

## Chapter IV

### RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

#### A. Introduction

41. At its fifty-second session, in 2000, the Commission decided to include the topic “Responsibility of international organizations” in its long-term programme of work.<sup>14</sup> The General Assembly, in paragraph 8 of its resolution 55/152 of 12 December 2000, took note of the Commission’s decision with regard to the long-term programme of work, and of the syllabus for the new topic annexed to the report of the Commission to the Assembly on the work of its fifty-second session. The Assembly, in paragraph 8 of its resolution 56/82 of 12 December 2001, requested the Commission to begin its work on the topic “Responsibility of international organizations”.

42. At its fifty-fourth session, in 2002, the Commission decided to include the topic in its programme of work and appointed Mr. Giorgio Gaja as Special Rapporteur for the topic.<sup>15</sup> At the same session, the Commission established a working group on the topic.<sup>16</sup> The Working Group in its report<sup>17</sup> briefly considered the scope of the topic, the relations between the new project and the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session,<sup>18</sup> questions of attribution, issues relating to the responsibility of member States for conduct that is attributed to an international organization, and questions relating to the content of international responsibility, implementation of responsibility and settlement of disputes. At the end of its fifty-fourth session, the Commission adopted the report of the Working Group.<sup>19</sup>

#### B. Consideration of the topic at the present session

43. At its present session, the Commission had before it the first report of the Special Rapporteur (A/CN.4/532).

44. The first report of the Special Rapporteur surveyed the previous work of the Commission relating to the responsibility of international organizations beginning with the work of the Commission on the topic of relations between States and international organizations in which the question of responsibility of international organizations was identified as early as 1963.<sup>20</sup> This question was further referred to in the context of the work on the topic

of State responsibility but it was then decided not to include it in that topic. The report explained that even though the topic of responsibility of international organizations was set aside, nevertheless some of the most controversial issues relating to responsibility of international organizations had already been discussed by the Commission in the context of its consideration of the topic which was eventually entitled “Responsibility of States for internationally wrongful acts”. The Commission’s work on State responsibility could not fail to affect the study of the new topic and it would be only reasonable to follow the same approach on issues that were parallel to those concerning States. Such an approach did not assume that similar issues between the two topics would necessarily lead to analogous solutions. The intention only was to suggest that, should the study concerning particular issues relating to international organizations produce results that did not differ from those reached by the Commission in its analysis of State responsibility, the model of the draft articles on State responsibility should be followed both in the general outline and in the wording.

45. In the first report the Special Rapporteur discussed the scope of the work and general principles concerning responsibility of international organizations, dealing with issues that corresponded to those that were considered in chapter I (General principles, arts. 1–3) of the draft articles on responsibility of States for internationally wrongful acts. He proposed three draft articles: article 1 (Scope of the present draft articles),<sup>21</sup> article 2 (Use of terms)<sup>22</sup> and article 3 (General principles).<sup>23</sup>

<sup>21</sup> Article 1 read as follows:

*“Article 1. Scope of the present draft articles*

“The present draft articles apply to the question of the international responsibility of an international organization for acts that are wrongful under international law. They also apply to the question of the international responsibility of a State for the conduct of an international organization.”

<sup>22</sup> Article 2 read as follows:

*“Article 2. Use of terms*

“For the purposes of the present draft articles, the term ‘international organization’ refers to an organization which includes States among its members insofar as it exercises in its own capacity certain governmental functions.”

<sup>23</sup> Article 3 read 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 attributed to the international organization under international law; and

“(b) Constitutes a breach of an international obligation of that international organization.”

<sup>14</sup> *Yearbook ... 2000*, vol. II (Part Two), p. 131, para. 729.

<sup>15</sup> *Yearbook ... 2002*, vol. II (Part Two), paras. 461 and 463.

<sup>16</sup> *Ibid.*, para. 462.

<sup>17</sup> *Ibid.*, paras. 465–488.

<sup>18</sup> See footnote 6 above.

<sup>19</sup> *Yearbook ... 2002*, vol. II (Part Two), para. 464.

<sup>20</sup> *Yearbook ... 1963*, vol. II, document A/CN.4/161 and Add.1, p. 184, para. 172.

46. The Commission considered the first report of the Special Rapporteur at its 2751st to 2756th and 2763rd meetings, held on 5 to 9, 13 and 27 May 2003.

47. At its 2756th meeting, the Commission referred draft articles 1 and 3 to the Drafting Committee and established an open-ended working group to consider draft article 2.

48. At its 2763rd meeting, the Commission considered the report of the Working Group on draft article 2<sup>24</sup> and referred the text for that article as formulated by the Working Group to the Drafting Committee.

49. The Commission considered and adopted the report of the Drafting Committee on draft articles 1, 2 and 3, at its 2776th meeting held on 16 July 2003 (see paragraph 53 below).

50. At its 2784th meeting held on 4 August 2003, the Commission adopted the commentaries to the aforementioned draft articles (see paragraph 54 below).

51. At its 2756th meeting, the Commission established an open-ended working group to assist the Special Rapporteur with regard to his next report. The Working Group held one meeting.

52. Bearing in mind the close relationship between this topic and the work of international organizations, the Commission at its 2784th meeting, requested the Secretariat to circulate, on an annual basis, the chapter on this topic included in the report of the Commission to the General Assembly on the work of its session, to the United Nations, its specialized agencies and some other international organizations for their comments.

### **C. Text of draft articles on responsibility of international organizations provisionally adopted so far by the Commission**

#### **1. TEXT OF THE DRAFT ARTICLES**

53. The text of the draft articles provisionally adopted so far by the Commission is reproduced below.

### **RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS**

#### ***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.

<sup>24</sup> The text of article 2 as proposed by the Working Group 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 of international law and possessing its own international legal personality [distinct from that of its members]. In addition to States, international organizations may include as members, entities other than States.”

#### ***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.

#### ***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.

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO ADOPTED AT THE FIFTY-FIFTH SESSION OF THE COMMISSION

54. The text of the draft articles with commentaries thereto adopted by the Commission at its fifty-fifth session is reproduced below.

### **RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS**

#### ***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.

#### ***Commentary***

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

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

(3) An international organization’s responsibility may be asserted under different systems of law. Before a national court, a natural or legal person will probably invoke the organization’s responsibility or liability under one or the other municipal law. The reference in article 1,

paragraph 1, and throughout the draft articles to international responsibility makes it clear that the draft articles only take the perspective of international law and consider whether an international organization is responsible under that law. Thus, issues of responsibility or liability under municipal law are not as such covered by the draft articles. This is without prejudice to the applicability of certain principles or rules of international law when the question of an organization's responsibility or liability arises before a national court.

(4) Article 1, paragraph 1, concerns the cases in which an international organization incurs international responsibility. The more frequent case will be that of the organization committing an internationally wrongful act. However, there are other instances in which an international organization's responsibility may arise. One may envisage, for example, cases analogous to those referred to in part one, chapter IV, of the draft articles on responsibility of States for internationally wrongful acts.<sup>25</sup> The international organization may thus be held responsible if it aids or assists another organization or a State in committing an internationally wrongful act, or if it directs and controls another organization or a State in that commission, or else if it coerces another organization or a State to commit an act that would be, but for the coercion, an internationally wrongful act. Another case in which an international organization may be held responsible is that of an internationally wrongful act committed by another international organization of which the first organization is a member.

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

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

[They] are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.<sup>26</sup>

The main question that has been left out in the articles on State responsibility, and that will be considered in the present draft articles, is the issue of the responsibility of a

State which is a member of an international organization for a wrongful act committed by the organization.

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

(8) Paragraph 2 does not include questions of attribution of conduct to a State, whether an international organization is involved or not. Part one, chapter II, of the draft articles on the responsibility of States for internationally wrongful acts deals, albeit implicitly, with attribution of conduct to a State when an international organization or one of its organs acts as a State organ, generally or only under particular circumstances. Article 4 refers to the "internal law of the State" as the main criterion for identifying State organs, and internal law will rarely include an international organization or one of its organs among State organs. However, article 4 does not consider the status of such organs under internal law as a necessary requirement. Thus, an organization or one of its organs may also be considered as a State organ under article 4 when it acts as a *de facto* organ of a State. An international organization may also be, under the circumstances, as provided for in article 5, a "person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority".<sup>27</sup> Article 6 then considers the case in which an organ is "placed at the disposal of a State by another State".<sup>28</sup> A similar eventuality, which may or may not be considered as implicitly covered by article 6, could arise if an international organization places one of its organs at the disposal of a State. The commentary to article 6 notes that this eventuality "raises difficult questions of the relations between States and international organizations, questions which fall outside the scope of these articles".<sup>29</sup> International organizations are not referred to in the commentaries on articles 4 and 5. While it appears that all questions of attribution of conduct to States are nevertheless within the scope of State responsibility for its internationally wrongful acts, and should therefore not be considered anew, some aspects of attribution of conduct to either a State or an international organization may be further elucidated in the discussion of attribution of conduct to international organizations.

(9) The present draft articles will deal with the symmetrical question of a State or a State organ acting as an organ of an international organization. This question concerns the attribution of conduct to an international organization and is therefore covered by article 1, paragraph 1.<sup>30</sup>

<sup>27</sup> *Ibid.*, p. 26.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*, p. 45, para. (9).

<sup>30</sup> The Commission has not yet adopted a position on whether and to what extent the draft will apply to violations of what is sometimes called the "internal law of international organizations" and intends to take a decision on this question later. For the problems to which the concept of the "internal law of international organizations" gives rise, see paragraph (10) of the commentary to article 3 below.

<sup>25</sup> *Yearbook ... 2001*, vol. II (Part Two), p. 27, para. 76.

<sup>26</sup> *Ibid.*, p. 30.



## 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.**

### Commentary

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

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

(3) Starting from the 1969 Vienna Convention,<sup>31</sup> several codification conventions have succinctly defined the term “international organization” as “intergovernmental organization”.<sup>32</sup> In each case the definition was given only for the purposes of the relevant convention and not for all purposes. The text of some of these codification conventions added some further elements to the definition: for instance, the 1986 Vienna Convention only applies to those intergovernmental organizations which have the capacity to conclude treaties.<sup>33</sup> No additional element would be required in the case of international responsibility apart from possessing an obligation under international law. However, the adoption of a different definition is preferable for several reasons. First, it is questionable whether by defining an international organization as an intergovernmental organization one provides much information: it is not even clear whether the term “intergovernmental organization” refers to the constituent instrument or to actual membership. Secondly, the term “intergovernmental” is in any case inappropriate to a certain extent, because several important international

organizations have been established by State organs other than governments or by those organs together with governments, nor are States always represented by governments within the organizations. Thirdly, an increasing number of international organizations comprise among their members entities other than States as well as States; the term “intergovernmental organization” would appear to exclude these organizations, although with regard to international responsibility it is difficult to see why one should reach solutions that differ from those applying to organizations of which only States are members.

(4) Most international organizations have been established by treaties. Thus, a reference in the definition to treaties as constituent instruments reflects prevailing practice. However, forms of international cooperation are sometimes established without a treaty. In certain cases, for instance with regard to the Nordic Council, an Agreement between Finland, Denmark, Iceland, Norway and Sweden concerning co-operation was subsequently concluded. In other cases, although an implicit agreement may be held to exist, member States insisted that there was no treaty concluded to that effect, as for example in respect of OSCE.<sup>34</sup> In order to cover organizations established by States on the international plane without a treaty, article 2 refers, as an alternative to treaties, to any “other instrument governed by international law”. This wording is intended to include instruments, such as resolutions adopted by the General Assembly of the United Nations or by a conference of States. Examples of international organizations that have been so established include the Pan American Institute of Geography and History (PAIGH),<sup>35</sup> OPEC<sup>36</sup> and OSCE.

(5) The reference to “a treaty or other instrument governed by international law” is not intended to exclude entities other than States from being regarded as members of an international organization. This is unproblematic with regard to international organizations which, so long as they have a treaty-making capacity, may well be a party to a constituent treaty. The situation is likely to be different with regard to entities other than States and international organizations. However, even if the entity other than a State does not possess treaty-making capacity or cannot take part in the adoption of the constituent instrument, it may be accepted as a member of the organization so established.

(6) The definition in article 2 does not cover organizations that are established through instruments governed by municipal laws, unless a treaty or other instrument governed by international law has been subsequently adopted and has entered into force.<sup>37</sup> Thus the definition does not include organizations such as IUCN, although

<sup>31</sup> The relevant provision is article 2, paragraph 1 (i).

<sup>32</sup> See article 1, paragraph 1 (1), of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character; article 2, paragraph 1 (n), of the Vienna Convention on succession of States in respect of treaties; and article 2, paragraph 1 (i), of the 1986 Vienna Convention.

<sup>33</sup> See article 6 of the Convention. As the Commission noted with regard to the draft articles on treaties concluded between States and international organizations or between international organizations (para. (22) of the commentary to article 2):

“Either an international organization has the capacity to conclude at least one treaty, in which case the rules in the draft articles will be applicable to it, or, despite its title, it does not have that capacity, in which case it is pointless to state explicitly that the draft articles do not apply to it.”

(*Yearbook ... 1981*, vol. II (Part Two), p. 124)

<sup>34</sup> At its Budapest session in 1995 the Conference for Security and Cooperation in Europe took the decision to adopt the name of the Organization (ILM, vol. 34 (1995), p. 773).

<sup>35</sup> See A. J. Peaslee, *International Governmental Organizations: Constitutional Documents*, 3rd rev. ed. (The Hague, Martinus Nijhoff, 1979), parts 3–4, pp. 389–403.

<sup>36</sup> See P. J. G. Kapteyn and others, eds., *International Organization and Integration: Annotated Basic Documents and Descriptive Directory of International Organizations and Arrangements*, 2nd rev. ed. (Dordrecht, Martinus Nijhoff, 1984), vol. II.K., sect. 3.2.a.

<sup>37</sup> This was the case of the Nordic Council (see paragraph (4) of the commentary to article 2 above).

over 70 States are among its members,<sup>38</sup> or the Institut du monde arabe, which was established as a foundation under French law by 20 States.<sup>39</sup>

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

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

The purpose of this type of provision in the constituent instrument is to impose on the Member States an obligation to recognize the organization’s legal personality under their internal laws. A similar obligation is imposed on the host State when a similar text is included in the headquarters agreement.<sup>40</sup>

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

International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.<sup>41</sup>

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

The Court need hardly point out that international organizations are subjects of international law which do not, unlike States, possess a general competence.<sup>42</sup>

While it may be held that, when making both these statements, the Court had an international organization such as WHO in mind, the wording is quite general and appears

to take a liberal view of the acquisition by international organizations of legal personality under international law.

(9) In the passages quoted in the previous paragraph, and more explicitly in its advisory opinion on *Reparation for Injuries*,<sup>43</sup> ICJ appeared to favour the view that when legal personality of an organization exists, it is an “objective” personality. Thus, it would not be necessary to enquire whether the legal personality of an organization has been recognized by an injured State before considering whether the organization may be held internationally responsible according to the present draft articles. On the other hand, an organization merely existing on paper could not be considered as having an “objective” legal personality under international law.

(10) The legal personality of an organization which may give rise to the international responsibility of that organization needs to be “distinct from that of its member-States”.<sup>44</sup> This element is reflected in the requirement in article 2 that the legal personality should be the organization’s “own”, a term that the Commission considers as synonymous with the phrase “distinct from that of its member-States”. The existence for the organization of a distinct legal personality does not exclude the possibility of a certain conduct being attributed both to the organization and to one or more of its members or to all its members.

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

International organizations are governed by the “principle of speciality”, that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.<sup>45</sup>

Many international organizations have only States as members. In other organizations, which have a different membership, the presence of States among the members is essential for the organization to be considered in the draft articles.<sup>46</sup> This requirement is intended to be conveyed by the words “in addition to States”.

(12) The presence of States as members may take the form of participation as members by individual State organs or agencies. Thus, for instance, the Arab States

<sup>38</sup> See [www.iucn.org](http://www.iucn.org).

<sup>39</sup> A description of the status of this organization may be found in a reply by the Minister for Foreign Affairs of France to a parliamentary question (*Annuaire français de droit international*, vol. XXXVII (1991), pp. 1024–1025).

<sup>40</sup> Thus in its judgement No. 149 of 18 March 1999, in *Istituto Universitario Europeo v. Piette*, the Italian Court of Cassation found that “[t]he provision in an international agreement of the obligation to recognize legal personality to an organization and the implementation by law of that provision only mean that the organization acquires legal personality under the municipal law of the contracting States” (*Giustizia civile*, vol. XLIX (1999), part I, p. 1313).

<sup>41</sup> *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion*, I.C.J. Reports 1980, p. 73 at pp. 89–90, para. 37.

<sup>42</sup> *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion*, I.C.J. Reports 1996, p. 78, para. 25.

<sup>43</sup> I.C.J. Reports 1949 (see footnote 10 above), p. 185.

<sup>44</sup> This wording was used by G. G. Fitzmaurice in the definition of the term “international organization” that he proposed in his first report on the law of treaties (*Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 108), and by the Institute of International Law in its 1995 Lisbon resolution on “The legal consequences for member States of the non-fulfilment by international organizations of their obligations toward third parties” (*Yearbook of the Institute of International Law*, vol. 66–II (1996), p. 445).

<sup>45</sup> See footnote 42 above.

<sup>46</sup> Thus, the definition in article 2 does not cover international organizations whose membership only comprises international organizations. An example of this type of organization is the Joint Vienna Institute, which was established on the basis of an agreement between five international organizations. See [www.jvi.org](http://www.jvi.org).

Broadcasting Union, which was established by a treaty, lists “broadcasting organizations” as its full members.<sup>47</sup>

(13) The reference in the second sentence of article 2 of entities other than States—such as international organizations,<sup>48</sup> territories<sup>49</sup> or private entities<sup>50</sup>—as additional members of an organization points to a significant trend in practice, in which international organizations increasingly tend to have a mixed membership in order to make cooperation more effective in certain areas.

(14) It is obvious that only with regard to States that are members of an international organization does the question of the international responsibility of States as members arise. Only this question, as well as the question of the international responsibility of international organizations as members of another organization, will be considered in the draft articles. The presence of other entities as members of an international organization will be examined only insofar as it may affect the international responsibility of States and international organizations.

### 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.**

#### *Commentary*

(1) Article 3 has an introductory character. It states general principles that apply to the most frequent cases occurring within the scope of the draft articles as defined in articles 1 and 2: those in which an international organization is internationally responsible for its own internationally wrongful acts. The statement of general principles in article 3 is without prejudice to the existence of cases in which an organization’s international responsibility may be established for conduct of a State or of another organization. Moreover, the general principles clearly do not apply to the issues of State responsibility referred to in article 1, paragraph 2.

<sup>47</sup> See article 4 of the Convention of the Arab States Broadcasting Union.

<sup>48</sup> For instance, the European Community has become a member of FAO, whose Constitution was amended in 1991 in order to allow the admission of regional economic integration organizations.

<sup>49</sup> For instance, article 3 (d)–(e) of the Convention of the World Meteorological Organization entitles entities other than States, referred to as “territories” or “groups of territories”, to become members.

<sup>50</sup> One example is the World Tourism Organization, which includes States as “full members”, “territories or groups of territories” as “associate members” and “international bodies, both intergovernmental and non-governmental” as “affiliate members”. See the statutes of the World Tourism Organization.

(2) The general principles, as stated in article 3, are modelled on those applicable to States according to articles 1 and 2 of the draft articles on the responsibility of States for internationally wrongful acts.<sup>51</sup> There seems to be little reason for stating these principles in another manner. It is noteworthy that in a report on peacekeeping operations the United Nations Secretary-General referred to:

the principle of State responsibility—widely accepted to be applicable to international organizations—that damage caused in breach of an international obligation and which is attributable to the State (or to the Organization), entails the international responsibility of the State (or of the Organization).<sup>52</sup>

(3) The order and wording of the two paragraphs in article 3 are identical to those appearing in articles 1 and 2 of the draft articles on the responsibility of States for internationally wrongful acts, but for the replacement of the word “State” with “international organization”. Since the two principles are closely interrelated and the first one states a consequence of the second one, it seems preferable to include them in a single article.

(4) As in the case of States, the attribution of conduct to an international organization is one of the two essential elements for an internationally wrongful act to occur. The term “conduct” is intended to cover both acts and omissions on the part of the international organization. The other essential element is that conduct constitutes the breach of an obligation under international law. The obligation may result either from a treaty binding the international organization or from any other source of international law applicable to the organization. Again as in the case of States, damage does not appear to be an element necessary for international responsibility of an international organization to arise.

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

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

The United Nations may be required to bear responsibility for the damage arising from such acts.<sup>53</sup>

(6) The meaning of international responsibility is not defined in article 3, nor is it in the corresponding provisions of the draft articles on responsibility of States for internationally wrongful acts. There the consequences of an internationally wrongful act only result from part

<sup>51</sup> See footnote 6 above. The classical analysis that led the Commission to outline these articles is contained in Roberto Ago’s third report on State responsibility, *Yearbook ... 1971*, vol. II (Part One), document A/CN.4/246 and Add.1–3, pp. 214–223, paras. 49–75.

<sup>52</sup> A/51/389, p. 4, para. 6.

<sup>53</sup> *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999*, pp. 88–89, para. 66.



two of the text, which concerns the “content of the international responsibility of a State”.<sup>54</sup> Also, in the present draft articles the content of international responsibility will result from further articles.

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

(8) The fact that an international organization is responsible for an internationally wrongful act does not exclude the existence of parallel responsibility of other subjects of international law in the same set of circumstances. For instance, an international organization may have cooperated with a State in the breach of an obligation imposed on both.

(9) The general principles as stated in article 3 do not include a provision similar to article 3 of the draft articles on the responsibility of States for internationally wrongful acts. That article contains two sentences, the first one of which, by saying that “[t]he characterization of an act of a State as internationally wrongful is governed by international law”,<sup>55</sup> makes a rather obvious statement. This sentence could be transposed to international organizations, but may be viewed as superfluous, since it is clearly implied in the principle that an internationally wrongful act consists in the breach of an obligation under international law. Once this principle has been stated, it seems hardly necessary to add that the characterization of an act

as wrongful depends on international law. The apparent reason for the inclusion of the first sentence in article 3 of the draft articles on the responsibility of States lies in the fact that it provides a link to the second sentence.

(10) The second sentence in article 3 on State responsibility cannot be easily adapted to the case of international organizations. When it says that the characterization of an act as wrongful under international law “is not affected by the characterization of the same act as lawful by internal law”,<sup>56</sup> this text intends to stress the point that internal law, which depends on the unilateral will of the State, may never justify what constitutes, on the part of the same State, the breach of an obligation under international law. The difficulty in transposing this principle to international organizations depends on the fact that the internal law of an international organization cannot be sharply differentiated from international law. At least the constituent instrument of the international organization is a treaty or another instrument governed by international law; some further parts of the internal law of the organization may be viewed as belonging to international law. One important distinction is whether the relevant obligation exists towards a member or a non-member State, although this distinction is not necessarily conclusive, because it would be questionable to say that the internal law of the organization always prevails over the obligation that the organization has under international law towards a member State. On the other hand, with regard to non-member States, Article 103 of the Charter of the United Nations may provide a justification for the organization’s conduct in breach of an obligation under a treaty with a non-member State. Thus, the relations between international law and the internal law of an international organization appear too complex to be expressed in a general principle.

<sup>54</sup> *Yearbook ... 2001* (see footnote 6 above), p. 86.

<sup>55</sup> *Ibid.*, p. 36.

<sup>56</sup> *Ibid.*

## Chapter V

### DIPLOMATIC PROTECTION

#### A. Introduction

55. The Commission at its forty-eighth session, in 1996, identified the topic of “Diplomatic protection” as one of three topics appropriate for codification and progressive development.<sup>57</sup> In the same year, the General Assembly, in paragraph 13 of its resolution 51/160 of 16 December 1996, invited the Commission to examine the topic further and to indicate its scope and content in the light of the comments and observations made during the debate in the Sixth Committee and any written comments that Governments might wish to make. At its forty-ninth session, in 1997, the Commission, pursuant to the above General Assembly resolution, established at its 2477th meeting a working group on the topic.<sup>58</sup> The Working Group submitted a report at the same session which was endorsed by the Commission.<sup>59</sup> The Working Group attempted to: (a) clarify the scope of the topic to the extent possible; and (b) identify issues which should be studied in the context of the topic. The Working Group proposed an outline for consideration of the topic which the Commission recommended to form the basis for the submission of a preliminary report by the Special Rapporteur.<sup>60</sup>

56. Also at its forty-ninth session, the Commission appointed Mr. Mohamed Bennouna as Special Rapporteur for the topic.<sup>61</sup>

57. The General Assembly in paragraph 8 of its resolution 52/156 of 15 December 1997 endorsed the decision of the Commission to include in its agenda the topic “Diplomatic protection”.

58. At its fiftieth session, in 1998, the Commission had before it the preliminary report of the Special Rapporteur.<sup>62</sup> At the same session, the Commission established an open-ended working group to consider possible conclusions which might be drawn on the basis of the discussion as to the approach to the topic.<sup>63</sup>

59. At its fifty-first session, in 1999, the Commission appointed Mr. Christopher John Robert Dugard

Special Rapporteur for the topic,<sup>64</sup> after Mr. Bennouna was elected a judge to the International Tribunal for the Former Yugoslavia.

60. At its fifty-second session, in 2000, the Commission had before it the first report of the Special Rapporteur.<sup>65</sup> The Commission deferred its consideration of chapter III to the next session, due to the lack of time. At the same session, the Commission established open-ended informal consultations, chaired by the Special Rapporteur, on draft articles 1, 3 and 6.<sup>66</sup> The Commission subsequently decided to refer draft articles 1, 3 and 5–8 to the Drafting Committee together with the report of the informal consultations.

61. At its fifty-third session, in 2001, the Commission had before it the remainder of the first report of the Special Rapporteur, as well as his second report.<sup>67</sup> Due to the lack of time, the Commission was only able to consider those parts of the second report covering draft articles 10 and 11, and deferred consideration of the remainder of the report, concerning draft articles 12 and 13, to the next session. At the same session, the Commission decided to refer draft articles 9–11 to the Drafting Committee.

62. Also at the same session, the Commission established open-ended informal consultations on article 9, chaired by the Special Rapporteur.

63. At its fifty-fourth session, in 2002, the Commission had before it the remainder of the second report of the Special Rapporteur,<sup>68</sup> concerning draft articles 12 and 13, as well as his third report,<sup>69</sup> covering draft articles 14 to 16. At the same session, the Commission decided to refer draft article 14 (a), (b), (d) (to be considered in connection with subparagraph (a)), and (e) to the Drafting Committee. It further decided to refer draft article 14 (c) to the Drafting Committee to be considered in connection with subparagraph (a).

64. The Commission also considered the report of the Drafting Committee on draft articles 1 to 7 [8], at the same session. It adopted articles 1 to 3 [5], 4 [9], 5 [7],

<sup>57</sup> *Yearbook ... 1996*, vol. II (Part Two), pp. 97–98, para. 248, and annex II, addendum 1, p. 137.

<sup>58</sup> *Yearbook ... 1997*, vol. II (Part Two), p. 60, para. 169.

<sup>59</sup> *Ibid.*, para. 171.

<sup>60</sup> *Ibid.*, pp. 62–63, paras. 189–190.

<sup>61</sup> *Ibid.*, p. 63, para. 190.

<sup>62</sup> *Yearbook ... 1998*, vol. II (Part One), p. 309, document A/CN.4/484.

<sup>63</sup> The conclusions of the Working Group are contained in *Yearbook ... 1998*, vol. II (Part Two), p. 49, para. 108.

<sup>64</sup> *Yearbook ... 1999*, vol. II (Part Two), p. 17, para. 19.

<sup>65</sup> *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/506 and Add.1.

<sup>66</sup> The report of the informal consultations is contained in *Yearbook ... 2000*, vol. II (Part Two), pp. 85–86, para. 495.

<sup>67</sup> *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/514.

<sup>68</sup> *Ibid.*

<sup>69</sup> *Yearbook ... 2002*, vol. II (Part One), document A/CN.4/523 and Add.1.