure the confidentiality of such data and information.

3. The Legal and Technical Commission shall protect the confidentiality of confidential data and information submitted to it pursuant to these Regulations or a contract issued under these Regulations. In accordance with the provisions of article 163, paragraph 8, of the Convention, members of the Commission shall not disclose, even after the termination of their functions, any industrial secret, proprietary data which are transferred to the Authority in accordance with Annex III, article 14, of the Convention, or any other confidential information coming to their knowledge by reason of their duties for the Authority.

4. The Secretary-General and staff of the Authority shall not disclose, even after the termination of their functions with the Authority, any industrial secret, proprietary data which are transferred to the Authority in accordance with Annex III, article 14, of the Convention, or any other confidential information coming to their knowledge by reason of their employment with the Authority.

5. Taking into account the responsibility and liability of the Authority pursuant to annex III, article 22, of the Convention, the Authority may take such action as may be appropriate against any person who, by reason of his or her duties for the Authority, has access to any confidential data and information and who is in breach of the obligations relating to confidentiality contained in the Convention and these Regulations.

In the draft regulations on prospecting and exploration for *polymetallic sulphides* and *cobalt-rich ferromanganese crusts* in the Area which was submitted by the Legal and Technical Commission of the Authority in 2004 to the Council for its consideration in 2005, similar provisions on confidential data and the obligation of the Authority to protect them are incorporated as well (ISBA/10/C/WP.l, regulations 38–39).

5. World Trade Organization

To the best of its knowledge, the WTO Legal Service has, until now, never been confronted with any formal claim of violation of international law by WTO. As a result, WTO does not feel that it has the experience necessary to make any meaningful comments on the Commission's work at this stage. However, WTO would be grateful if it could continue to be associated with the consultation process in the future.

[6] *Yearbook … 2004*, vol. II (Part Two).

B. Draft article 1. Scope of the draft articles

4. 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.[7]

INTERNATIONAL CRIMINAL POLICE ORGANIZATION

Paragraph 2

Given the proposed definition of the term "international organization", it needs to be determined whether it is appropriate for paragraph 2 to only speak of the international responsibility of a State for the international wrongful act of an international organization. Should draft article 1, paragraph 2, not also cover the responsibility of non-State members for the international wrongful act of an international organization?

As made clear by the second sentence of draft article 2 (Use of terms), "[i]nternational organizations may include as members, in addition to States, other entities". Indeed, international practice confirms that not only States are members of international organizations and, as noted by Brownlie, whilst "organizations are normally composed of states, a number of organizations have operated in effect a functional concept of membership compatible with their special purposes".[8]

INTERPOL is a case in point. Currently, sovereign States as well as non-independent countries, which are self-governing in police matters, are represented in INTERPOL through their police bodies. The situation in INTERPOL conforms to the general view in doctrinal writings that there exists no general rule of international law that bars disaggregated national institutions, non-independent territories,[9] associated States,[10] or other entities from membership in international organizations. Whether they are allowed or not must be determined primarily by the relevant rules of the organization. There are international organizations which expressly allow non-sovereign countries to participate as full members. That is, for instance, the case in some equally functional organizations, such as UPU and WMO. Some trade-related international organizations also allow the membership of non-independent territories. This is true for WTO, for the Agency for International Trade Information and Cooperation, the Advisory Centre on WTO Law and the World Customs Organization. Other functional international organizations also allow participation of non-independent territories. In addition, there are several regional organizations, which also allow non-sovereign countries to become full members. Recently it was confirmed in the Bank for International Settlements (BIS) repurchase of private shares award,[11] that BIS is one example where countries came together and created an international organization, but in which the central banks of the contracting countries, rather than the countries themselves, are members.[12] Similarly, article IV–A of the agreement for the establishment of the Joint Vienna Institute also makes a distinction between the parties to the agreement and the members.[13] The Inter-Parliamentary Union is the international organization of the parliaments of sovereign States. The Union has transformed itself from an association of individual parliamentarians into the international organization of the parliaments of sovereign States. Its members are not the States, but the parliaments of the States.

C. Draft article 2. Use of terms

5. 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.[14]

1. INTERNATIONAL CRIMINAL POLICE ORGANIZATION

According to the first sentence of draft article 2, an international organization is nothing else but a juristic person, which derives its autonomous legal personality not from any national law, but from international public law. That seems to cover the concept of international organization entirely. One wonders whether the second sentence is indeed necessary. As defined by the first sentence, an international organization that does not have members at all could theoretically exist. Is it the intention to exclude organizations which do not have members at all from the application of the rules of responsibility?

2. INTERNATIONAL MONETARY FUND

Although it had previously commented on draft article 2, IMF wishes to highlight a factual error in the earlier commentaries to this draft article and seek clarifications with regard to a related proposition.

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[7] See footnote 5 above.

[8] Brownlie, *Principles of Public International Law*, p. 660. See also Fawcett, "The place of law in an international organization", p. 341.

[9] See Kovar, "La participation des territoires non autonomes aux organisations internationales".

[10] See Igarashi, *Associated Statehood in International Law*, pp. 283–294.

[11] Permanent Court of Arbitration, partial award on the lawfulness of the recall of the privately held shares on 8 January 2001 and the applicable standards for valuation of those shares (22 November 2002) (www.pca-cpa.org).

[12] See Bermejo, "La banque des règlements internationaux: approche juridique", pp. 100–101.

[13] The Joint Vienna Institute is a cooperative venture of six international organizations—BIS, European Bank for Reconstruction and Development, IBRD, IMF, OECD and WTO—and the Government of Austria. It provides training for officials of Central and Eastern European countries, the former Soviet Union and former centrally planned economies in Asia.

[14] *Yearbook ... 2003*, vol. II (Part Two), p. 18, para. 53.

Footnote 46 of the 2003 report,[15] dealing with the definition of international organizations, stated that only international organizations are members of the Joint Vienna Institute, when in fact Austria is now also a member of the Institute.

The same footnote states that the Joint Vienna Institute would not be covered by the draft articles because its membership only comprises international organizations. The reason for this assertion is unclear to IMF. IMF would be grateful if the Commission or the Special Rapporteur could please clarify why membership by only international organizations, in another international organization, would exclude this other organization from being covered by the present draft articles. Further, with regard to the Institute, does membership by one State subject it to being covered by the draft articles, or is membership by more than one State required (since the plural word "States" is used in the last sentence of draft article 2)?

In this connection, IMF would also appreciate some clarification concerning the meaning assigned to the term "State" in these draft articles. The commentary to draft article 2 explained that a State could be understood to include State organs or agencies. Would this reference include agencies that are separate legal entities? For instance, is a State-owned central bank deemed to be a State for the purposes of these draft articles? Would an organization owned by central banks be subject to these draft articles?

D. Draft article 3. General principles

6. 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.[16]

1. International Criminal Police Organization

Please refer to comments contained in section L, below.

2. International Monetary Fund

IMF wishes to highlight that certain statements made in paragraph 72 (2) of the 2004 report[17] and in paragraph (1) of the commentary to draft article 3[18] contain an unsubstantiated and unexplained characterization of fundamental issues, in suggesting that attribution of conduct is not an essential requirement for international responsibility of international organizations.

The commentary to draft article 1 explicitly stated, in paragraph (5), that "international responsibility is linked with a breach of an obligation under international law".[19] It also recognized that international responsibility may "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".[20] If international responsibility necessarily requires the breach of an obligation, then international responsibility for that breach cannot be imputed to a subject of international law, unless the conduct giving rise to the breach is attributable to that subject of international law. IMF knows of no support for the proposition that attribution is not required for the application of international responsibility in such cases.

In the draft articles on responsibility of States for internationally wrongful acts the term "international responsibility" was used to cover "relations which arise under international law from the internationally wrongful act of a State".[21] Admittedly, this statement could be read to mean that the term "international responsibility" might also cover international legal relations which arise from other acts of a State as well (i.e. acts that are not wrongful). However, the draft articles categorically stated that they were not dealing with such primary obligations. On the contrary, "for the purposes of these articles [i.e. on responsibility of States for internationally wrongful acts], international responsibility results *exclusively** from a wrongful act contrary to international law".[22] Further, the draft articles were also explicit in stating that for an internationally wrongful act to occur the conduct in question "must be attributable to the State under international law".[23]

Therefore, even under the present draft articles, the conduct of a State or other organization could only give rise to the responsibility of an international organization if that conduct were attributable to the international organization being held responsible. Even conduct, otherwise not attributable, but acknowledged and adopted by the international organization as its own, becomes attributable to the organization by virtue of such acknowledgement and adoption.[24]

It is therefore surprising that the commentary should now assert that "responsibility of an international organization may in certain cases arise also when conduct is not attributable to that international organization".[25] IMF does not recognize the validity of such a proposition and sees no legal basis on which to accept this statement as

[15] *Ibid*., p. 21.

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

[17] See footnote 6 above.

[18] *Yearbook ... 2003*, vol. II (Part Two), p. 22.

[19] *Ibid*., p. 19.

[20] *Ibid*.

[21] *Yearbook ... 2001*, vol. II (Part Two), p. 33, para. (5) of the commentary to draft article 1.

[22] *Ibid*., p. 32, para. (4) (*c*) of the general commentary.

[23] *Ibid*., p. 34, para. (1) of the commentary to draft article 2.

[24] This is similar to draft article 11 of the articles on responsibility of States for internationally wrongful acts noted by the General Assembly (General Assembly resolution 56/83 of 12 December 2001, annex).

[25] *Yearbook … 2004*, vol. II (Part Two), para. 72 (2).

codifying either a general principle of international law or as representing a proposal for its progressive development.

E. Draft article 4. General rule on attribution of conduct to an international organization

7. Draft article 4, as provisionally adopted by the Commission at its fifty-sixth session, in 2004, reads as follows:

Article 4. General rule on attribution of conduct to 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 as an act of that organization under international law whatever position the organ or agent holds in respect of the organization.

2. For the purposes of paragraph 1, the term "agent" includes officials and other persons or entities through whom the organization acts.

3. Rules of the organization shall apply to the determination of the functions of its organs and agents.

4. For the purpose of the present draft article, "rules of the organization" means, in particular: the constituent instruments; decisions, resolutions and other acts taken by the organization in accordance with those instruments; and established practice of the organization.[26]

1. International Criminal Police Organization

(a) *Paragraph 2*

The INTERPOL reality reveals that an entity can be an organ or agent of both a country and an international organization at the same time. In such case, even if one of its organs or agents is involved in a conduct, that conduct is not always by definition attributable to INTERPOL. That would certainly not be the case if the action concerned is performed in the capacity of local law enforcement authorities. Hence, the rule proposed by the Commission must be qualified in order to express this nuance.

In the case of INTERPOL, any discussion with regard to the attribution of conduct to the organization must take into account article 5 of its Constitution.[27] According to article 5, INTERPOL shall comprise:

— The General Assembly

— The Executive Committee

— The General Secretariat

— The National Central Bureaux

— The Advisers.

The Constitution of INTERPOL further stipulates that, in the exercise of their duties, all members of the Executive Committee shall conduct themselves as representatives of INTERPOL and not as representatives of their respective countries (art. 21). Similarly, the Secretary General and the staff members are declared international officials, who cannot represent nor be given instructions by countries with regard to the exercise of their duties (arts. 29–30).

(b) *Conduct of the National Central Bureaux*

A controversy exists with regard to the question whether the National Central Bureaux mentioned in article 5 are organs of INTERPOL. In an opinion issued in 1980 at the request of the Secretary General of INTERPOL, Reuter assumed the following position, which does not distinguish between attribution of conduct and responsibility:

> The National Central Bureaux are not organs of the organization; their functions are not subject to the provisions of the Constitution; they are not under the authority of the Secretary-General. If a wrongful act, whether national or international, is committed by a National Bureau, it is not ICPO that is responsible but the State under whose jurisdiction that Bureau comes.[28]

Reuter's description in the first sentence of the above quote is not accurate. The Constitution and practice of the organization contain enough indicators which support the view that NCBs are either organs or agents of INTERPOL.[29] It appears from report No. 5 of the Secretary General to the thirty-fourth session of the General Assembly (Rio de Janeiro, Brazil, 16–23 June 1965) that from 1925 through 1927, the notion of NCB referred to national organs responsible for the centralization of documentation and correspondence with foreign entities on police matters. The first NCBs were created between 1927 and 1938. Between 1946 and 1954, NCBs consolidated their pivotal role in the system for international police cooperation and in 1956 the NCB concept was deemed sufficiently solid and clear to be listed in article 5 of the Constitution as part of the structure of the organization. The Secretary General described the NCB as follows:

> An Interpol National Central Bureau is at the national level the correspondent, the representative, the competent responsible authority of the Organization; consequently, it is the national centre for matters of police cooperation.[30]

In addition to the listing in article 5, article 26 (*e*) of the Constitution of INTERPOL stipulates that the General Secretariat must deal exclusively with NCBs as far as concerns questions relative to the search for criminals. More importantly, article 32 requires each INTERPOL country to appoint a body which will serve as NCB. The NCB shall ensure liaison with:

(i) The various departments in the country;

(ii) Those bodies in other countries serving as NCBs;

(iii) The organization's General Secretariat.

NCBs play a pivotal role in the system for international police cooperation set up by INTERPOL. This was made clear during the thirty-fourth session of the General

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[26] *Ibid.*, para. 71.

[27] This provision has the same function as similar provisions in the constitutions of other international organizations, such as, *inter alia*, article XII, section 1, IMF Articles of Agreement; article III, UNESCO Constitution; article 13, UPU Constitution.

[28] "Consultation du professeur Reuter", pp. 60–61.

[29] It should be noted that the English version of the Constitution of INTERPOL does not employ the term "organs", but "body" (e.g. arts. 6, 26 and 29). The French version uses "*organes*", "*organismes*" and "*institutions*". The Spanish version employs "*órganos*" and "*organismos*".

[30] AGN/34/RAP/5, p. 6.

Assembly,[31] when a report entitled " The National Central Bureaus of the I.C.P.O-Interpol: policy" was appended to the General Regulations. In 1994, at the sixty-third session of the Assembly in Rome, 17 service standards for NCBs were adopted as an appendix to the General Regulations.[32] These service standards set out good practice for NCB operations and provided a framework for measuring NCB performance against such good practice. Implementation of these standards is designed to improve mutual assistance and services between NCBs and support for NCBs from the General Secretariat. This supports the view that NCBs are "organs" or "agents" of INTERPOL.

Thus the Constitution of INTERPOL goes beyond that by listing NCBs as components of the structure of the organization. Moreover, it defines their function in relation to the General Secretariat (not in relation to the organization), in relation to the other departments within the countries and in relation to other NCBs. Accordingly, inasmuch that the General Assembly derives its authority to regulate certain aspects of the other components of the structure of the organization, it is also legally authorized by article 44 of the Constitution to adopt rules with regard to NCBs.

Given ICJ case law involving the concept of an "agent" of an organization discussed in the commentary to draft article 4,[33] it must be conceded that NCBs should be deemed to be either organs or agents of INTERPOL as far as concerns the special liaison function conferred on them by the Constitution. However, as mentioned before, that function is subject to the condition of respect for the limits of the laws existing in the different countries (art. 2, para. 1) and the compatibility of the actions of members with the legislations of their countries (art. 31). As a result, INTERPOL never exercises effective control over any NCB. Moreover, the act of actual apprehension of a wanted person or the use of evidence obtained through INTERPOL sources (including criminal analysis produced by the General Secretariat) in national criminal procedures, are actions only national law enforcement authorities can perform, which cannot be said to be based on the rules of INTERPOL. Thus, even if NCBs were to be considered to be either organs or agents of INTERPOL, given the terms of article 32 of the Constitution, in combination with articles 2, paragraph 1, and 31, the conduct of NCBs will normally not be attributed to INTERPOL. The judgment in *Founding Church of Scientology* v. *Donald T. Regan Secretary of the Treasury* contains the following description of the position of NCBs, which partly reflects the foregoing:

> Interpol has established a worldwide communications network, but all actual investigative and enforcement functions are performed by domestic police authorities of participating governments. Each member country designates a national law enforcement agency—the United States has appointed USNCB—referred to as its "national central bureau", to serve as a message and information exchange between that country and Interpol. Official inquiries emanating from law enforcement entities within a member country are channelled through its national central bureau to Interpol, and the route is reversed for responses. The national central bureaus thus serve as transmitters between domestic law enforcers and Interpol, which, in turn, is the conduit of communication among the national central bureaus of different nations.[34]

Obviously, this description incorrectly assimilates the ICPO General Secretariat with the organization as a whole. Nevertheless, it explains correctly that national law enforcement entities remain responsible for the law enforcement actions in their territories.

The ruling in that case also sheds light on the question of how the position of the NCB in relation to the organization should be approached for the purposes of attribution of conduct. This was a ruling on appeal taken from orders of the United States District Court for the District of Columbia, requiring USNCB to disclose documentary materials previously received from foreign police agencies through the INTERPOL General Secretariat concerning the Church of Scientology, under the United States Freedom of Information Act, and to retrieve and index similar documents from the INTERPOL files in France. The United States Court of Appeals held that the Freedom of Information Act empowers United States federal courts to compel disclosure of agency records improperly withheld, but does not confer authority upon the courts to command agencies to take possession or control of records they do not already have.

The key question was therefore whether USNCB and INTERPOL can be assimilated. The United States District Court took the position that USNCB was required to retrieve the sought-after documents from INTERPOL under the section of the Freedom of Information Act providing for search and collection of the requested records from field facilities and other establishments that are separate from the office processing the request. The United States Court of Appeals held differently. It did not agree with that rationale of the District Court. It held that, although USNCB is an affiliate of INTERPOL, it serves only as the United States liaison with the organization; it is neither a branch nor an agent of INTERPOL. It based this characterization on *Mohammad Sami* v. *United States of America*, where it was held that "USNCB acted exclusively as an agent of the national government which created, staffed, financed and equipped it",[35] and that therefore the presence of USNCB in the District of Columbia was not enough to establish a predicate for personal jurisdiction of the District Court over INTERPOL. According to the Court of Appeals, the same reasoning fully applied in the instant case. If USNCB is not sufficiently related to INTERPOL to subject the latter to the jurisdiction of the District Court, surely INTERPOL is a third party from which the NCB cannot be ordered to retrieve documents. Consequently, it overruled the District Court's order requiring USNBC to retrieve and index the documents already forwarded to INTERPOL.

The above assertion that the conduct of an NCB will normally not be attributed to INTERPOL—even if NCBs were to be considered as either organs or agents of INTERPOL—is confirmed by the way in which the European Court of Human Rights, the Inter-American Court of Human Rights, the United Nations Commission

[31] *Ibid*., p. 3.

[32] AGN/63/RES/14.

[33] See footnote 6 above.

[34] United States Court of Appeals, District of Columbia Circuit, 670 F.2d 1158 (31 December 1981).

[35] 617 F.2d 755, at p. 760 (1979).

on Human Rights, as well as ICJ (in the *Yerodia* case),[36] handled complaints involving behaviour of NCBs alleged to be in violation of the fundamental rights of persons sought or apprehended through the INTERPOL system. In all those instances, the actions of NCBs were attributed to their country.

Admittedly, when NCBs populate or use any database of the INTERPOL General Secretariat, this constitutes a typical liaison function contemplated by article 32 (c) of the Constitution of INTERPOL. However, in addition to the conditions of respect for the limits of the laws existing in the different countries (art. 2, para. 1) and the compatibility of the actions of members with the legislations of their countries (art. 31), other important stipulations ensure that such acts cannot be attributed to INTERPOL. Article 5 of the INTERPOL Rules on the processing of information for the purposes of international police cooperation, clearly states that:

a. NCBs (and other authorized entities) remain responsible for the information they communicate through the police information system and which may be recorded in the organization's files;

b. They must take steps to ensure that the information still fulfils the conditions for being processed by the organization;

c. They must take any appropriate steps to ensure the accuracy and relevance of the information and inform the General Secretariat of any change or deletion that needs to be carried out;

d. Prior to the use of any information obtained through the INTERPOL information system, NCBs (and other authorized entities) must check with the General Secretariat and the source of the information to ensure that the information is still accurate and relevant.[37]

The conclusion to be drawn is that, even though NCBs should be classified as organs or at least agents of INTERPOL, whenever they act in their capacity as local law enforcement authorities their conduct cannot normally be attributed to INTERPOL. Hence, the rule proposed by the Commission must be qualified in order to express this nuance.

(c) *Conduct of the General Secretariat: functions conferred by the rules of the organization*

The recommendations mentioned in the annual reports of the Commission for the control of the INTERPOL files, made following an investigation pursuant to individual complaints, confirm that the actions of the General Secretariat with regard to the processing of information are actions of the organization which are deemed to engage the responsibility of the organization.

The authorization of access to the INTERPOL files to third parties by the General Secretariat is also a conduct that is attributable to INTERPOL.

Conscious of the risks involved, articles 2–3 of the INTERPOL Rules on the processing of information for the purposes of international police cooperation, restrict the purposes for which information can be processed by INTERPOL or through its channels to two:

(i) Processing for international police purposes;

(ii) Processing for purposes related to the effective administration of the organization.

Particularly, the processing of nominal data for any other purpose would be *ultra vires*. To ensure that the INTERPOL files remain within the limits of articles 2–3 of its Constitution, article 10 of the INTERPOL Rules on the processing of information for the purposes of international police cooperation sets out the general conditions for the processing of information by the General Secretariat. It mirrors the obligations resting on NCBs contained in article 5. Its provisions impose the obligation on the General Secretariat to verify whether the information that is processed is *intra vires* and otherwise consistent with the rules of INTERPOL.

The *Yerodia* case[38] brought to the fore that when the General Secretariat processes information on a person and issues Red Notices for their arrest, INTERPOL can become involved in situations that are not in conformity with international law. The General Secretariat processes information and issues notices mostly at the request of NCBs. Accordingly, Belgium's request for the search for the Democratic Republic of the Congo's Foreign Minister of the time, Mr. Yerodia, was processed and a Red Notice issued. Belgium's arrest warrant was challenged by the Democratic Republic of the Congo before ICJ. After examining the terms of the arrest warrant, the Court held that its issuance, as such, represented an act by the Belgian judicial authorities intended to enable the arrest on Belgian territory of an incumbent Minister for Foreign Affairs on charges of war crimes and crimes against humanity. The Court noted that the warrant did admittedly make an exception for the case of an official visit by Mr. Yerodia to Belgium and that Mr. Yerodia never suffered arrest in Belgium. The Court considered itself bound, however, to find that, given the nature and purpose of the warrant, its mere issue violated the *erga omnes* immunity which Mr. Yerodia enjoyed as the Democratic Republic of the Congo's incumbent Minister for Foreign Affairs. The Court accordingly concluded that the issue of the warrant constituted a violation of an obligation of Belgium towards the Democratic Republic of the Congo, in that it failed to respect the immunity of that Minister and, more particularly, infringed upon the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law. The Court also found that, as in the case of the warrant's issue, its international circulation from June 2000 by the Belgian authorities, given its nature and purpose, effectively infringed upon Mr. Yerodia's immunity as the Democratic Republic of the Congo's incumbent Minister for Foreign Affairs and was furthermore liable to affect the Democratic Republic of the Congo's conduct of its international relations. The Court concluded that the circulation of the warrant, whether or not it significantly interfered with Mr. Yerodia's

[36] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3.

[37] Article 10 of the Rules contains the corresponding obligations of the General Secretariat.

[38] See footnote 36 above.

diplomatic activity, constituted a violation of an obligation of Belgium towards the Democratic Republic of the Congo, in that it failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo and, more particularly, infringed upon the immunity from criminal jurisdiction and inviolability then enjoyed by him under international law.

Following the ICJ ruling in the *Yerodia* case, the INTERPOL Rules on the processing of information for the purposes of international police cooperation currently contain a specific provision requiring the General Secretariat to verify whether information processed by an NCB or other authorized entity complies with the laws existing in its country and whether it is consistent with the international conventions to which the source country is a party (art. 10.1, para. (*a*) 5). It became necessary to explicate this rule, because in the *Yerodia* case, the General Secretariat issued Red Notices further to Belgian arrest warrants which were later found to be inconsistent with Belgian obligations under international law.

(d) *Paragraph 3*

According to the commentary on draft article 4, paragraph 3,[39] by not making application of the rules of the organization the only criterion for establishing which functions are entrusted to each organ or agent, the wording of said paragraph 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.

The INTERPOL General Secretariat invites the Commission to take the following into account.

As is acknowledged by the Commission, international organizations are governed by the "principle of speciality".[40] This principle poses a bar to what tasks an organization may accept from third parties. It seems to follow from the advisory opinion on *South West Africa—Voting Procedure*,[41] that the principle of *expressio unius est exclusio alterius* applies when an extraconstitutionally conferred power requires an organ to act in a manner which conflicts with the major purpose or fundamental structure of the organization.[42]

In the case of INTERPOL, article 41, fourth paragraph of its Constitution, clearly states that, with the approval of the General Assembly or the Executive Committee, the Secretary General may accept duties which are within the scope of the activities and competence of the organization from other international institutions or organizations or in application of international conventions. This expresses the clear wish not to involve the organization in activities which are beyond its stated mission in article 2 or prohibited under article 3 of the Constitution.

The effect of this provision is not only in the area of the scope of functions that may be accepted, but also that no function can be accepted by the Secretary General, without the approval of the General Assembly or the Executive Committee. The condition of approval by the General Assembly or the Executive Committee ensures that the internal allocation of powers is respected. A "specialization principle"[43] applies in that regard. It means that, as each organ has been endowed by the Constitution with a particular mission or range of special tasks with corresponding explicit means and powers, it would not be compatible with that division of functions among organs, if functions may be considered as being given to an organ or agent even if this could not be said to be based on the rules of the organization.

Another effect of article 41, fourth paragraph, of the Constitution is that the other organs of INTERPOL may not accept duties from third parties. Moreover, article 41, fourth paragraph, of the Constitution implies that the Secretary General cannot accept duties from national governments; he can only accept duties from other international institutions or organizations or in application of international conventions. This is to preserve the international character of the organization, in general, and of the Secretary General, in particular.[44]

Based on the foregoing, the INTERPOL General Secretariat appeals to the Commission to study further the possibility that it wishes to leave open in order to permit that, in exceptional circumstances, functions may be considered as being given to an organ or agent even if this could not be said to be based on the rules of the organization.

2. International Monetary Fund

The first comment on draft article 4 concerns the concept of "agent" that the draft articles and commentary seek to define.

As IMF has previously commented, it considers that only acts of officials performed in their official capacity would be attributable to IMF. An act of another person external to IMF would not be attributable to the organization under general principles of international law, even where they were helping to carry out the functions of IMF, unless IMF exercised effective control over that act or an appropriate organ of IMF ratified or expressly assumed responsibility for that act.

The IMF position is not inconsistent with the three ICJ advisory opinions which are referred to in the commentary to draft article 4.[45] Those were construing a different treaty that is worded differently from the IMF Articles of Agreement. Furthermore, while IMF fully supports the

[39] *Yearbook … 2004*, vol. II (Part Two).

[40] *Ibid*., footnote 299.

[41] *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, Advisory Opinion, I.C.J. Reports 1955*, p. 67.

[42] See, specifically on the application of this maxim to the extra-constitutional conferment of powers, Lauterpacht, "The development of the law of international organization by the decisions of international tribunals", pp. 436–437 and 406.

[43] Bedjaoui, *The new world order and the Security Council: testing the legality of its acts*, p. 12.

[44] See also articles 29–30 of the Constitution of INTERPOL.

[45] *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 4, and *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Order of 14 June 1989, I.C.J. Reports 1989*, p. 9, mentioned in *Yearbook … 2004*, vol. II (Part Two), para. (2); and *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, in *ibid*., para. (3).

results and the reasoning of those advisory opinions, it notes that those opinions were concerned with State obligations to an international organization. Considering that these cases did not concern the responsibility of international organizations and that the Court was construing only one of a multitude of treaties bearing on the responsibility of international organizations, IMF questions the blanket reliance upon those three cases for the unqualified proposition in paragraph (4) of the commentary to the draft article 4 rule that what "was said by ICJ with regard to the United Nations applies more generally to international organizations".[46]

The second comment on this draft article concerns a suggestion implicit in paragraph (7) of the commentary to draft article 4. Paragraph (7) of the commentary suggests that since the discussion of *ultra vires* conduct of an organ is set out in draft article 6, draft article 4 deals with conduct by an organ that is not *ultra vires*, but is still wrongful.

If the conduct of an organ is not *ultra vires*, then that conduct must have been undertaken pursuant to powers expressly provided for in, or necessarily implied from, the organization's charter. To suggest that acts authorized by and consistent with an organization's charter are wrongful suggests that the organization's charter is itself contrary to some higher international obligations. IMF can accept this only in cases involving breaches of peremptory norms of international law, but finds no support for such a proposition with regard to ordinary norms of international law. Accordingly, IMF recommends that the Commission reconsider or provide authority for its suggestion that the acts of organs of an organization that are not *ultra vires* can nonetheless be considered wrongful under ordinary norms of international law.

3. Organisation for the Prohibition of Chemical Weapons

Questions can arise as to whether an alleged practice is an "established practice"[47] of the particular organization. A footnote explaining the circumstances in which an alleged practice would be deemed to be an "established practice", or otherwise, would thus be helpful. For instance, such practice must be consistent with the context of the formal sources of rules enumerated in the provision.

4. United Nations Secretariat

The commentary in chapter V of the Commission's report[48] incorporates some of the comments contained in the Secretariat's letter to the Commission of 3 February 2004, and with one exception the Secretariat has no further comments. In footnote 264, it is suggested that reference also be made to Security Council resolution 1272 (1999), which decided:

> to establish, in accordance with the report of the Secretary-General, a United Nations Transitional Administration in East Timor (UNTAET), which will be endowed with overall responsibility for the administration of East Timor and will be empowered to exercise all legislative and executive authority, including the administration of justice.

F. Draft article 5. Conduct of organs or agents placed at the disposal of an international organization by a State or another international organization

8. Draft article 5, as provisionally adopted by the Commission at its fifty-sixth session, in 2004, reads as follows:

> ***Article 5. Conduct of organs or agents placed at the disposal of an international organization by a State or 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.[49]

1. International Criminal Police Organization

(a) *Seconded officers*

INTERPOL employs a significant amount of seconded officials from national administrations. It can also employ officials loaned by international organizations. During their period of secondment, seconded officials are international officials acting exclusively in the interest of INTERPOL. All seconded officials are subject to INTERPOL Staff Regulations and Staff Rules, and to the Staff Instructions by the Secretary General, under whom they are placed and to whom they are responsible during their secondment. Therefore, on taking up their duties, they sign a declaration of loyalty to INTERPOL.

As, according to the INTERPOL rules, seconded officials are *de facto* and *de jure* staff members, the attribution of their conduct would be covered by draft article 4, and not by draft article 5.

(b) *Liaison officers of other international organizations*

It would appear that the situation with regard to liaison officers from other international organizations, placed at the General Secretariat, requires consideration. It is not entirely clear whether it is the intention for draft article 5 to cover such situations. If so, the INTERPOL General Secretariat would like to petition the Commission to take the following consideration into account.

Liaison officers are exchanged pursuant to cooperation agreements with other organizations. Thus, in the cooperation agreement between the European Police Office (Europol) and INTERPOL, parties agree that the cooperation as laid down in the cooperation agreement may be enhanced through either or both parties stationing (one or more) liaison officer(s) with the other. The liaison officers' tasks, rights and obligations as well as details regarding their stationing will be laid down in a memorandum of understanding to be concluded between the Director of Europol and the Secretary General of INTERPOL. The parties will arrange for all necessary facilities, such as office space and telecommunications equipment, to be provided to such liaison officers within their premises. The costs of telecommunication shall be borne by

[46] *Yearbook … 2004*, vol. II (Part Two), para. (4) of the commentary to article 4.

[47] *Ibid*., art. 4, para. 4.

[48] *Ibid*.

[49] *Ibid.*, para. 71.

the sending party. The archives of the liaison officer shall be inviolable from any interference by the other party's officials. These archives shall include all records, correspondence, documents, manuscripts, computer records, photographs, films and recordings belonging to or held by the liaison officer. Each party shall permit the liaison officer of the other party, within its own premises, to communicate freely for all official purposes and protect his right to do so. The liaison officer(s) shall have the right to use codes and to dispatch and receive official correspondence and other official communications by courier or in sealed bags, subject to the respective privileges and immunities applicable. Each party shall ensure that its liaison officer(s) has speedy access to its own information, which is necessary to fulfil his tasks while stationed at the other party.

The foregoing supports the view that liaison officers of other international organizations are neither officers of INTERPOL, nor are they placed at the disposal of INTERPOL. It follows from this that the conduct of those liaison officers must be attributed to the organization they represent under draft article 4.

(c) *National officers made available to incident response teams*

During the last two years, INTERPOL has sent 13 incident response teams to 12 different countries. Assume that there is a major criminal incident or that terrorists strike somewhere in the world. INTERPOL will offer to send a team to the site of the attack in order to provide support to the INTERPOL country concerned and to ensure that wanted persons notices are issued, databases are checked, relevant warnings are issued and analytical reports are generated where appropriate.

Obviously, as long as such incident response teams consist of INTERPOL General Secretariat staff, no issue would arise under draft article 5. However, several of the incident response teams included national officers lent to INTERPOL for a particular mission. In such cases, should those officers qualify as agents of INTERPOL within the meaning of draft article 4, or do the draft articles consider them as agents placed at the disposal of INTERPOL, within the meaning of draft article 5?

2. International Monetary Fund

As noted above, IMF agrees that attribution should be determined as in draft article 5, by the factual question of effective control over the conduct, regardless of whether the conduct was requested or authorized by another person.

G. Draft article 6. Excess of authority or contravention of instructions

9. Draft article 6, as provisionally adopted by the Commission at its fifty-sixth session, in 2004, reads as follows:

Article 6. Excess of authority or contravention of instructions

The conduct of an organ or an agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in that capacity, even though the conduct exceeds the authority of that organ or agent or contravenes instructions.[50]

1. International Criminal Police Organization

As explained in paragraph (3) of the commentary on draft article 6, the wording of draft article 6 closely follows that of article 7 of the draft articles on responsibility of States for internationally wrongful acts. In paragraph (1) of the commentary, it is stated that the draft article covers both the situation of excess of authority or contravention of instructions by an organ or agents as well as when the act exceeds the competence of the organization. The INTERPOL General Secretariat wonders whether the notion expressed there is suitable for international organizations. Indeed, none of the examples derived from the practice of international organizations mentioned by the Commission involve a case of attribution of conduct that exceeds the area of competence of an organization.

To the extent that draft article 6 deals with situations where organs or agents act *ultra vires* by disregarding the internal division of function between the organs (usurpation of powers), but does not exceed the competence of the organization, the proposed rule is understandable. However, when the *ultra vires* act exceeds the competence of the organization, the proposed rule becomes less persuasive.

Article 7 of the draft articles on responsibility of States for internationally wrongful acts departs from the premise that States possess general competence. Hence, in the case of States, the "principle of speciality"[51] does not play any role in article 7 of the articles on the responsibility of States. However, as the Commission acknowledges, international organizations do not, unlike States, possess general competence. They are governed by the "principle of speciality", which means that they are invested by their creators with powers, the limits of which are a function of the common interests whose promotion those creators entrust to them.

It is clear from the principle of speciality—as applied by ICJ—that an organization can only claim entitlements and exercise procedural rights before international tribunals, to the extent and as long as the organization remains within its statutory area of competence. Logically, it also follows that international organizations cannot be held responsible for actions outside their area of competence, without any qualification.

The INTERPOL General Secretariat therefore invites the Commission to consider adding a paragraph to draft article 5. Such provisions could possibly use some inspiration derived from article 46 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter the 1986 Vienna Convention). Under article 46, paragraph 2, of this Convention, an

international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the

[50] *Ibid.*

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

organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.

A violation is manifest if it were objectively evident to any State or any international organization conducting itself in the matter in accordance with the normal practice of States and, where appropriate, of international organizations and in good faith (art. 46, para. 3).

Transgression of an organization's mandate would qualify as objectively evident to any country or any international organization conducting itself in the matter in accordance with the normal practice of countries and, where appropriate, of international organizations and in good faith.

2. International Monetary Fund

While IMF agrees with the principle that an international organization may be bound, as to innocent third parties, by an *ultra vires* act of an organ or official, it believes article 6 should take account of one key exception, drawn from municipal law, which excuses the attribution of an agent's *ultra vires* conduct to the principal in cases where the injured party was (*a*) on actual or constructive notice about the *ultra vires* nature of the conduct and (*b*) participated in such conduct. IMF believes this principle should be considered to be an exception to the provisions of draft article 6.

H. Draft article 7. Conduct acknowledged and adopted by an international organization as its own

10. Draft article 7, as provisionally adopted by the Commission at its fifty-sixth session, in 2004, reads as follows:

Article 7. Conduct acknowledged and adopted by an international organization as its own

Conduct which is not attributable to an international organization under the preceding draft articles shall nevertheless be considered an act of that international organization under international law if and to the extent that the organization acknowledges and adopts the conduct in question as its own.[52]

International Criminal Police Organization

Here also, the principle of speciality would justify the consideration of a qualifying provision. It is not obvious that the *EC-Computer Equipment* case[53] can properly be adduced in support of the principle that draft article 7 purports to articulate. In that case, the European Community argued that the action in question was that of the European Community and that therefore the United States of America sued the wrong party, because the alleged breach was an obligation of the Community, not of its members. In the event, that was also how that case was treated.[54] But even if the statement quoted by the Commission could be considered an example of acknowledgement, it should be kept in mind that the Community based its assertion on the fact that the Community has the exclusive competence in matters of tariff concessions and customs classification. Leaving aside the question of which would be the organ competent to acknowledge and adopt, the foregoing would support the view that only conduct acknowledged and adopted by an international organization, which is *intra vires*, can be attributed to an organization under draft article 7.

I. Reference to the "rules of the organization"

Democratic Republic of the Congo

In line with the meaning of article 2, paragraph 1 (*j*), of the 1986 Vienna Convention (" ' rules of the organization' means, in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization"), a general rule on attribution of conduct to international organizations should in principle contain a reference to the "rules of the organization".

This position is based on the principle of speciality governing international organizations and on the principle that the organization's international legal personality cannot be asserted *vis-à-vis* third States. Given that the international organization is founded on a treaty which itself is of relative effect (*res inter alios acta*), its existence as an autonomous entity cannot theoretically be asserted *vis-à-vis* third States to that treaty. Moreover, organizations may exercise the legal powers vested in them only within the limits and for the fulfilment of the mandate set out in their constituent instrument.

J. Definition of "rules of the organization"

Democratic Republic of the Congo

The Democratic Republic of the Congo is of the opinion that this definition is adequate.

However, as regards the conduct of organs of an international organization, the Democratic Republic of the Congo would like the Commission to examine in depth the treatment that should be given to the draft articles on organs established under bilateral agreements concerning the joint management of transboundary natural resources, such as transboundary watercourses, protected areas, etc.

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

Democratic Republic of the Congo

It is a fact that any action or omission by an organization that is incompatible with the rules of general customary law or the provisions of a treaty to which it is a party constitutes an internationally wrongful act that will be attributable to that organization.

Indeed, Article 24 of the Charter of the United Nations confers "on the Security Council primary responsibility for the maintenance of international peace and security". In carrying out this weighty responsibility, the Council acts on behalf of the States Members of the Organization, which constitutes a true delegation of power.

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[52] *Yearbook … 2004*, vol. II (Part Two), para. 71.

[53] WTO, "European Communities—customs classification of certain computer equipment: report of the panel (WT/DS62/R, WT/DS67/R and WT/DS68/R of 5 February 1998).

[54] See Martha, "Capacity to sue and be sued under WTO law", pp. 41–42.

In the absence of an "international army", as provided in Article 43 of the Charter of the United Nations, the Security Council itself cannot undertake an operation of military coercion within the meaning of Article 42. However, it alone can and must lend its authority, pursuant to Article 39 or Article 42 *in fine*, to measures taken by Member States to give effect to its decisions. Specifically, Article 42 of the Charter may be implemented in two ways: either through the contribution of an armed force that depends directly or exclusively on the Security Council or through the creation of an army consisting of national contingents and placed under United Nations command.

In principle, the conduct of peacekeeping forces is in both cases attributable to the United Nations, as the Security Council has authority over national commands and the soldiers themselves receive orders only from national commands.

It is also important to stress that Article 47 of the Charter of the United Nations

> established a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament.

Indeed, article 39 of the General Principles governing the Organization of the Armed Forces made available to the Security Council by Member Nations of the United Nations provides as follows:

> The command of national contingents will be exercised by Commanders appointed by the respective Member Nations. These contingents will retain their national character and will be subject at all times to the discipline and regulations in force in their own national armed forces.[55]

Thus, if crimes committed during peacekeeping operations are defined as crimes under the Rome Statute of the International Criminal Court, while the United Nations may be held financially responsible for damages caused by the armed forces responsible, their criminal responsibility would be governed either by the Rome Statute or by national laws.

However, given the special nature of these missions, the Democratic Republic of the Congo believes that the Commission should continue its work with a view to making the necessary adjustments to the regime governing the responsibility of peacekeeping operations.

It nonetheless suggests that this type of responsibility should be regulated through practical arrangements between the United Nations and host countries (such as the agreement between the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) and the Government of the Democratic Republic of the Congo) on possible damages caused by the activities of peacekeeping forces in their respective territories.

[55] Report by the Military Staff Committee (S/336 of 30 April 1947).

L. Breaches of obligations of an international organization towards its member States or its organs: scope of study

1. European Commission

With regard to question (*a*)[56] whether the International Law Commission should consider in its study breaches of obligations that an international organization may have towards its member States or its agents, the European Commission would counsel for caution not to overburden the project. In its view, the relationship between an organization and its member States or agents is foremost governed by the rules of the organization. These rules do not only define the conditions under which an obligation of the organization may arise (primary rules). Often these internal rules would also set up a special system of responsibility (secondary rules). Even if the International Law Commission attempted to address only relevant secondary rules, it would have to undertake an in-depth study of these in order to find out whether these rules completely govern the subject matter as *leges speciales* or whether there would be room for useful residual general rules. In the framework of the European Community, it should be kept in mind that the scope of Community obligations both *vis-à-vis* its member States under article 10 EC of the Treaty establishing the European Community and *vis-à-vis* its agents under the staff regulation adopted under article 282 EC of the Treaty is vast and raises complex legal questions not apt for the present codification project.

2. International Criminal Police Organization

(a) *The essential difference with the law of State responsibility*

The issue of whether the Commission should include the rules of international organizations in the scope of its work calls for some comments regarding an important difference between the law of State responsibility and the law of responsibility of international organizations.

As confirmed by PCIJ in the *Certain German Interests in Polish Upper Silesia* case, "municipal laws, including the national constitutions, are, from the standpoint of international law and of international tribunals, merely facts which express the will and constitute the activities of States".[57] However, as was recently illustrated in the BIS repurchase of private shares award,[58] the situation of international organizations is totally different. Issues implicating the "organic principles or internal governance" of international organizations "are governed by international law".[59] The obligations resting upon international organizations by virtue of their constituent instruments and the secondary law of international organizations are international legal norms in the same way as the obligations from the treaties to which an organization may be a party and other applicable rules of customary

[56] See footnote 3 above.

[57] *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, p. 19.

[58] Permanent Court of Arbitration (see footnote 11 above).

[59] *Ibid*., para. 123.

international law.[60] Simply, there cannot exist an internal legal order of international organizations which is autonomous from the law to which it owes its existence. It is therefore difficult to conceive a study of the responsibility of international organizations which disregards the responsibility because of breaches of the rules of international organizations. This is not to say that the study should cover the relations between organs of the organization. The rules of the organizations are only relevant to the law of international responsibilities as far as they relate to the relations governed by international law between the international organization as an international legal person and third parties, whether these are States, other international organizations, other entities, or natural persons.[61]

The constituent instruments of international organizations, which are embodied in international agreements, are, according to ICJ, multilateral treaties, albeit of a particular type.[62] One of these particularities is that those constituent instruments create new subjects of law endowed with a certain autonomy. Based on this autonomy, the new subject can act or omit to act in a way that is in breach of both its constituent instrument and the secondary law under the instrument from which it derives its legal existence, or general international law and particularly international law applicable to international organizations. This assertion is based on the following statement by ICJ:

> International organizations are subjects of international law and, as such, are bound by any obligation incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.[63]

Thus, unlike when States breach their own domestic law, any breach of its own rules by an international organization is by definition a breach of an international obligation of the organization, within the meaning of draft article 3, paragraph 2 (*b*). The existence of such a breach can give rise to the responsibility of organizations towards third parties.

(b) *The international character of staff relations*

As regards the responsibility of international organizations in relation to their staff members, it should be recalled that administrative tribunals have continuously emphasized the independence of international organizations, which entails that international organizations are not subject to the laws of another international organization or to any national law. In the specific situation of INTERPOL, in a case where the applicant invoked both the law of other organizations as well as the law of one country, the ILO Administrative Tribunal ruled that INTERPOL was an international organization and not subject to any national law and that "Interpol is an independent international organization; the parties cite no agreement and do not even mention the existence of any co-ordinating body that would warrant comparison; and even if the plea succeeded it would not mean quashing the impugned decisions anyway".[64]

One consequence of this independence is that the relationship between international organizations and their staff is inherently international. Accordingly, any national court would lack jurisdiction *rationae personae* and *rationae materiae* to deal with staff disputes of international organizations.[65] In the case of INTERPOL this is expressly stated in article 30 of its Constitution. Accordingly, when staff members invoke the responsibility of an international organization, tribunals also look at the constituent instrument and the decisions and practice of the organization concerned, in order to determine the responsibility of the organization. The decision of the World Bank Administrative Tribunal in the *de Merode* case constitutes an instructive example. In that case, the Tribunal looked at the constituent instrument of the World Bank, its by-laws and certain manuals, notes and statements issued by the management as well as certain other sources, including general principles, in order to adjudicate the case.[66]

(c) *Actions affecting private parties*

The rules of the organization can also play a determining role in defining the responsibility of an international organization in relation to private parties. The BIS repurchase of private shares award[67] illustrates this point very clearly. In that case, the arbitral tribunal subscribed to the view that, in order to establish whether the international organization concerned committed a wrongful act against its private shareholders, it was necessary to examine the consistency of the act under the constituent instruments as well as under the principles of international law that might apply. Accordingly, the tribunal first answered the question as to whether the amendment of the constituent instrument, which eliminated the possibility of private shares in the organization, was consistent with the rules of the organization. Only after answering that question affirmatively, the tribunal examined whether the repurchase of the shares took place in a way consistent with the international law rules concerning expropriation and compensation, the human right principle of peaceful enjoyment of property and the principle of non-discrimination.

It would therefore be very useful if a definition of an internationally wrongful act were provided that also encompassed breaches by an international organization of its own rules. This is all the more necessary as there exist international organizations whose rules impose standards of treatment on the organization as such (thus not obligations on any particular organ), whose purpose is to protect

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[60] See Amerasinghe, *Principles of the institutional law of international organizations*, p. 326.

[61] See Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens*, pp. 22–30.

[62] See, for example, *I.C.J. Reports 1996* (footnote 51 above), pp. 74–75; see also for an extensive examination of ICJ case law prior to 1996, Sato, *Evolving constitutions of international organizations: a critical analysis of the interpretative framework of the consituent instruments of international organizations*.

[63] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, pp. 89–90, para. 37.

[64] Seventieth Session, Judgment 1080, consideration 12 (29 January 1991).

[65] See Seidl-Hohenveldern, *Avis concernant l'incompétence des tribunaux nationaux pour régler des litiges opposant l'Organisation internationale de police criminelle-Interpol à ses agents* (26 May 1986).

[66] World Bank Administrative Tribunal (5 June 1981), *De Merode and others* v. *The World Bank*, decision No. 1.

[67] See footnote 11 above.

subjective rights of third parties, or whose operations affect third parties adversely.

In the case of INTERPOL, article 2, paragraph 1, of the Constitution requires the organization to respect the spirit of the Universal Declaration of Human Rights in all its actions. This provision is unique to INTERPOL,[68] and imports the totality of the rights listed in the Universal Declaration and their elaboration in various human rights instruments into the rules of INTERPOL. The organization has therefore taken several initiatives to promote the observance of human rights in its various fields of activities.[69]

INTERPOL must also respect human rights in its own operations. As one of its main activities consists of the processing of information for the purpose of international police cooperation, INTERPOL activities come within the range of the privacy of persons protected by the fundamental right enshrined in article 12 of the Universal Declaration of Human Rights. *Steinberg* v. *International Criminal Police Organization*[70] is a case in point. This case involved a United States citizen, who was the subject of an INTERPOL notice describing him as a wanted international criminal who used the alias "Mark Moscowitz". On learning that the INTERPOL General Secretariat was circulating the notice through its network, he notified the General Secretariat twice and offered proof that the notice was erroneous. He alleged that despite the proof offered, the General Secretariat continued to publish the notice and other statements associating him with "Mark Moscowitz" for over a year until, according to the complainant, it conceded that this association was erroneous. Steinberg sought general punitive damages for substantial injury he alleged he had suffered as a result of the organization's purportedly defaming notice.

The issue of the responsibility towards third parties for the breach of article 2 of the Constitution of INTERPOL lies at the root of the Supervisory Board for the Control of INTERPOL's Archives (currently referred to as the Commission), which came into being when INTERPOL renegotiated its headquarters agreement with France.

France claimed that the law of 6 January 1978 concerning information technology, files and freedoms was applicable to the nominal data stored at INTERPOL premises. Consequently, France argued that natural persons should have access to data concerning them, a right which could be exercised through the Commission nationale de l'informatique et des libertés, which was set up in application of the above-mentioned law and given powers to control computerized files in France.

INTERPOL argued that this law should not be applicable to the police information processed by the General Secretariat for the following two reasons:

(i) Information sent in by INTERPOL countries does not belong to INTERPOL, which merely acts as a depository; applying a national law to such information would give that law an extraterritorial status;

(ii) Applying the law of 1978 to INTERPOL files in France could hamper international police cooperation, since certain countries would prefer not to communicate police information which could be disclosed to French bodies.

Much was clearly at stake for both parties. France was unwilling to strengthen INTERPOL status on its territory without some kind of guarantee concerning the processing of personal data protected by the law of 1978, and the organization was keen to ensure the smooth functioning of international police cooperation through its channels.

These conflicting views were reconciled as a result of both parties' commitment to data protection, both in order to protect international police cooperation and to protect individual rights (article 2 of the Constitution of INTERPOL states that its action is carried out in the spirit of the Universal Declaration of Human Rights).

The consensus was made official on 3 November 1982 with the signing of a new Headquarters Agreement between France and INTERPOL, which came into force on 14 February 1984 and to which an exchange of letters is appended. These texts form the basis of the system for the control of INTERPOL files.

By signing the text, France agreed not to apply the law of 1978 to INTERPOL files. The Headquarters Agreement guarantees the inviolability of INTERPOL archives and official correspondence (arts. 7 and 9) and provides for internal control of INTERPOL archives by an independent body rather than by a national supervisory board (art. 8).

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[68] But see Waldock, "General course on public international law", pp. 198–199, on how the Universal Declaration became accepted as part of the "law of the United Nations".

[69] At its eighteenth session in Berne, in 1949, the INTERPOL General Assembly adopted resolution No. 3, which laid down that "all acts of violence or inhuman treatments, that is to say those contrary to human dignity committed by the police in the exercise of their judicial and criminal police duties, must be denounced to justice". The resolution also recommended that "in all the police training schools, special importance be attached to the complete recognition of the right of all persons, suspected of an infringement of the penal law, or any other persons, to receive a fair and humane treatment". This resolution was followed, at the forty-fifth Assembly session (Accra, 1976), by the presentation of report No. 20 on the work of the United Nations concerning the preparation of a code of conduct for law enforcement officials. More recently, resolution No. AGN/63/RES/16, adopted by the Assembly at its session in Rome (1994), recommended that the organization's members encourage the adoption of measures to ensure that training on human rights was provided in police colleges. A circular letter was subsequently sent asking INTERPOL countries to keep the General Secretariat informed of all developments concerning the implementation of this resolution. It should also be pointed out that INTERPOL works in close cooperation with the United Nations Commission on Human Rights; the Commission consults INTERPOL about the texts it adopts. A number of international instruments have also been adopted, in order to give practical expression to the Universal Declaration of Human Rights and form a corpus of international criminal law by defining crimes which constitute infringements of human rights. In the application of article 2 of its Constitution, the organization follows the norms set out in such texts and has always recommended that its member States ratify these international instruments.

[70] United States Court of Appeals, District of Columbia (23 October 1981), 672 F.2d 927; 217 U.S. App. D.C. For a discussion of this case, see Reinisch, *International Organizations Before National Courts*, pp. 28, 50, 152 *et seq*. and 170.

In accordance with the exchange of letters between INTERPOL and the French authorities, which invites INTERPOL to set up a Supervisory Board and define its function, the organization adopted the Rules on International Police Co-operation and on the Internal Control of INTERPOL's Archives in 1982. The purpose of these Rules, as stated in article 1, paragraph (2), is "to protect police information processed and communicated within the ICPO-Interpol international police cooperation system against any misuse, especially in order to avoid any threat to individual rights".[71] This is the text which set up the Board whose English name was changed to the present "Commission for the Control of INTERPOL's Files" in 2003.

INTERPOL developed an elaborate regime to ensure that its processing of information for the purpose of international police cooperation does not wrongfully encroach on the privacy of persons.[72] The question is whether in cases where a breach nevertheless occurs, such a breach comes within the scope of draft article 3, paragraph 1.

If the answer is positive, which seems to be the case, this should be made clear somewhere. As said before, the rules of the organization are by definition international. Therefore it seems that the law of obligations cannot validly make a distinction between obligations resulting from external engagements and obligations resulting from the internal rules of the organization. Rather, it would seem that the responsibility will be determined by the substance of the obligation that is breached. If the purpose of the obligation is to protect the subjective rights of third parties, the consequences of breaches cannot be governed by anything other than the law of responsibility for acts that are wrongful under international law.

INTERPOL acts under the same assumption, as far as it concerns the precepts of article 3 of its Constitution. Although not directly phrased as a standard of treatment of private parties, failure to comply with article 3 can have major repercussions for the person on whom INTERPOL keeps nominal data processed or is the target of diffusion through the INTERPOL network of a Red Notice. Article 3 bars INTERPOL from engaging in "activities of a political, military, religious or racial character".[73]

On a daily basis, the INTERPOL Office of Legal Affairs, one way or the other, becomes involved with issues raised either by law enforcement bodies urging the General Secretariat to assist in the search for a certain person or by parties who are dissatisfied with the fact that INTERPOL has opened a file on them, which in many cases also includes an international wanted notice, the famous Red Notices. The Office, as well as the Commission for the Control of INTERPOL's Files, must frequently also deal with challenges by individuals regarding the services rendered by the Secretariat to the affiliated countries, when it affects such individuals. Typically, an individual would claim that he is being wanted for the reasons mentioned in article 3 of the INTERPOL Constitution, and that therefore INTERPOL should not assist the requesting country.

These complaints become all the more adamant when the subject of an INTERPOL police file or wanted notice experiences hindrance in his or her international mobility, such as the rejection of a request for a visa, denial of a landing, and expulsion or deportation. Sometimes these hindrances are alleged to cause damages because of missed business opportunities.

In practice individuals often claim that, based on article 3 of the INTERPOL Constitution, they have a right to be protected against INTERPOL assistance to the prosecution of "political offences". Whenever INTERPOL is persuaded that its cooperation to apprehend a certain person is not in conformity with the foregoing, it must cease its cooperation with the requesting country on the file

[71] Fooner, *Interpol: Issues in World Crime and International Criminal Justice*, appendix E, p. 217.

[72] Rules on the processing of information for the purposes of international police co-operation, adopted by the INTERPOL General Assembly at its seventy-second session (Benidorm, Spain, 2003). The current rules replace the rules that have evolved since 1982. In 1982, at its fifty-first session (Torremolinos, Spain), the Assembly adopted the "Rules on International Police Co-operation and on the Internal Control of INTERPOL's Archives" (resolution AGN/51/RES/1), which provide, *inter alia*, that information shall be processed "in an electronic data processing system consisting of a processing centre installed at the General Secretariat". In 1987, at its eighty-fourth session (Saint-Cloud, France), the Executive Committee adopted the "Rules on the Deletion of Information held by the General Secretariat", having been delegated by the Assembly at its fifty-fifth session, held in Belgrade (resolution AGN/55/RES/2). In 1990, at its fifty-ninth session (Ottawa), the Assembly adopted the "Rules governing the Database of Selected Information at the ICPO-INTERPOL General Secretariat and Direct Access by NCBs to that Database" (resolution AGN/59/RES/7). In 1996, 1998 and 2000, at its sixty-fifth session (Antalya, Turkey), sixty-seventh session (Cairo) and sixty-ninth session (Rhodes, Greece), the General Assembly adopted three resolutions, respectively on "ACIU [Analytical Criminal Intelligence Unit] and crime analysis" (AGN/65/RES/16), "INTERPOL's crime analysis training strategy and programme" (AGN/67/RES/9) and the "Development of a strategic criminal intelligence capability at the INTERPOL General Secretariat" (AGN/69/RES/4).

[73] Article 3 of the INTERPOL Constitution has a specific historical background. In the immediate post-war period, the INTERPOL predecessor, the International Criminal Police Commission (ICPC), adopted a position of neutrality by refusing to become involved in cases of a political, religious or racial nature. In his opening speech to the Brussels Conference in June 1946, President Louwage said that by scrupulously adhering to that principle, ICPC had succeeded in gaining the respect of administrative and judicial authorities in all member countries. This position was also in keeping with the development of extradition law—both national and international—during the nineteenth and early twentieth centuries and, in particular, with the concept of "political offence". Despite the fact that the ICPC statutes adopted in 1946 contained no provisions limiting the scope of the organization's action in cases of a political, racial or religious nature, in practice, the organization maintained its position. In 1948, the phrase "to the strict exclusion of all matters having a political, religious or racial character" was added to the end of article 1, paragraph (1), of the statutes. The then Secretary General of ICPC described the lack of any formal provision on the matter as a "serious omission". In his report to the General Assembly, he stated that "the strict limitation of our action within the realm of common law [sic] has enabled us to extend the influence of the ICPC without opposition, and we consider that its future hangs largely on the strict observance of this neutrality". Thereafter, article 1 read as follows:

> "The purpose of the International Criminal Police Commission is to ensure and officially promote the growth of the greatest possible mutual assistance between all criminal police authorities, within the limits of the laws existing in the different States, to establish and develop all institutions likely to contribute to an efficient repression of common law crimes and offences, to the strict exclusion of all matters having a political, religious or racial character."

In 1956, when the Constitution of INTERPOL was being drafted, this provision was taken up and became what is now article 3: "It is strictly forbidden for the Organization to undertake any intervention or activities of a political, military, religious or racial character".

and cancel any request to its membership for cooperation with regard to information on or the capture of the person in question. INTERPOL may also temporarily cease, i.e. suspend, the cooperation with the requesting member on the file, if it has reason to believe that the requested assistance is possibly not in conformity with the above prescriptions of the Constitution.

As said before, it would therefore be very useful to provide a definition of an internationally wrongful act that also encompasses breaches by an international organization of its own rules.

(d) *Actions affecting countries and other international organizations*

In the INTERPOL set-up, it can also happen that an organ acts in violation of a rule of an organization that has been designed in order to protect the interest of the INTERPOL countries. In this regard, it is important to note that INTERPOL rules on the processing of police information balance the requirements of international police cooperation against the need to protect data and individuals' basic rights in conformity with articles 2–3 of the Constitution. Therefore, the following two fundamental principles have been taken into consideration during preparation of the aforementioned rules: respect for national sovereignty and recognition of the key role played by the National Central Bureaux, contemplated in article 32 of the INTERPOL Constitution.

Thus the relevant provision in the rules sets out the obligations incumbent upon the entities of the INTERPOL countries that communicate information to the INTERPOL General Secretariat, with a view to processing that information within the cooperation system set up by INTERPOL. This serves as a reminder of the obligation to respect the purposes for which information is processed (these purposes being based on the provisions of articles 2–3 of the organization's Constitution) and the main obligation to provide accurate information and ensure that it is updated whenever necessary.

Respect for national sovereignty is expressed in the ownership of the information supplied to INTERPOL by INTERPOL countries, through their National Central Bureaux and other authorized entities. Lastly, the relevant provision in the rules states that the entities communicating items of information may, at any time, restrict access rights to that information. In this connection, the relevant provision in the rules lays down the procedures for informing entities which have communicated information whenever a new entity may become a recipient of the said information. This enables the source of the information to decide whether the new entity may have access to the information it has communicated.

The rules impose on the INTERPOL General Secretariat the obligation to ensure that the processing of information through the channels of the organization is in conformity with the condition stipulated and only for the authorized purposes. Failure by the INTERPOL General Secretariat to observe the rules that have been designed to protect the interests of INTERPOL countries could engage INTERPOL responsibility, even though the rule pertains to the internal legal order of the organization. Accordingly, the dispute settlement mechanism contemplated in article 23 of the INTERPOL Rules on the processing of information for the purposes of international police cooperation, is partly premised on the assumption that the entities through which the INTERPOL countries act with regard to the processing of information for international policing purposes, should have a remedy against INTERPOL.

3. International Monetary Fund

The draft articles should clearly state that relations between an international organization and its members and agents that are covered under the organization's charter are outside their scope. Such relations are governed by the rules of each organization.[74] When an international organization acts in accordance with its charter, it would not be subject to responsibility for doing so under general international law principles (that are implicitly referred to but not set forth in the substance of the draft articles), but its responsibility must be determined under its own charter.

The reasons for these conclusions are related to the nature of the rules of international organizations, and to the differences between States and international organizations and among international organizations.

The rules of an international organization, such as IMF, are both internal in scope and international in nature. They are internal in scope because they govern relations between the organization and its members, among the members (in their capacity as members) and between the organization and its organs and agents. They are international in nature because they have been agreed to by treaty among the organization's member States[75] or have been developed pursuant to such agreement. For this reason, it would be inappropriate to treat the rules of an international organization as equivalent either to domestic law or as subordinate to general rules of international law, in the sense in which those terms are used with reference to States.[76] Therefore, as a body of law, the rules of international organizations are *sui generis*.

It should also be recognized that the rules of an organization are *lex specialis* as between the organization and its members and agents and among its members. It is therefore not possible to suggest, as has been done in the commentary to draft article 3, that in some cases (other than involving obligations of a peremptory nature) general international obligations might prevail over the rules of

[74] Furthermore, in some international organizations the members have agreed to an exclusive mechanism to determine the scope of obligations under the organization's charter. For IMF, article XXIX of the Articles of Agreement provides such an exclusive mechanism.

[75] On the issue of organizations created by other international organizations, or whose members are international organizations, please see the comments on draft article 2, below.

[76] This treatment, with which IMF does not agree, has been attempted in the commentary to draft article 3 (*Yearbook ... 2003*, vol. II (Part Two), pp. 22–23).

an organization.[77] Such a suggestion ignores the international agreements between the organization's members regarding the exclusive application of the laws governing their relations and it suggests that *lex generalis* prevails over *lex specialis*.

In addition, international law recognizes that international organizations are "unlike States" in that they "do not … possess a general competence".[78]

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.[79]

Therefore, for international organizations, international responsibility must depend upon the organizations' purposes and functions as specified or implied in their constituent documents and developed in practice.

International organizations are also different from each other in purpose and in function; the constituent documents and the practices of these organizations are also necessarily different. These differences are particularly pronounced when dealing with relations between organizations and their members and agents, since those relations depend on the purpose and functions of each organization.

Since the rules of each organization reflect those differences in purpose and function, since those rules have been agreed to by member States as governing relations between the organization and its members and agents, and since those rules are *lex specialis* for the organization's legal relations, those rules alone govern relations between an international organization and its members and agents, including in circumstances where those relations might concern the breach of an international obligation the organization may have towards its members and agents. Accordingly, IMF believes that such relations are, and should be, outside the scope of the Commission's study.

4. United Nations Secretariat

With regard to the first question, in the absence of any indication as to the nature of the obligations breached by an international organization—other than its treaty obligations—this office is not in a position to express an opinion on whether the Commission should study the question, or what weight should be given to it in the general framework of its study on responsibility of international organizations.

[77] Practice has demonstrated, in particular, that one international organization is not subject to rules of international law that may be promulgated by other international organizations, unless it has accepted those rules. For example, the 1947 Agreement between the United Nations and the International Monetary Fund recognizes that IMF is not bound by decisions of the Security Council under Articles 41 and 42 of the Charter of the United Nations, although its member States may be bound pursuant to Article 48 of the Charter. The Agreement provides that IMF is only obliged to "have due regard" for such decisions of the Security Council (art. VI, para. 1).

[78] *I.C.J. Reports 1996* (see footnote 51 above).

[79] *I.C.J. Reports 1949* (see footnote 45 above), p. 180.

5. World Intellectual Property Organization

For the purposes of addressing this question, the Commission states that "rules of the organization" means "in particular: the constituent instruments, decisions, resolutions and other acts taken by the organization in accordance with those instruments; and established practice of the organization".[80] It may be appropriate for the Commission to consider extending this definition to include a more general rubric as well, such as "established or generally accepted principles of international law". WIPO agrees with the statement that the legal nature of the rules of the organization in relation to international law is controversial. WIPO also recognizes that the definition of "rules of the organization" is in large measure modeled on that provided in article 2, paragraph 1 (*j*), of the 1986 Vienna Convention. Nevertheless, in the WIPO view, the relations between an international organization and its member States and between an international organization and its agents should be more generally governed by international law, an integral part of which is the rules of the organization. This would be consistent with draft article 4, paragraph 1, for example (General rule on attribution of conduct to an international organization), which uses "international law"[81] as the standard for determining the general rule on attribution of conduct to an international organization. In this regard, WIPO would in addition recommend that the Commission also consider breaches of obligations that an international organization may have towards its member States or its agents.

M. Necessity as a circumstance to preclude wrongfulness

1. European Commission

The European Community is aware that this ground has a basis in customary international law[82] and that article 25 on responsibility of States for internationally wrongful acts contains further guidance. States may, exceptionally, point to necessity to "safeguard an essential interest against a grave and imminent peril", provided that this "does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole".[83] The Community observes that, in theory, this scenario may also apply to international organizations. However, such application must be operated with the utmost care. For example, an environmental international organization may possibly invoke "environmental necessity" in a comparable situation where States would be allowed to do so,[84] provided that:

(*a*) It needs to protect an essential interest enshrined in its Constitution as a core function and reason of its very existence;

[80] *Yearbook … 2004*, vol. II (Part Two), para. 71.

[81] *Ibid*.

[82] *Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 40, para. 51.

[83] *Yearbook … 2001*, vol. II (Part Two), p. 28, art. 25, para. 1 (*a*)–(*b*).

[84] See, for example, *I.C.J. Reports 1997* (footnote 82 above), p. 41. ICJ accepted that the concerns of Hungary for its natural environment in the region constituted an "essential interest" of that State, but it was not convinced that abandoning the project in disregard of Hungary's treaty obligations *vis-à-vis* Slovakia met a "grave and imminent" peril.

(*b*) This does not seriously impair an essential interest of other subjects of international law towards which the obligation exists, or the international community as a whole.

2. International Criminal Police Organization

Customary international law recognizes necessity as a circumstance precluding wrongfulness. But as pointed out by ICJ in the *Reparation for Injuries* case, the "subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights".[85]

The necessity exception evolved essentially in relations between States, and in INTERPOL experience it has not been confronted with any situation to which the notion would apply. At the same time it must be conceded that necessity does not pertain to those areas of international law that, by their nature, are patently inapplicable to international organizations.[86] The INTERPOL General Secretariat therefore considers that the Commission should not exclude the notion from its study, but should examine whether the application of necessity to international organizations would require consideration of the distinguishing features of international organizations. It should be kept in mind that there exists a great variety of international organizations, which could imply that for certain types of organizations necessity might be suitable.[87]

It is recalled that, although it was found in the *Russian Indemnity* case[88] that there was no circumstance precluding the wrongfulness of Turkey's default, it was accepted in principle that financial distress can constitute a circumstance precluding wrongfulness. Unlike States and other territorial entities, generally international organizations do not possess jurisdiction over tax, and cannot therefore generate their own income. International organizations are dependent on the financial contributions of the participating countries. Should it happen that a significant number of countries fail to pay their contributions, a situation may arise in which an organization would not be able to meet its financial obligations. As proved by the demise of the International Tin Council,[89] unlike the case of States, insufficient funding can be a life-threatening situation for an international organization. This issue demands special attention in the codification and progressive development of the law of responsibility of international organizations, either under the heading *force majeure* or "necessity",[90] or in an arrangement for dealing with the insolvency of international organizations.

3. International Monetary Fund

Although the Commission's question was specific to whether necessity precludes the wrongfulness of an act of an international organization, as a more general matter, the circumstances in which the wrongfulness of an act could arise must first be determined before turning to the circumstances that preclude the wrongfulness of such acts.

As stated above, the wrongfulness of an act of an international organization under its charter needs to be determined with reference to the rules of the organization. Hence, the question of whether necessity precludes the wrongfulness of an act must also be determined with reference to the rules of the organization.

IMF is unaware of any prior case involving the Fund, or any other international organization, where the issue of necessity precluding the wrongfulness of an act was addressed. While this does not imply that necessity would not preclude the wrongfulness of an act in the case of all international organizations, the application of necessity to an international organization would also need to be related to the organization's purposes and functions. Incidentally, IMF have found it difficult to envisage situations in which necessity might preclude the wrongfulness of acts in the case of international organizations dealing essentially with international financial obligations.

The leading case on this subject in the area of State responsibility also provides little assistance. In the *Gabčikovo-Nagymaros Project* case,[91] ICJ considered that the state of necessity is a ground for precluding the wrongfulness of an act not in conformity with an international obligation. Unlike other statements made by the Court on this topic, the observation quoted above was not made with limited reference to States as subjects of international law. On that basis, the quoted observation could be used to lend support to the proposition that necessity might preclude the wrongfulness of acts of international organizations. Another of the Court's propositions on this point, i.e. that such a preclusion can only be accepted on an exceptional basis, might also be applied to international organizations using the same reasoning.

However, when applying this principle to international organizations, principles of State responsibility begin to lose relevance. Turning to the circumstances under which necessity might be invoked, ICJ was more specific in its discussion, explicitly referring to an "essential interest"[92] of the State which is the author of the act and to the fact that the State must not have contributed to the condition of necessity. It is unclear whether international organizations could claim "essential interests" similar to those of States, in order to invoke the defence of necessity. This begs the question whether the circumstances under which a State might invoke necessity are relevant to the circumstances under which an international organization might invoke necessity to preclude the wrongfulness of an act, assuming an international organization can invoke necessity to preclude the wrongfulness of an act.

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[85] *I.C.J. Reports 1949* (see footnote 45 above), p. 178.

[86] See Klein, *op. cit.*, pp. 416–419, for a projection of the notion of necessity on international organizations.

[87] See Riphagen, "The second round of treaty law", pp. 571–572.

[88] UNRIAA, vol. XI (Sales No. 61.V.4), p. 421. See also Scott, *The Hague Court Reports*, pp. 297–328.

[89] See, *inter alia*, Seidl-Hohenveldern, "Failure of controls in the Sixth International Tin Agreement", and the sources cited there.

[90] For a discussion of the classification of the *Russian Indemnity* case (footnote 88 above) under the notion of necessity, see Martha, "Inability to pay under international law and under the Fund Agreement", pp. 104–108, and also Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, p. 180.

[91] *I.C.J. Reports 1997* (see footnote 82 above).

[92] *Ibid*., p. 41.

4. United Nations Secretariat

The closest analogy to the notion of "necessity"[93] invoked by States in circumstances of article 25 of the draft articles on responsibility of States for internationally wrongful acts, is "operational necessity" in the context of peacekeeping operations. An analysis of the concept of "operational necessity" as an exemption of the Organization from liability for property loss or damage caused by United Nations forces in the ordinary operation of the force, and the conditions for invoking it, are contained in the report of the Secretary-General on financing of the United Nations peacekeeping operations (A/51/389, paras. 13–15).

5. World Intellectual Property Organization

As pointed out, article 25 of the Commission's draft on responsibility of States for internationally wrongful acts refers to "necessity",[94] which may be invoked by a State under certain conditions. To the extent that international organizations are a mere conglomeration of States (and, sometimes, other entities), WIPO sees no reason why those organizations should not also be able to invoke necessity as regards certain of their actions. This invocation of necessity by an international organization would, in any event, presumably be done in the name of the constituent States members of the organization. The inbuilt mechanisms of accountability by the international organization to its member States should also serve to prevent or check abuse by the international organization when it seeks to invoke necessity.

N. Request or authorization of the conduct of a State by an international organization

1. European Commission

In response to this question, the European Commission would like to refer back to its general view, explained above, that such situations warrant adequate treatment already at the level of attribution of conduct (and not only at the level of attribution of responsibility).

2. International Criminal Police Organization

It would seem that an organization's responsibility for the conduct a member adopts in compliance with a request of the organization or authorized by it will depend on the nature of the relationship between the organization and its members. True, the very fact of membership in an international organization entails certain mutual cooperation and good faith on the part of both the member and the organization.[95] However, this does not necessarily rise to the level that an organization must be held responsible for actions members undertake in compliance with a request of the organization or authorized by it. Under the INTERPOL Constitution, the body of mutual cooperation and good faith is subject to the limits of the laws existing in the different countries (art. 2, para. 1) and the compatibility of the actions of members with the legislations of their countries (art. 31). The terms "laws existing in the different countries" and "the legislations of their countries" are deemed to comprehend the international obligations incumbent upon them.

Hence, whether stated or not in each case, all requests for cooperation with INTERPOL in the search for a wanted person, a missing person, or any other type of police cooperation, which is inherent to INTERPOL transmittals of requests by its members, is always conditioned by the aforementioned provisions of the Constitution.

The European Court of Human Rights judgment in *Öcalan* v. *Turkey*[96] may be called upon to illustrate the effects of the condition in the INTERPOL Constitution that countries should cooperate within the limits of their national laws. Öcalan, who was the subject of an INTERPOL Red Notice, was prosecuted in Turkey after he was detained in Kenya pursuant to that Red Notice and handed over to Turkish law enforcement authorities at Nairobi airport. In his complaint before the European Court of Human Rights, the applicant maintained that he had been abducted by the Turkish authorities operating overseas, beyond their jurisdiction, and that it was for the Government to prove that the arrest was not unlawful. In his view, the fact that arrest warrants had been issued by the Turkish authorities and a Red Notice circulated by INTERPOL did not give officials of the Turkish State jurisdiction to operate overseas. He submitted that the arrest procedures that had been followed did not comply with Kenyan law or the rules established by international law, that his arrest amounted to abduction and that his detention and trial, which were based on that unlawful arrest, had to be regarded as null and void. The Turkish Government affirmed that its responsibility was not engaged by the applicant's arrest abroad and that the cooperation between Kenya and Turkey had led to Mr. Öcalan's arrest. Therefore, according to the Government, Öcalan had been brought before a Turkish judicial authority at the end of a lawful procedure, in conformity with customary international law and as part of the strategy of cooperation between sovereign States in the prevention of terrorism.

The European Court of Human Rights accepted that an arrest made by the authorities of one country on the territory of another country, without the consent of the latter, affects the person's individual rights to security under the European Convention for the Protection of Human Rights and Fundamental Freedoms. As regards extradition arrangements between countries when one is a party to the Convention and the other is not, the Court considered that the rules established by an extradition treaty or, in the absence of any such treaty, the cooperation between the countries concerned, are also relevant factors to be taken into account for determining whether the arrest that has led to the subsequent complaint to the Court was lawful. The fact that a fugitive has been handed over as a result of cooperation between countries did not in itself make the arrest unlawful or, therefore, give rise to any problem under the Convention. The Court reiterated that inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the

[93] *Yearbook ... 2001*, vol. II (Part Two), p. 28.

[94] *Ibid*.

[95] See *I.C.J. Reports 1980* (footnote 63 above), p. 93, para. 43.

[96] *Öcalan* v. *Turkey*, application No. 46221/99, Judgment of 12 March 2003.

community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but would also tend to undermine the foundations of extradition. It considered that, subject to its being the result of cooperation between the countries concerned and provided that the legal basis for the order for the fugitive's arrest is an arrest warrant issued by the authorities of the fugitive's State of origin, even an extradition in disguise cannot as such be regarded as being contrary to the Convention.

The European Court of Human Rights further held that, independently of the question whether the arrest amounts to a violation of the law of the country in which the fugitive has taken refuge—a question only examined by the Court if the host State is a party to the European Convention on Human Rights—it must be established to the Court beyond all reasonable doubt that the authorities of the country to which the applicant has been transferred have acted extraterritorially in a manner that is inconsistent with the sovereignty of the host State and therefore contrary to international law. As regards the question whether the arrest was in violation of Kenya's sovereignty, the Court noted that the Kenyan authorities did not perceive the applicant's arrest by the Turkish officials in an aircraft at Nairobi airport as being in any way a violation of Kenyan sovereignty. It did not lead to any international dispute between Kenya and Turkey or to any deterioration in their diplomatic relations. The Kenyan authorities did not make any protest against the Turkish Government on this point or claim any redress from Turkey, such as the applicant's return or compensation.

These aspects of the case led the European Court of Human Rights to accept the Government of Turkey's version of events: it considered that at the material time the Kenyan authorities had decided either to hand the applicant over to the Turkish authorities or to facilitate such a handover. In the light of these considerations and in the absence of any extradition treaty between Kenya and Turkey laying down a formal procedure to be followed, the Court held that it has not been established beyond all reasonable doubt that the operation carried out in the instant case partly by Turkish officials and partly by Kenyan officials amounted to a violation by Turkey of Kenyan sovereignty and, consequently, of international law.

It can be inferred from the way the European Court of Human Rights handled the above case that the fact a person is apprehended and brought to justice based on cooperation within INTERPOL does not convert the actions of the countries concerned into action that should engage the responsibility of the organization.

3. International Monetary Fund

In responding to this set of questions, the assumptions that underlie the questions asked must be validated.

First, it is important to note that when a member State acts in compliance with a request on the part of an international organization and the conduct subsequently results in a breach of an international obligation of that State, the international organization may not have requested the member State to breach its international obligations, but merely to carry out a certain activity. Thereafter, absent direction or control by the organization, the State alone is responsible for the manner in which it chooses to carry out, or not, the organization's request.

For example, IMF may, in response to a member's request for use of IMF resources, indicate, in accordance with the Articles of Agreement, that for the member to use IMF resources, the member needs to reduce the net present value of its sovereign debt. The member might decline to do so, or it might do this in a variety of ways, e.g. by refinancing the debt with new concessional debt, by negotiating debt write-offs or reductions in debt with its creditors, etc. However, the member may also reduce its debt burden by unilaterally defaulting on its debt, thereby breaching the member's international financial obligations. Here, IMF has neither requested the member to breach its international obligations, nor exercised any direction or control over the means used by the member to carry out the act, which constituted the internationally wrongful act. Indeed, the IMF policy is to encourage a member to adhere to its contractual obligations to the extent possible. It never encourages a member to default. Rather, it encourages a member to approach its creditors in a collaborative manner to seek a restructuring of claims in a manner that avoids defaults. Therefore, the specification of a certain objective by an international organization, which the member decides to achieve by breaching one of its international obligations, cannot result in international responsibility of the organization.

Secondly, the question asked contemplates a situation where the conduct requested gives rise to a breach of an international obligation of both the State in question and the international organization requesting the conduct. It is important to note that States and international organizations seldom have identical or even similar obligations. It is difficult to envisage a situation where conduct by a State could give rise to the breach of an international obligation of the international organization. Specific examples of the situation(s) envisaged by the Commission in drafting this query would facilitate our responding to this element of the question.

Thirdly, when conduct is "authorized" by an international organization, the fact that the organization can "authorize" the conduct necessarily implies that, once authorized, the conduct is not a violation of the organization's charter. For example, article VIII, section 2 (*a*), of the IMF Articles of Agreement allows IMF to approve exchange restrictions imposed by members on the making of payments and transfers for current international transactions. If IMF were to authorize the imposition of an exchange restriction by a member pursuant to this provision, IMF would have acted in accordance with the Articles, and the imposition of said exchange restriction could not be regarded as a breach of that member's obligations under the Articles. Therefore, it is difficult to envisage a situation where the granting of an authorization could be regarded as wrongful in international law.

4. United Nations Secretariat

As for the third question raised by the Commission, the Secretariat is not aware of any situation where the Organization was held jointly or residually responsible for an unlawful act by a State in the conduct of an activity or operation carried out at the request of the Organization or under its authorization. In the practice of the Organization, however, a measure of accountability was nonetheless introduced in the relationship between the Security Council and Member States conducting an operation under Council authorization, in the form of periodic reports to the Council on the conduct of the operation. While the submission of these reports provides the Council with an important "oversight tool", the Council itself or the United Nations as a whole cannot be held responsible for an unlawful act by the State conducting the operation, for the ultimate test of responsibility remains "effective command and control".

5. World Intellectual Property Organization

WIPO is of the view 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. The degree of responsibility of the organization should be much lower if the State's wrongful conduct was only authorized, but not requested, by the organization.

O. Practice relating to responsibility of international organizations

Germany

Germany is a member of numerous international organizations. The question of "responsibility of international organizations" presupposes the possession of an international legal personality separate and distinct from that of the States creating it. The existence, constitution, status, membership and representation of an international organization is governed by international law. To a certain degree it is attributed an autonomy in order to fulfil its tasks and to exclude influence from the outside. It is usually also given privileges and immunity to ensure its autonomy. If the responsibility of an international organization is not governed by its statute or treaty law, a minimum standard of responsibility can be derived from customary international law and from human rights standards as well as generally accepted standards contained in widely ratified treaties.[97]

There has been relatively little German State practice relating to the responsibility of international organizations. Germany's comments on State practice in this field are thus based on relevant judicial rulings and federal Government statements.

The division of responsibility between Germany as a member of various international organizations and the international organizations themselves is in principle governed by the pertinent international agreements concluded between Germany and each organization. However, only a few of these agreements include express provisions on responsibility. And these do not provide for a standardized solution on the issue of responsibility.

In Germany's opinion there is no customary international law on the responsibility of international organizations.

Practice to date shows that in a majority of cases, Germany has presumed that the responsibility of member States and that of international organizations is separate. Indirect responsibility of member States was only considered in exceptional cases.

The following comments are divided into three parts:

(*a*) Attribution of responsibility in international treaties;

(*b*) Attribution of responsibility in the jurisprudence of national and international courts;

(*c*) Final observations.

1. *Attribution of responsibility in international treaties*

Germany is party to a number of international agreements that provide for a division of responsibility between an international organization and its member States. Such agreements include in particular constituent agreements, headquarters agreements and status of forces/mission agreements. In principle these treaties—with a few exceptions—envisage such a distinction.

(a) *Constituent agreements of international organizations*

The constituent agreements of some international organizations include express provisions on the responsibility of the member States for the obligations of the organization. These are primarily organizations such as international development banks and commodity organizations whose principal activities involve independent economic operations or the assumption of obligations, that is, activities which inherently expose them to liability.

(i) *International development banks*

The charters of the international banks of which Germany is a member commonly limit the liability of the member States and shareholders to the value of their paid-in and payable shares. Clauses of this kind are found, for example, in the IBRD Articles of Agreement (art. II, sect. 6), the BIS Statutes (art. 11), the Agreement establishing the European Bank for Reconstruction and Development (art. 5, para. 7, first sentence, cf. also article 17), the Statute of the European Investment Bank (art. 4, para. 1), the Agreements establishing the African Development Bank (art. 6, para. 5) and the Asian Development Bank (art. 5, para. 6) and the Convention Establishing the Multilateral Investment Guarantee Agency (art. 8 (*d*)).

[97] See resolution No. 1/2004 on the accountability of international organizations, International Law Association, *Report of the Seventy-first Conference held in Berlin, 16–21 August 2004* (London, 2004). See also www.ila-hq.org.

Some constituent agreements include equivalent clauses that explicitly stipulate that member States shall not be held liable, by reason of their membership, for obligations of the organization. Such provisions are found, for example, in the Articles of Agreement of the International Development Association (art. II, sect. 3) and of the International Finance Corporation (art. II, sect. 4), both World Bank subsidiaries, and the Agreements establishing the African Development Fund (art. 10), the Asian Development Bank (art. 5, para. 7), the International Fund for Agricultural Development (art. 3, sect. 4) and the European Bank for Reconstruction and Development (art. 5, para. 7, second sentence).

All of these agreements provide that should a State cease to be a member, it shall remain liable for its direct obligations to the bank, but shall cease to incur liabilities with respect to obligations entered into thereafter by the bank. The same applies in the event that the organization is wound up.

All in all, the constituent agreements of the international development banks thus follow the model of limiting the liability of member States to their subscription. No further joint and several liability or secondary liability on the part of the member States is envisaged.

(ii) *International commodity organizations*

Some of the commodity organizations[98] of which Germany is a member also have express provisions on liability. Such provisions are of special importance when the commodity organization maintains a buffer stock to help regulate prices. The most famous example of this kind, the Sixth International Tin Agreement,[99] did not, however, contain any provisions on the member States' liability for obligations entered into to finance the buffer stock. An unambiguous obligation to provide extra funds was included solely with respect to the International Tin Council's administrative expenses. When the Council suspended activities in 1985 because of excess debts, the liability of the member States thus had to be determined by the courts.

In contrast, the International Cocoa Agreement, 2001 expressly excludes members' liability for obligations to finance the buffer stock.[100] The International Natural Rubber Agreement, 1994 limits the liability of member States to the extent of their obligations regarding contributions to the administrative budget and to financing the buffer stock.[101] These contributions are in turn limited *ab initio* by the fixed maximum size of the buffer stock; the borrowing of monies to finance the buffer stock is not envisaged, in contrast to the situation under the previous International Natural Rubber Agreement, 1979. The resulting limitation of liability is also likely to apply in the event of the liquidation of the buffer stock,[102] although this is not entirely clear from the provisions.

The constituent agreements of the international commodity organizations that do not maintain buffer stocks contain no more than rudimentary provisions on liability. Such clauses can be found in the International Agreements on Tropical Timber, Olive Oil, Coffee and Jute. All these agreements expressly exclude liability by reason of membership above and beyond the normal liability to pay contributions.[103]

A special case is presented by the Agreement establishing the Common Fund for Commodities, which is designed to finance measures of the individual commodity organizations. Insofar as they are also members of the Fund, the member States of the relevant commodity organizations provide the Fund with a certain guarantee capital to cover their liability for the obligations of their commodity organization.[104] The liability in question is a *pro rata* liability. The member States are thus liable for the debts of their commodity organization to the Fund, but not without limit and only secondarily. The guarantee capital is also subject to call by the Fund to cover its own obligations in certain circumstances. Liability of the member States by reason of their membership as such is expressly excluded.[105]

Some of the commodity organizations thus provide for liability for certain obligations on the part of the member States, but only to a limited extent that is defined in advance. Apart from such express exceptions, the commodity agreements presume that there is a division of responsibility between States and organizations.

(iii) *Treaty establishing the European Community*

A distinction must be drawn between the above agreements and the attribution of responsibility within the European Union. The Treaty establishing the European Community contains no express provisions on the liability of the member States for obligations of the Community, but states in article 300, paragraph 7,[106] that agreements concluded by the European Community shall be binding not only on the institutions of the Community but also on member States. The meaning of this provision is, however, disputed. It is interpreted by some as saying that international treaties are directly binding as between the States members of the European Community and the relevant Contracting Parties.

However, in the opinion of the German federal Government, article 300, paragraph 7, is a purely internal provision. Understood as such, the article only forms a basis for obligations under community law *vis-à-vis* the European Community and does not permit third parties to assert direct claims against the States members

[98] Liability is not mentioned in the International Wheat Agreement, 1971 or in the International Sugar Agreement, 1984.

[99] The International Tin Council was dissolved in 1990.

[100] Art. 24.

[101] Art. 48, para. 4, of the Agreement.

[102] Art. 40, para. 2 (*d*) of the Agreement.

[103] Art. 20, para. 8, of the International Tropical Timber Agreement, 1994; art. 49 of the International Olive Oil Agreement, 1979; art. 16, para. 1, fifth sentence, of the International Coffee Agreement 2001; para. 15 of the Agreement establishing the Terms of Reference of the International Jute Study Group, 2001, as well as art. 22, para. 7, of the (now expired) International Agreement on Jute and Jute Products, 1989.

[104] Art. 14, para. 4, of the Agreement.

[105] Art. 6 of the Agreement.

[106] Originally art. 225, para. 2; included in the Treaty establishing a Constitution for Europe without amendment as article III–323, paragraph 2.

of the European Community. Accordingly, no liability for breaches of treaty by the European Community can be construed from article 300, paragraph 7, when thus interpreted, but only the internal obligation within the European Community to contribute to the fulfilment of treaties and to finance through the budgetary procedure any obligation to pay damages.

(iv) *Other constituent agreements*

The constituent treaties of some other international organizations also include provisions on the attribution of responsibility to the organization and to its member States. Some international research institutions which are partly funded by Germany provide for the *pro rata* liability of member States for the obligations of the organization in the event of its liquidation. This is true for example of the European Organization for Nuclear Research (CERN),[107] the European Centre for Medium-Range Weather Forecasts,[108] the European Molecular Biology Laboratory and the Convention for the establishment of a European Space Agency.[109]

In some other cases member States are liable for the obligations of the organization, but expressly only *vis-à-vis* the organization itself, that is, not to external creditors. Liability is regulated in this way for the European Patent Office[110] and the International Telecommunications Satellite Organization (INTELSAT), and is limited on a *pro rata* basis for the latter organization. Here, too, it can thus be presumed that basically there is a division of responsibility, which is only departed from in expressly specified cases.

The Convention for the establishment of a European organisation for the exploitation of meteorological satellites ("EUMETSAT"), which regulates liability in article 9, operates on similar assumptions. Relevant for present purposes is article 9, paragraph 2, which excludes the liability of the member States and EUMETSAT to each other with respect to specific errors in operating the organization's satellite system.

(b) *Headquarters agreements with international organizations*

Pursuant to the principle of territoriality, a host State could potentially be held liable for the actions of the hosted organization (most of which occur or were at least decided upon on this territory). However, headquarters agreements in general focus on status issues and thus indicate indirectly that international organizations can themselves be held liable for their actions. Provisions on the responsibility of host States are very rare. Where they do exist, they tend explicitly to exclude the liability of the host State as such—as for example in the Agreement between the Republic of Austria and the International Atomic Energy Agency,[111] the Agreement between the United Nations and Austria regarding the United Nations Industrial Development Organization[112] and the headquarters agreement between Switzerland and the International Labour Organization.[113]

The headquarters agreements that Germany has concluded with international organizations rarely contain provisions on the topic currently under consideration. The Agreement between the United Nations and the Federal Republic of Germany concerning the Headquarters of the United Nations Volunteers Programme,[114] for example, which serves as a model agreement for the other headquarters agreements with the United Nations and related international institutions, does not govern liability at all, but concentrates primarily on privileges and immunities. The Headquarters Agreement between the Government of the Federal Republic of Germany and European Organisation for the Exploitation of Meteorological Satellites (EUMETSAT)[115] makes the organization liable for damage arising from its activities in Germany (see article 4). However, it refers only to liability under German law and does not mention Germany's liability as host State; this provision could at best be read as implicitly excluding Germany's liability. On the other hand, some conference agreements between the German federal Government and the United Nations contain a far-reaching exemption from liability for the United Nations for damage or other claims arising during the conference. Germany accepted the main thrust of this clause in connection with a United Nations workshop on the use of spare technology for disaster management in Bremen University in September 2003[116] and another workshop in Munich in 2004 for purely political reasons.

(c) *Status of forces and status of mission agreements*

Status of forces and status of mission agreements contain case-specific provisions on liability. General statements on the division of responsibility are hard to make. In Germany's view, the status of forces agreements concluded within the framework of the United Nations, NATO and the European Union are particularly relevant for the present topic.

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[107] Art. XIV of the Convention for the establishment of a European Organization for Nuclear Research.

[108] Art. 21, para. 3, of the Convention establishing the European Centre for Medium-Range Weather Forecasts.

[109] Art. XXV, para. 3.

[110] Art. 40, para. 2, of the Convention on the Grant of European Patents.

[111] Signed in Vienna on 11 December 1957, United Nations, *Treaty Series*, vol. 339, No. 4849, p. 169, art. XVIII, sect. 46.

[112] Signed in New York on 13 April 1967, *ibid*., vol. 600, No. 8679, p. 126, art. XV, sect. 36. This headquarters agreement was replaced in 1995 by a new headquarters agreement between Austria and UNIDO itself (Agreement between the United Nations Industrial Development Organization and the Republic of Austria regarding the headquarters of the United Nations Industrial Development Organization, *United Nations Juridical Yearbook, 1998* (United Nations publication, Sales No. E.03.V.5), p. 146).

[113] *Procès-verbal*, Agreement, Arrangement for the execution of the Agreement, and Declaration concerning the legal status of the League of Nations (Geneva, 11 March 1946), United Nations, *Treaty Series*, vol. 15, No. 103, p. 393, art. 24.

[114] Signed in New York (10 November 1995), United Nations, *Treaty Series*, vol. 1895, No. 32310, p. 103..

[115] Signed in Darmstadt (18 June 2002), *ibid*., vol. 2290, No. 40813, p. 287.

[116] Workshop on "Education and Capacity-Building in Space Technology for the Benefit of Developing Countries with emphasis on remote sensing applications".

One such standing agreement is the Agreement between the Parties to the North Atlantic Treaty regarding the status of their forces (NATO Status-of-Forces Agreement), which (only) applies between the States members of NATO.[117] It governs, *inter alia*, liability for damage caused by troops stationed abroad. Under article VIII, paragraph 1, the member States have waived all their claims against the other members for damage to property. In the case of damage to third parties, especially private persons, article VIII, paragraph 5, of the Agreement[118] provides for a distribution of costs between the receiving State and the relevant sending State. No liability is envisaged on the part of NATO. The sending and receiving States shall be held responsible. This rule has been extended to the status of NATO headquarters included by means of a separate protocol.[119] Only if it cannot be determined whose armed services caused the damage are all the member States concerned held equally liable.[120] It must be noted that these provisions are not based on the idea that liability arises out of NATO membership. Rather, the sending State is held responsible for the actions of its own armed services. The joint liability of the receiving State is based on its contributory responsibility for allowing allied troops to use its territory and because of the benefit it reaps in security policy terms from their presence and activities. The joint liability of all States concerned when the originator of the damage cannot be confidently identified is to be considered the result of their possible albeit unproven responsibility for activities that may have been entirely theirs. There is no presumption that the international organization as such bears responsibility.

The same is true of the European Union Status of Forces Agreement, which was signed in Brussels on 17 November 2003, and should enter into force early in 2005.[121] Article 18 thereof contains a waiver of all claims by the member States against each other and provides for the distribution of costs incurred in satisfying third party claims between the sending and receiving States. A supplementary agreement is intended to extend this waiver to all damage that occurs outside the territory of the States members of the European Union.[122] In both cases there is no provision for the liability of the European Union itself.

The Council of the European Union decision on the ATHENA financing mechanism contains further provisions on liability that relate specifically to European Union military operations abroad.[123] ATHENA itself has legal capacity, so that article 40, paragraphs (2)–(3), of the decision can directly assign contractual and non-contractual liability to this financing mechanism. The phrase "shall be covered through ATHENA by the contributing States" (art. 40, para. 3) means that ATHENA is liable to third parties and that the contributing States may only be proceeded against within the financing mechanism through their contributions to it.[124] One could thus talk of joint liability. However, this sharing of costs for non-contractual liability is limited to damage caused by the common European Union command structures, that is, by the integrated headquarters and its staff. Liability for damage caused by the forces provided by the member States is not mentioned in the decision and so remains the responsibility of each sending State. The liability of the European Union and its member States to other contributing States is explicitly excluded.

In addition to these standing status of forces agreements, account should also be taken of the specific status of forces agreements concluded with the third state on whose territory an operation is to take place. The relevant Agreement between the European Union and the Former Yugoslav Republic of Macedonia on the status of the European Union-led Forces (EUF) in the Former Yugoslav Republic of Macedonia for operation Concordia governed liability for damage arising in connection with the operation in article 13.[125] This provision did not, however, specify the party against which such claims can be brought and so provided no indication of how liability is distributed between the troop-contributing States and the European Union financing mechanism. The distribution of liability was only regulated with the conclusion of the relevant arrangements with the sending States, which provided in principle for the liability of the sending State.[126] This was only to be derogated from should the financing mechanism established for the operation decide to make good the damage; this in turn was only provided for in the case of damage caused by the European Union joint command structures[127]—that is, as is now provided for under the Athena mechanism.[128]

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[117] This is supplemented for Germany by the Agreement of 3 August 1959 to Supplement the NATO Status-of-Forces Agreement.

[118] Supplemented for Germany by article 41 of the Agreement to Supplement the NATO Status-of-Forces Agreement, and the Domestic Implementing Act, *Federal Law Gazette* (1961), part II, pp. 1183 *et seq*.

[119] Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty, especially article 6 thereof; Agreement between the Federal Republic of Germany and the Supreme Headquarters Allied Powers Europe on the special conditions applicable to the establishment and operation of International Military Headquarters in the Federal Republic of Germany, art. 22, *Federal Law Gazette* (1969), part II, p. 2009.

[120] Art. VIII, para. 5 (*e*) (ii)–(iii), of the Agreement.

[121] Agreement between the Member States of the European Union concerning the status of military and civilian staff seconded to the institutions of the European Union, of the headquarters and forces which may be made available to the European Union in the context of the preparation and execution of the tasks referred to in Article 17(2) of the Treaty on European Union, including exercises, and of the military and civilian staff of the Member States put at the disposal of the European Union to act in this context (EU SOFA), *Official Journal of the European Union*, No. C 321, vol. 46 (31 December 2003), p. 6.

[122] Agreement between the Member States of the European Union concerning claims introduced by each Member State against any other Member State for damage to any property owned, used or operated by it or injury or death suffered by any military or civilian staff of its services, in the context of an EU crisis management operation (Brussels, 28 April 2004), *ibid*., No. C 116, vol. 47 (30 April 2004), p. 1.

[123] Council decision 2004/197/CFSP of 23 February 2004 (*ibid*., No. L 63, p. 68) establishing a mechanism to administer the financing of the common costs of European Union operations having military or defence implications. This separate financing mechanism serves the financing of European Union military operations, since the European Community budget is not available for such operations.

[124] "Contributing States" means all States contributing to the financing of any specific operation.

[125] See *Official Journal of the European Union*, No. L.82/45 (29 March 2003).

[126] See, for example, the Agreement between the European Union and the Republic of Turkey on the participation of the Republic of Turkey in the European Union-led forces in the Former Yugoslav Republic of Macedonia (4 April 2003), *ibid*., No. L 234, p. 22.

[127] Specimen Council decision establishing an operational Financing Mechanism to provide for the financing of a European Union operation having military or defence implications, Council of the European Union document 5491/1/03 of 21 January 2003, art. 9, para. 3.

[128] See above for comments on ATHENA.

The United Nations model status-of-forces agreement for peace-keeping operations, which underlies the status-of-forces agreements concluded between the United Nations and the various host countries for peace-keeping operations[129] is silent as to the distribution of responsibility.

(d) *Other agreements*

A few multilateral agreements touch on the issue of attribution of responsibility in the event of a breach of treaty by an international organization. As early as 1962, the Convention on the Liability of Operators of Nuclear Ships considered the matter. The committee charged with resolving this problem proposed that international organizations should be allowed to accede to the Convention, provided their member States promised the organization that they would (part-)finance its obligations. This proposal was not, however, incorporated into the Convention.

An example for responsibility by virtue of membership of an organization is to be found in the Treaty on principles governing the activities of States in the exploration and use of outer space, including the moon and other celestial bodies, which has been ratified by Germany. The third sentence of article VI thereof stipulates that both international organizations and their member States bear responsibility for ensuring compliance with the Treaty; article VII states that each country from whose territory an object is launched into outer space is internationally liable for damage caused by that object. The Treaty is thus one of the very few instruments that provides for responsibility by reason of membership of an organization. The Convention on the international liability for damage caused by space objects likewise provides for the joint and several liability of the member States should an international organization bear responsibility for damage.[130] However, the claim must first be asserted against the organization. Only if it fails to make good the damage may the plaintiff proceed against the member States. By acceding to the Convention, the member States of an organization thus basically act as its guarantors.

Finally, article 139, paragraph 2, of the United Nations Convention on the Law of the Sea envisages that States and international organizations are in principle to be held separately liable for breaches of their treaty obligations. Only when States and international organizations act together do they bear joint and several liability.

It is moreover possible for member States to assume liability by means of a specific agreement among themselves or with the creditor to that effect. This was the case with respect to the liquidation of Eurochemic, an international company founded under the auspices of OECD. Upon its liquidation, the member States agreed to make available funds beyond the business capital in order to meet existing obligations, in return for which Belgium declared itself willing to assume responsibility for taking over and decommissioning the plants and disposing of the radioactive waste.

[129] Report of the Secretary-General (A/45/594 of 9 October 1990).

[130] Art. XXII, para. 3, of the Convention.

2. *Attribution of responsibility in the jurisprudence of national and international courts*

There are only a few known cases in which the courts have had to take a stance on the attribution of responsibility. Below follows a survey of German and international jurisprudence on the subject. The list is by no means comprehensive; the selection is limited to cases that are of direct relevance to Germany.

(a) *International Tin Council*

The classic case for the issue of member State liability for the actions of international organizations is the insolvency of the International Tin Council in October 1985. The unfulfilled private law obligations of the Council stemming from its borrowing and subsequent forward transactions led to a series of cases against the Council, primarily before the English courts. One case was, however, also heard by the European Court of Justice.[131] In his final submissions, Advocate General Darmon presumed that a separation of liability was to be derived from the Council's international legal personality.[132] The fact that the European Community and its member States together formed a blocking minority in the Council in no way altered this conclusion. In addition, he submitted, the Court was not competent to review actions of the Council. The Court was never called upon to rule in this case, since the proceedings were discontinued on 10 May 1990 after the parties had reached an amicable agreement.

(b) *Responsibility of member States of international organizations under human rights instruments*

The jurisprudence of the European Court of Justice and Commission of Human Rights, which are responsible for upholding the European Convention on Human Rights, is of considerable significance for this topic on the activities of international organizations. International organizations, in particular the European Community, are not parties to the Convention and thus are not subject to the jurisdiction of its judicial organs. The question thus arises whether European Convention States (at least) bear responsibility for any infringements of the standards set by the Convention by the international organizations they have established and whether they can be sued for such infringements before the European organs.

The European Commission of Human Rights has rejected the liability of the host State, for example in *X.* v. *the Federal Republic of Germany*[133] and *X.* v. *Sweden, the Federal Republic of Germany and other States*.[134] Both cases concerned the responsibility of the host State for rulings of an international court. The Commission initially also rejected the idea of liability by reason of membership.

[131] *Maclaine Watson and Co. Ltd.* v. *Council and Commission of the European Communities*, case C–241/87, *Reports of cases before the Court of Justice and the Court of First Instance, 1990–5*, p. I–1797.

[132] *Ibid.*, Final submissions, paras. 131 *et seq.*

[133] Application No. 235/56, decision of 10 June 1958, *Yearbook of the European Court of Human Rights 1958–1959*, p. 256.

[134] Application No. 2095/63, decision of 15 July 1965, *Yearbook of the European Court of Human Rights 1965*, p. 272.

In its decision[135] of 10 July 1978, the Commission rejected the claims brought against the member States of the European Coal and Steel Community (ECSC) by a French trade union aggrieved at not being considered for a position on the ECSC Consultative Committee, on the grounds that the participation of the States in ECSC organs did not constitute an exercise of sovereign powers within the meaning of article 1 of the European Convention on Human Rights.

The European Commission of Human Rights and later the European Court of Human Rights have, however, declined to adhere strictly to this early line. In the Melchers decision[136] of 9 February 1990, the Commission dealt with a case in which the Court had on the whole upheld a fine imposed by the Commission of the European Communities for breach of competition rules and for which the German courts had issued a writ of execution pursuant to article 192, paragraph 2, of the Treaty establishing the European Community (now art. 256, para. 2, of the Treaty). The federal Government argued that Germany bore no liability on the grounds that the acts involved were acts of the European Community:

> The respondent Government argue that the Federal Republic of Germany is not responsible under the Convention for acts and decisions of the European Communities. The Federal Minister of Justice, in granting a writ of execution for a judgment of the European Court of Justice, did not have to examine whether the judgment in question had been reached in proceedings compatible with fundamental rights guaranteed by the European Convention on Human Rights or the German Basic Law. He only had to examine whether the judgment was authentic. Therefore, he had neither to determine a civil right, nor a criminal charge within the meaning of Article 6 of the Convention.
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> Furthermore, the Federal Republic's responsibility under the Convention could not be derived from the fact that it transferred part of its powers to the European Communities. Otherwise all Community acts would indirectly be subject to control by the Convention organs. However, such a result would not be compatible with the generally accepted principle that the Convention did not apply to the European Communities and would become binding for them only if they formally adhered to it. In this context the respondent Government also point out that, in any event, observance of fundamental rights is secured by the European Court of Justice. Even if it should be found that national authorities nevertheless also remained bound to control Community acts as to manifest and flagrant violations of fundamental rights, such a control had, in the present case, been effected by the German civil courts which had found no appearance of such a violation.[137]

The European Commission of Human Rights dismissed the complaint as inadmissible. It decided that the transfer of sovereign powers to international organizations was not prohibited by the European Convention on Human Rights. However, it was of the opinion that such a transfer could not release the member States from their responsibility to ensure observance of the Convention. The test is thus whether fundamental rights are sufficiently protected within the international organization.

Germany expressly rejected responsibility for acts of the European Community in its submissions to the Commission.[138]

The doctrine of equivalent protection was reaffirmed by the European Court of Human Rights in its parallel judgments in *Waite and Kennedy* v. *Germany* and *Beer and Regan* v. *Germany* of 18 February 1999.[139] In these cases, workers hired out to the European Space Agency (ESA) in Darmstadt, Germany, sued ESA, arguing that they had acquired the status of ESA employees. The German labour courts declared the actions inadmissible because ESA enjoyed immunity from jurisdiction as an international organization. The plaintiffs proceeded to challenge this ruling in the European Court of Human Rights in Strasbourg, France. The complaint in Strasbourg did not, however, relate to the actions of ESA, but to the refusal of the German courts to review those actions. The Court thus did not need to address directly the question of whether Germany could be held responsible for the actions of ESA. The federal Government made the following submission:

> The respondent Government observe that the German courts granted the European Space Agency immunity from the applicant's action in accordance with the relevant provisions of the German Courts Organisation Act. Referring to the case-law of the Convention organs, they maintain that the right of access to court is subject to inherent limitations which include the traditional and generally recognised principle of parliamentary and diplomatic immunity and also the immunity of international organisations. In this respect, they explain that the immunity granted to international organisations corresponds, like the state immunity, to the principle of the sovereign equality of all states. An international organisation can only function satisfactorily if its independence is ensured. The activities of international organisations are so closely linked with their sovereign purposes that even private acts cannot be entirely excluded from immunity.
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> Moreover, the Government consider that sufficient legal protection is provided for the applicants in that they could have brought an action against the Irish company CDP, the other party to their contracts, claiming compensation under S. 10 para. 2 of the German Provision of Labour Act. The question of whether they acted in good faith would have had to be clarified in the said court proceedings.[140]

Although this case did not primarily concern the question of responsibility, the European Court of Human Rights reiterated the view that establishing an international organization did not release parties to the European Convention on Human Rights from the obligations assumed thereunder. It thus presumed that Germany remained in principle responsible for safeguarding the right to a fair trial under article 6, paragraph 1, of the Convention, even where actions of ESA were involved. In the final analysis, it did not, however, consider the recognition of ESA immunity to constitute a violation of article 6, paragraph 1, because the Convention for the establishment of a European Space Agency 1975 itself provided adequate alternative legal remedies against ESA acts. This is ultimately in line with the test formulated in *M. & Co.* v. *the Federal Republic of Germany* under which fundamental rights must receive an equivalent protection when sovereign powers are transferred to an

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[135] *Confédération française démocratique du travail* v. *the European Communities*, application No. 8030/77, *Decisions and Reports*, p. 231.

[136] *M. & Co.* v. *Germany*, application No. 13258/87, *ibid.*, vol. 64, p. 138.

[137] *Ibid*., p. 144.

[138] *Ibid*.

[139] *Waite and Kennedy* v. *Germany*, application No. 26083/94, *Reports of Judgments and Decisions, 1999–I*, p. 393; *Beer and Regan* v. *Germany*, application No. 28934/95, *ibid*.; see, in particular, paras. 57 *et seq*. Similarly, the judgment in *Prince Hans-Adam II of Liechtenstein* v. *Germany* of 12 July 2001, application No. 42527/98, *ibid*., *2001-VIII*, para. 48, which did not involve an international organization but the exclusion of German legal remedies by an international treaty.

[140] *Waite and Kennedy* v. *Germany* (see footnote 139 above).

international organization. Nonetheless, the scope and precise meaning of the *M. & Co.* doctrine of equivalent protection are still not entirely clear.

It was hoped that the decision in *Senator Lines GmbH* v. *Austria and others* of 10 March 2004 would clarify the issue.[141] As a State member of the European Union, Germany, too, was among the respondents. The facts of the case were as follows: the shipping company Senator Lines had been fined by the European Commission for infringements of European Community competition rules. Senator Lines challenged the decision before the Court of First Instance and requested a dispensation from the requirement to provide a bank guarantee. The request was refused by the Court and thereafter by the European Court of Justice. Senator Lines thereupon applied to the European Court of Human Rights on the grounds that its fundamental rights to a fair trial under article 6 of the European Convention on Human Rights, in particular the presumption of innocence, had been infringed. The application was directed against the States members of the European Union. The respondents seemed to presume a separation of responsibility existed. In their joint submissions, the European Union States argued as follows:

> The Governments' principal contention was that the complaints did not relate to sovereign acts by any of the individual respondent States, such that the acts complained of did not represent an exercise by the individual States of their jurisdiction within the meaning of Article 1 of the Convention. They referred to the case law of the European Commission of Human Rights to the effect that an application cannot be made against the European Communities as such, or against the member States jointly and/or severally (*CFDT* v. *the European Communities and their Member States*, application No. 8030/77, Commission decision of 10 July 1978, Decisions and Reports (DR) 13, p. 231). They saw no contradiction between this position and the case law of the Court in which States have been held liable for acts which they performed in pursuance of international obligations or in the context of international obligations (the aforementioned *Matthews* v. *the United Kingdom* judgment), and pointed out that the European Community has legal personality, and neither it nor its organs in any way represents its member States.
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> In the alternative, the respondent States submitted that the Community's legal order in any event ensures respect for human rights. Consequently, the principle of subsidiarity should exclude a review by the Court of the acts at issue. They referred in this respect to the case of *M. & Co.* v. *Germany* (application No. 13258/87, Commission decision of 9 February 1990, DR 64, p. 138), in which the Commission accepted that it was permissible for States to transfer powers to international organisations provided that, within the organisation, fundamental rights receive an equivalent protection. The Commission found that the European Communities, through declarations and the existing case law of the ECJ [European Court of Justice], secured fundamental rights and provided for control of their observance. The respondent States pointed out that, since that decision, the human rights safeguards in the Community's legal order have been further strengthened by the inclusion in the Treaty on European Union (the EU Treaty) of Articles 6 and 46 d, which refer expressly to fundamental rights, including the European Convention on Human Rights.
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> The respondent States underlined that the question of the requirement for a bank guarantee in the present case was examined by the Presidents of the CFI [Court of First Instance] and the ECJ, that neither instance accepted the applicant company's arguments, and that those instances both offered a number of guarantees of a fair hearing.[142]

The European Court of Human Rights did not, however, go into the question of the responsibility of the member States for actions of the European Community, but declared the application inadmissible for other reasons.[143] Nonetheless, the issue was discussed in the submissions made during the proceedings.[144] The European Union Commission agreed with the submissions of the States members of the European Union and rejected the idea that member States are responsible for the acts of the European Community and its institutions, pointing out that there is equivalent protection of fundamental rights in accordance with the *M. & Co.* doctrine developed by the European Commission of Human Rights. However, the International Commission of Jurists, in its submissions in this case, argued that the *M. & Co.* test should be abandoned because member States generally remain responsible for violations of fundamental rights by organs of international organizations; under general public international law, States cannot, the Commission argued, escape their responsibility by establishing international organizations:

> ICJ [International Commission of Jurists] took the view that the Court should accept the possibility of member States' responsibility for the conduct of organs of international organisations of which they are members. It considered that it would be unacceptable for violations of basic rights to go unredressed merely because the perpetrator is an international body established by the State, rather than the State itself. States should not be allowed to escape their obligations by transferring powers to international organisations. The ICJ submitted that this view is in conformity with general public international law and compatible with the existing Convention case law. The ICJ did not consider that the doctrine of "equivalent protection" applied by the Commission should be continued, as it is not clear how it operates in a number of circumstances.[145]

(c) *Other cases of responsibility for third-party sovereign acts on the territory of member States*

The question of responsibility for third-party sovereign acts on the territory of member States can also arise in other contexts. Two constellations under which third-party action may be related to international organizations are of particular relevance.

(i) *European Community legal instruments*

The first constellation concerns the effects of legal instruments adopted by the European Community. One question that arises here is that of member State responsibility for the application and implementation of Community law. In 1994, for example, the Federal Court of Justice of Germany (BGH) was called upon to adjudicate a case brought by a company against the Federal Republic of Germany for loss resulting from the economic embargo of Iraq.[146] This embargo had been laid down in a Community Council regulation. BGH—like the lower instance—rejected the claims against Germany, because

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[141] Application No. 56672/00, *Reports and Judgments and Decisions, 2004–IV.*

[142] *Ibid.*, The Law, sect. A.

[143] Because the fine had in the meantime been quashed by the Court of First Instance, the applicant could no longer claim to be a "victim of a violation", as required under article 34 of the European Convention on Human Rights.

[144] See The Law, sects. A and C of the decision (footnote 139 above).

[145] *Ibid.*, sect. C, para. 5.

[146] *Entscheidungen des Bundesgerichtshofs in Zivilsachen* (BGHZ), 1995, vol. 125, p. 27. See also *Neue Juristische Wochenschrift* (NJW), 1994, No. 13, p. 858. The judgement of the previous instance (Bonn Regional Court) is reproduced in *Europäische Zeitschrift für Wirtschaftsrecht* (EuZW), 1992, No. 14, p. 455.

the embargo was contained in European Community legislation with direct effect, for which the Community alone bore responsibility. BGH thus rejected any responsibility on the part of Germany by reason of membership or on the basis of its voting behaviour within the Community. It also considered the ordinance enacted in Germany to implement the embargo and penalize violations thereof to be purely declaratory in effect and incapable of attributing to Germany responsibility for any impairment of basic rights potentially arising from the embargo. BGH thus assumed that there is a strict division of liability between the Community and member States—at least where Community legislation with direct effect is involved. Interestingly enough, in a similar case the European Court of First Instance ruled that the Community was not responsible for loss resulting from this embargo because it was imposed under a Security Council resolution and could thus not be attributed to the Community.[147]

The other side of the coin—the extent of European Community responsibility for the implementation of its legal instruments by national authorities—was examined by the European Court of Justice in the 1986 *Krohn* case. A German company sued the European Community for damages because the Federal Institute for Agricultural Market Regulation had refused to grant import licences on the instructions of the European Commission. The Court held the claim to be admissible, because the challenged measure was attributable to the Commission, not the Federal Institute. It thus considered the national authority to be an "auxiliary" of the Community for the purposes of Community liability under article 288 (second paragraph) of the Treaty establishing the European Community for damage caused by its institutions or servants in the performance of their duties, at least when they are acting on an official instruction.[148] More recent decisions go a step further: they hold that for claims brought against the Community for violation of official duty, it is normally sufficient for the Community to have (co-)caused the injurious conduct of the national authority—as for example in *New Europe Consulting and Michael P. Brown* v. *Commission of the European Communities* in 1999. In this case, the European Commission had, by sending a fax to the national authorities, caused the latter to exclude the applicant from a public tender under the PHARE programme.[149]

(ii) *Presence of foreign armed forces*

The second constellation concerns the implications of the presence of allied NATO forces on German soil. The question of liability arises when members of such armed forces cause injury or damage in the exercise of their duties. Provisions on liability are included in the NATO Status-of-Forces Agreement; these have already been discussed.[150] As stated above, no liability is envisaged on the part of NATO itself. Damage to third parties (private persons) is instead attributed equally to the relevant sending State and the receiving State pursuant to article VIII, paragraph 5 (*e*) of the Agreement. If it cannot be determined whose forces caused the injury, all member States concerned are equally liable (art. VIII, para. 5 (*e*) (iii)). BGH has concluded from this provision that joint and several liability exists for such non-attributable injury, so that Germany can be sued in full by private persons who have suffered such injury.[151] It has, however, already been remarked that these rules in the Agreement are not based on responsibility by reason of NATO membership, but rather on responsibility for one's own actions. The procedural option of pursuing a claim against the receiving State also derives, irrespectively of joint and several liability, from article VIII, paragraph 5 (*b*) of the Agreement, according to which the receiving State pays the compensation and thereafter recoups its costs from the member States concerned. This arrangement is likewise unrelated to any idea of responsibility by reason of membership. It is rather a pragmatic way of providing legal redress to injured parties while respecting the immunity of the allied States.[152] The German case law affirming claims against the Federal Republic of Germany on the basis of the Agreement for damage caused during exercises by allied armed forces[153] cannot thus be viewed as evidence of member State responsibility for actions of an international organization.

The jurisprudence of BGH on liability for damage caused during manoeuvres must also be seen in this light. The aforementioned provisions of article VIII, paragraph 5, of the NATO Status-of-Forces Agreement mean that in the first instance it is the Federal Republic of Germany which is liable to third parties for damage resulting from exercises or the presence of forces on the territory, just as if its own forces were responsible for the damage. BGH has expressly affirmed a liability claim against Germany for damage caused by Belgian troops in the course of their duty for precisely this reason.[154]

The 1993 BGH decision (BGHZ, vol. 122, p. 363) must also be viewed in the context of the joint and several liability for non-attributable damage which, as described above, is based on the principle of responsibility for one's own actions and not on membership. In this case, BGH confirmed that a claim could be brought against the Federal Republic of Germany based on its liability for the habitual disregard of the time restrictions imposed on low-altitude

[147] *European Court Reports, 1998–II*, case T–184/95 (*Dorsch Consult* v. *Council and Commission),* in particular, p. 694, para. 74.

[148] *Krohn & Co.* v. *Commission of the European Communities*, case 175/84, *Reports of Cases before the Court of Justice and the Court of First Instance, 1986–2*, p. 753. The claim was, however, dismissed because the European Commission had not acted unlawfully.

[149] Case T–231/97, *European Court Reports, 1999–II*, in particular paras. 29 *et seq.* Cf. *ibid.*, 1994, p. I–4199, case C–146/91 (*Koinopraxia Enóséon Georgikon Synetairismon Diacheiríséos Enchorion Proïonton Syn. PE (KYDEP)* v. *Council of the European Union and Commission of the European Communities*), paras. 19 *et seq.* See, for a similar ruling and for a different approach, *ibid.*, *1987,* p. 3005, cases 89 and 91/86 (*Étoile commerciale* v. *Commission*), paras. 18 *et seq.*

[150] See section 1 (*c*) above.

[151] BGH NJW, 1976, vol. 23, p. 1030; ibid, 1982, vol. 19, p. 1046; BGHZ, 1994, vol. 122, p. 363.

[152] Germany can sue and be sued on behalf of the sending States (art. 12, para. 2, of the Agreement).

[153] See, for example, the judgements of Oldenburg Higher Regional Court in NJW, 1990, vol. 50, p. 3215; Aachen Regional Court in NJW-RR, 1992, vol. 3, pp. 165 *et seq.*, BGH in NJW-RR, 1989, vol. 11, p. 673, and in NJW, 1991, vol. 22, pp. 1421 *et seq.*

[154] BGHZ, 1968, vol. 49, p. 270.

flying shown by the armed forces of the NATO partners. The breach of duty and culpability were not found to lie with the German authorizing bodies, but were identified as being "on the part of those responsible within the NATO armed forces". BGH reasoned as follows:

> Those responsible within the NATO armed forces for the conduct of the individual military low-altitude flights thus have a duty to the inhabitants of the low-flying areas to ensure that the flight times scheduled for the sake of their health are indeed respected. Of course, isolated failures to stay precisely within the allotted time slot for low-altitude flight will not of itself impair their health. However, if the NATO air forces display a serious disregard for the restrictions imposed on military low-flying exercises, restrictions imposed out of consideration for the health risks involved for the inhabitants of the low-flying areas, the respondent Federal Republic of Germany will be held liable under German law for a breach of official duty. Since, in application of the principles of German law, they must have or acquire the administrative and legal knowledge necessary for their duties (court order of 15 June 1989—III ZR 96/88—BGH-Rechtsprechung (BGHR) § 839 (1) first sentence of the Civil Code (BGB), judgement 13 (culpability), with further references), the members of the NATO armed forces responsible for the military low-flying exercises are culpable if when conducting low-altitude exercises they do not respect the time restrictions stipulated in the special authorization.[155]

In deciding to attribute responsibility to the Federal Republic of Germany, BGH implicitly relied on the aforementioned provisions of the NATO Status-of-Forces Agreement. An at best ancillary role may have also been played by the fact that the Federal Republic has not—as it has with respect to European Community regulations—relinquished its ultimate legal responsibility for permitting exercises by the NATO units stationed in Germany.[156] This being the case, it is logical not to discharge it from liability for breaches of official duty.

In 1994, the Higher Administrative Court of Rhineland-Palatinate ruled as follows:

> [T]he Federal Republic of Germany bears legal responsibility for the effect of noise pollution from low-altitude flights—at least in areas that are particularly affected over a longer period—without any requirement that the operation of aircraft by the Federal Armed Forces be distinguished from the operation of aircraft by NATO armed forces for the purpose of identifying the potential violations.[157]

The fact that the plaintiff pursued his claims against both parties did not tarnish the admissibility of his suit based on the low-flying of Bundeswehr and NATO jet planes, because:

> [T]he mere circumstance that the respondent has by reason of international law no direct powers to intervene in the affairs of its NATO partners, but is reliant on negotiation to secure compliance with the German legal order, does not make it necessary to identify the individual contributory causal elements when analysing the breach of duty. The plaintiffs' applications as combined are admissible insofar as direct forbearance is demanded of the respondent as regards the Bundeswehr flights and insofar as it also has an obligation to negotiate so that the further perpetrators cease or minimize the activities complained of, so that the rights asserted by the plaintiffs are protected.[158]

When all is said and done, the case law does not suggest that the Federal Republic of Germany bears any general responsibility for the actions of NATO or other NATO members by reason of membership greater than that set out in the provisions of the NATO Status-of-Forces Agreement.

Indeed, the more recent rulings also accept that liability exists on the basis of responsibility for one's own, even if possibly non-attributable, action, and not by reason of membership of an organization. It can therefore not be presumed that member States are liable for international organizations.

(d) *Responsibility of troop-contributing nations in United Nations operations*

The United Nations has in certain cases assumed liability when damage or injury has resulted from United Nations operations. Any compensation awarded is ultimately paid by all States Members of the United Nations through their financial contributions. The general principle that the United Nations is liable for damage caused by its officials in the course of their duty was confirmed by ICJ in its advisory opinion regarding Mr. Cumaraswamy.[159]

However, the attribution of liability is complicated where military operations under United Nations auspices are involved, since the participating soldiers are not direct employees of the United Nations but belong to national contingents that are made available to the United Nations by its Member States. The conditions under which contingents are made available vary greatly, as does the practice regarding assumption of responsibility for damage or injury by the United Nations. On the whole, however, a pattern can be discerned in the practice of the United Nations: it has assumed responsibility when command and control genuinely lie with the United Nations. If the operational command remained with one or more Member States, the United Nations did not recognize responsibility. The United Nations has, in general, assumed responsibility for unauthorized official action by individual members of peacekeeping forces, but not for their private acts.

As far as can be ascertained, claims have rarely been asserted directly against the troop-contributing nations.

Although not directly under the umbrella of the United Nations, the NATO Peace Implementation Force (IFOR) and the Stabilization Force (SFOR) in the former Yugoslavia are also of relevance in connection with the practice regarding the liability of troop-contributing nations. Both forces were established as having independent international personality. The sending States have taken it upon themselves to settle any claims for damages, at the same time, however, disclaiming all legal liability.

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[155] *Ibid*., vol. 122, p. 363.

[156] Articles 45, paragraph 1, and 46, paragraph 1, of the Agreement to Supplement the NATO Status-of-Forces Agreement do give the allies the right to conduct the necessary exercises, but only subject to the approval of the competent German authorities.

[157] Higher Administrative Court of Rhineland-Palatinate AS RP-SL 26, 112.

[158] *Ibid*.

[159] *I.C.J. Reports 1999* (see footnote 45 above), p. 88, para. 66. This was, however, merely *obiter dictum*. The case was not about liability, but about the immunity of all United Nations staff.

(e) *Responsibility for the NATO bombing of the Federal Republic of Yugoslavia*

On 29 April 1999, the Federal Republic of Yugoslavia applied to ICJ in The Hague on the basis of article 73 of the Rules of Court, with a request for the indication of provisional measures against 10 States members of NATO, including Germany (the *Legality of Use of Force* case).[160] This request was rejected by the Court on 2 June 1999 because it lacked *prima facie* jurisdiction, in particular on the basis of the Convention on the Prevention and Punishment of the Crime of Genocide. The problem of attributing responsibility to NATO or the member States was not touched upon. ICJ rejected the entire application in its judgment of 15 December 2004, finding that it had no jurisdiction to entertain the claims.[161]

In its written and oral submissions, Germany focused on questions of admissibility and, in particular, on the issue of jurisdiction. The problem of whether and to what extent Germany could be held liable for the NATO air strikes was not directly addressed. In its written preliminary objections, Germany rejected the idea that the actions of international organizations could be generally attributed to their member States. In paragraph 3.45 of its preliminary objections, it stated that there could be no joint responsibility on the part of all NATO members for the alleged genocide caused by the air strikes, but rather all of the elements of the supposed crime—in particular the subjective elements—must be proven for each of the respondent States: "Each one of the respondents must be treated according to its own record."[162]

In paragraph 3.66 of the preliminary objections, it was emphasized that the United Nations itself bears primary responsibility for all acts (and omissions) committed subsequent to the establishment of the Kosovo Force (KFOR) on the basis of Security Council resolution 1244 (1999), and that Germany was thus the wrong addressee for the claim. The Federal Republic of Yugoslavia was, in particular, reprimanded in paragraph 3.68 for not producing any indication that German personnel were involved in the disputed KFOR actions.[163]

The European Court of Human Rights has also been seized of a case related to the air strikes. In *Bankovič and others* v. *Belgium* and others,[164] victims and relatives brought a case against the States members of NATO on the basis of an air strike on a broadcasting facility, on 23 April 1999. Germany and the other States contested the jurisdiction of the Court, since Yugoslavia was outside the area of application of the European Convention on Human Rights (art. 1) because it had not exercised any legal authority over the territory. The Court upheld this view and dismissed the complaint as inadmissible. The question of the responsibility of the member States for acts of an international organization was not examined.[165]

The Bonn Regional Court was also called upon to adjudicate a similar claim for damages.[166] On 30 May 1999 NATO bombed a bridge in Serbia; during this air strike several civilians were wounded or lost their lives. Some of those injured and relatives of the deceased brought a claim against the Federal Republic of Germany for damages before the Court in Bonn. The Court dismissed the action on the basis that no actionable individual claims of this kind can be derived from international law, except under special conventional regimes, such as that provided by the European Convention for the Protection of Human Rights and Fundamental Freedoms, and because the German law of State responsibility is not applicable in cases of armed conflict. The question of whether Germany is responsible at all for NATO actions was not addressed. It would have given rise to considerable difficulties for the plaintiffs, since no German units participated directly in the attack in question.

3. *Final observations*

The above analysis of conventions and case law suggests that the responsibility of international organizations is distinct from that of their member States.

The federal Government has to date advocated the principle of separate responsibility before the European Commission of Human Rights (*M & Co.*), the European Court of Human Rights (*Senator Lines*)[167] and ICJ (*Legality of Use of Force*) and has rejected responsibility by reason of membership for measures taken by the European Community, NATO and the United Nations.

These statements do not, however, refer to the case where German sovereign organs, in particular German armed forces, themselves committed, under the auspices of one of these international organizations, an act giving rise to liability. In such cases, Germany has, in the framework of SFOR and IFOR missions, settled any claims for damages without, however, recognizing any legal obligations.

The Federal Court of Justice of Germany has presumed that there is a strict division of liability between the European Community and its member States in cases involving directly applicable Community law. Its judgements on Germany's liability for damage caused by NATO forces during exercises is, on the other hand, based on the special nature of the NATO Status-of-Forces Agreement and does not permit generalization.

The overall trend in German State practice is to deny State responsibility for the actions of international organizations.

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[160] *Legality of Use of Force (Yugoslavia* v. *Germany), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 422.

[161] *Ibid. (Serbia and Montenegro* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2004, p. 720.*

[162] *Case concerning legality of use of force (Yugoslavia* v. *Germany), Preliminary Objections of the Federal Republic of Germany*, vol. I (5 July 2000) (www.icj-cij.org).

[163] *Ibid.*

[164] European Court of Human Rights, *Reports of Judgments and Decisions, 2001–XII*, decision of 12 December 2001, application No. 52207/99.

[165] Expressly stated by the Court in paragraph 83 (*ibid.*).

[166] Order of the First Civil Chamber of 10 December 2003 (Az.I O 361/02), printed in NJW, 2004, vol. 8, pp. 525 *et seq.*

[167] Germany's submissions are not printed separately in the decision. Rather, the submissions of all the respondent States are summarized together. These arguments were apparently made by all the respondent States, that is, including Germany.

Annex

LIST OF ATTACHMENTS TO THE COMMENTS AND OBSERVATIONS RECEIVED FROM GOVERNMENTS AND INTERNATIONAL ORGANIZATIONS*

Germany

- Index of documents, agreements and court decisions on the topic of responsibility of international organizations

International Criminal Police Organization

- *Basic Legal Documents of the International Criminal Police Organization (INTERPOL)*
- Staff Manual of INTERPOL
- Annual reports of the INTERPOL Commission on the Control of Files (2002 and 2003)

World Intellectual Property Organization

- Contracting Parties or Signatories to Treaties Administered by WIPO, WIPO document 423 (15 January 2005)

* The attachments to the comments and observations received from Governments and international organizations are on file with the Codification Division of the United Nations Office of Legal Affairs and available for consultation.