

## Chapter VIII

### RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

#### A. Introduction

325. At its fifty-second session (2000), the Commission decided to include the topic “Responsibility of international organizations” in its long-term programme of work.<sup>363</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 General Assembly on the work of that session. The General 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”.

326. At its fifty-fourth session, the Commission decided, at its 2717th meeting, held on 8 May 2002, to include the topic in its programme of work and appointed Mr. Giorgio Gaja as Special Rapporteur for the topic.<sup>364</sup> At the same session, the Commission established a Working Group on the topic.<sup>365</sup> The Working Group in its report<sup>366</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>367</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>368</sup>

327. From its fifty-fifth (2003) to its fifty-eighth (2006) sessions, the Commission had received and considered four reports from the Special Rapporteur,<sup>369</sup> and provisionally adopted draft articles 1 to 30.<sup>370</sup>

<sup>363</sup> *Yearbook ... 2000*, vol. II (Part Two), p. 131, para. 729.

<sup>364</sup> *Yearbook ... 2002*, vol. II (Part Two), p. 93, paras. 461 and 463.

<sup>365</sup> *Ibid.*, p. 93, para. 462.

<sup>366</sup> *Ibid.*, pp. 93–96, paras. 465–488.

<sup>367</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26–30, para. 76.

<sup>368</sup> *Yearbook ... 2002*, vol. II (Part Two), para. 464.

<sup>369</sup> First report: *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/532; second report: *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/541; third report: *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/553; and fourth report: *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/564 and Add.1–2.

<sup>370</sup> Draft articles 1 to 3 were adopted at the fifty-fifth session (*Yearbook ... 2003*, vol. II (Part Two), p. 18, para. 49); draft articles 4 to 7 at the fifty-sixth session (*Yearbook ... 2004*, vol. II (Part Two), p. 46, para. 69); draft articles 8 to 16 [15] at the fifty-seventh session (*Yearbook ... 2005*, vol. II (Part Two), p. 40, para. 203); and draft articles 17 to 30 at the fifty-eighth session (*Yearbook ... 2006*, vol. II (Part Two), p. 118, para. 88).

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

328. At the present session, the Commission had before it the fifth report of the Special Rapporteur (A/CN.4/583), as well as written comments received so far from international organizations.<sup>371</sup>

329. The fifth report of the Special Rapporteur, dealing with the content of the international responsibility of an international organization, followed, like the previous reports, the general pattern of the articles on responsibility of States for internationally wrongful acts.

330. In introducing its fifth report, the Special Rapporteur addressed some comments made on the draft articles provisionally adopted by the Commission. As to the view that the current draft did not take sufficiently into account the great variety of international organizations, he indicated that the draft articles had a level of generality which made them appropriate for most, if not all, international organizations; this did not exclude, if the particular features of certain organizations so warranted, the application of special rules.

331. The Special Rapporteur also referred to the insufficient availability of practice in respect of the responsibility of international organizations. While calling for more information on relevant instances being provided to the Commission, he emphasized the usefulness of the draft articles as an analytical framework, which should assist States and international organizations in focusing on the main legal issues raised by the topic.

332. In introducing the draft articles contained in his fifth report, the Special Rapporteur indicated that the work undertaken by the Commission did not consist in merely reiterating the articles on responsibility of States for internationally wrongful acts. Whether or not the legal issues addressed were covered by these articles, they were considered on their own merits with regard to international organizations. Given the level of generality of the draft however, he deemed it reasonable to adopt a similar wording to that used in the articles on State responsibility

<sup>371</sup> Following the recommendations of the Commission (*Yearbook ... 2002*, vol. II (Part Two), p. 93, para. 464 and p. 96, para. 488 and *Yearbook ... 2003*, vol. II (Part Two), p. 18, para. 52.), the Secretariat, on an annual basis, has been circulating the relevant chapter of the report of the Commission to international organizations asking for their comments and for any relevant materials which they could provide to the Commission. For comments from Governments and international organizations, see *Yearbook ... 2004*, vol. II (Part One), documents A/CN.4/545; *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/547 and A/CN.4/556; and *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/568 and Add.1. See also document A/CN.4/582 (reproduced in *Yearbook ... 2007*, vol. II (Part One)).

in the many instances where the provisions could equally apply to States and to international organizations. This was actually the case for most of the draft articles proposed in his fifth report.

333. The fifth report contained 14 draft articles, corresponding to Part Two of the articles on State responsibility. Draft articles 31 to 36 dealt with general principles of the content of international responsibility of an international organization; draft articles 37 to 42 related to reparation for injury and draft articles 43 and 44 addressed the issue of serious breaches of obligations under peremptory norms of general international law.

334. The Special Rapporteur presented the six draft articles embodying general principles, namely: draft article 31 (Legal consequences of an internationally wrongful act),<sup>372</sup> draft article 32 (Continued duty of performance),<sup>373</sup> draft article 33 (Cessation and non-repetition),<sup>374</sup> draft article 34 (Reparation),<sup>375</sup> draft article 35 (Irrelevance of the rules of the organization),<sup>376</sup> and draft article 36 (Scope of international obligations set out in this Part).<sup>377</sup>

335. Draft articles 31 to 34 and 36 followed closely the wording of the corresponding provisions on responsibility

<sup>372</sup> Draft article 31 reads as follows:

*“Legal consequences of an internationally wrongful act*

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

<sup>373</sup> Draft article 32 reads as follows:

*“Continued duty of performance*

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

<sup>374</sup> Draft article 33 reads as follows:

*“Cessation and non-repetition*

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

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

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

<sup>375</sup> Draft article 34 reads as follows:

*“Reparation*

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

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

<sup>376</sup> Draft article 35 reads as follows:

*“Irrelevance of the rules of the organization*

“Unless the rules of the organization otherwise provide for the relations between an international organization and its member States and organizations, the responsible organization may not rely on the provisions of its pertinent rules as justification for failure to comply with the obligations under this Part.”

<sup>377</sup> Draft article 36 reads as follows:

*“Scope of international obligations set out in this Part*

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

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

of States for internationally wrongful acts. In the view of the Special Rapporteur, the principles contained in these articles were equally applicable to international organizations. The situation was somewhat different in respect of draft article 35: whereas a State could not rely on the provisions of its internal law as justification for failure to comply with the obligations entailed by its responsibility, an international organization might be entitled to rely on its internal rules as a justification for not giving reparation towards its members. The proviso in draft article 35 was designed to deal with this particular assumption.

336. The Special Rapporteur also introduced six draft articles in respect of reparation for injury, namely: draft article 37 (Forms of reparation),<sup>378</sup> draft article 38 (Restitution),<sup>379</sup> draft article 39 (Compensation),<sup>380</sup> draft article 40 (Satisfaction),<sup>381</sup> draft article 41 (Interest),<sup>382</sup> and draft article 42 (Contribution to the injury).<sup>383</sup>

337. Despite the paucity of relevant practice as far as international organizations were concerned, the few

<sup>378</sup> Draft article 37 reads as follows:

*“Forms of reparation*

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

<sup>379</sup> Draft article 38 reads as follows:

*“Restitution*

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

“(a) is not materially impossible;

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

<sup>380</sup> Draft article 39 reads as follows:

*“Compensation*

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

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

<sup>381</sup> Draft article 40 reads as follows:

*“Satisfaction*

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

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

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

<sup>382</sup> Draft article 41 reads as follows:

*“Interest*

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

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

<sup>383</sup> Draft article 42 reads as follows:

*“Contribution to the injury*

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

instances that could be found confirmed the applicability to them of the rules on reparation adopted in respect of States. There was thus no reason for departing from the text of the articles on State responsibility in that regard.

338. The Special Rapporteur then presented two draft articles dealing with serious breaches of obligations under peremptory norms of general international law, namely: draft article 43 (Application of this chapter),<sup>384</sup> and draft article 44 (Particular consequences of a serious breach of an obligation under this chapter).<sup>385</sup>

339. Regarding serious breaches of obligations under peremptory norms of general international law, the Special Rapporteur recalled the comments made by States and international organizations in response to questions addressed by the Commission in its previous report.<sup>386</sup> He deemed it reasonable to consider that both States and international organizations had the obligation to cooperate to bring the breach to an end, not to recognize the situation as lawful and not to render aid or assistance in maintaining it. This did not imply that the organization should act beyond its powers under its constitutive instrument or other pertinent rules.

340. The Commission considered the fifth report of the Special Rapporteur at its 2932nd to 2935th and 2938th meetings from 9 to 12 July 2007 and on 18 July 2007. At its 2935th meeting, on 12 July 2007, the Commission referred draft articles 31 to 44 to the Drafting Committee. At the same meeting, a supplementary draft article was proposed by a member of the Commission.<sup>387</sup> The Special Rapporteur proposed a different supplementary article on the same issue. At the 2938th meeting, on 18 July 2007, the Commission referred the draft article proposed by the Special Rapporteur to the Drafting Committee.<sup>388</sup>

<sup>384</sup> Draft article 43 reads as follows:

*“Application of this chapter*

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

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

<sup>385</sup> Draft article 44 reads as follows:

*“Particular consequences of a serious breach of an obligation under this chapter*

“1. States and international organizations shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 43.

“2. No State or international organization shall recognize as lawful a situation created by a serious breach within the meaning of article 43, nor render aid or assistance in maintaining that situation.

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

<sup>386</sup> *Yearbook ... 2006*, vol. II (Part Two), p. 21, para. 28.

<sup>387</sup> The supplementary draft article reads as follows:

“The member States of the responsible international organization shall provide the organization with the means to effectively carry out its obligations arising under the present part.”

<sup>388</sup> In its amended version, the supplementary draft article reads as follows:

“In accordance with the rules of the responsible international organization, its members are required to take all appropriate measures in

341. The Commission considered and adopted the report of the Drafting Committee on draft articles 31 to 44 [45] at its 2945th meeting, on 31 July 2007 (sect. C.1 below).

342. At its 2949th to 2954th meetings, on 6, 7 and 8 August 2007, the Commission adopted the commentaries to the aforementioned draft articles (sect. C.2 below).

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

#### 1. TEXT OF THE DRAFT ARTICLES

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

#### RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

##### PART ONE

#### THE INTERNATIONALLY WRONGFUL ACT OF AN INTERNATIONAL ORGANIZATION

##### CHAPTER I

#### INTRODUCTION

##### *Article 1.*<sup>389</sup> *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.

##### *Article 2.*<sup>390</sup> *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.*<sup>391</sup> *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.

order to provide the organization with the means for effectively fulfilling its obligations under the present chapter.”

<sup>389</sup> For the commentary to this article, see *Yearbook ... 2003*, vol. II (Part Two), chapter IV, section C.2, pp. 18–19, paragraph 54.

<sup>390</sup> *Idem.*

<sup>391</sup> *Idem.*

CHAPTER II<sup>392</sup>

## ATTRIBUTION OF CONDUCT TO AN INTERNATIONAL ORGANIZATION

*Article 4.<sup>393</sup> 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.<sup>394</sup>

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.<sup>395</sup>

*Article 5.<sup>396</sup> 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.

*Article 6.<sup>397</sup> 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.

*Article 7.<sup>398</sup> 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.

CHAPTER III<sup>399</sup>

## BREACH OF AN INTERNATIONAL OBLIGATION

*Article 8.<sup>400</sup> Existence of a breach of an international obligation*

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

<sup>392</sup> For the commentary to this chapter, see *Yearbook ... 2004*, vol. II (Part Two), chapter V, section C.2, p. 47, paragraph 72.

<sup>393</sup> For the commentary to this article, see *idem*, pp. 48–50.

<sup>394</sup> The location of paragraph 2 may be reconsidered at a later stage with a view to eventually placing all definitions of terms in article 2.

<sup>395</sup> The location of paragraph 4 may be reconsidered at a later stage with a view to eventually placing all definitions of terms in article 2.

<sup>396</sup> For the commentary to this article, see *Yearbook ... 2004*, vol. II (Part Two), chapter V, section C.2, paragraph 72, pp. 50–52.

<sup>397</sup> *Idem*, pp. 52–53.

<sup>398</sup> *Idem*, pp. 53–54.

<sup>399</sup> For the commentary to this chapter, see *Yearbook ... 2005*, vol. II (Part Two), chapter VI, section C.2, paragraph 206, p. 42.

<sup>400</sup> For the commentary to this article, see *idem*, pp. 42–43.

2. Paragraph 1 also applies to the breach of an obligation under international law established by a rule of the international organization.

*Article 9.<sup>401</sup> International obligation in force for an international organization*

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

*Article 10.<sup>402</sup> Extension in time of the breach of an international obligation*

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

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

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

*Article 11.<sup>403</sup> Breach consisting of a composite act*

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

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

CHAPTER IV<sup>404</sup>

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

*Article 12.<sup>405</sup> Aid or assistance in the commission of an internationally wrongful act*

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

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

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

*Article 13.<sup>406</sup> Direction and control exercised over the commission of an internationally wrongful act*

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

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

<sup>401</sup> *Idem*, pp. 43–44.

<sup>402</sup> *Idem*, p. 44.

<sup>403</sup> *Idem*, p. 44.

<sup>404</sup> For the commentary to this chapter, see *idem*, pp. 44–45.

<sup>405</sup> For the commentary to this article, see *idem*, p. 45.

<sup>406</sup> *Idem*, p. 46.

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

*Article 14.<sup>407</sup> Coercion of a State or another international organization*

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

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

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

*Article 15 [16].<sup>408</sup> Decisions, recommendations and authorizations addressed to member States and international organizations*

1. An international organization incurs international responsibility if it adopts a decision binding a member State or international organization to commit an act that would be internationally wrongful if committed by the former organization and would circumvent an international obligation of the former organization.

2. An international organization incurs international responsibility if:

(a) it authorizes a member State or international organization to commit an act that would be internationally wrongful if committed by the former organization and would circumvent an international obligation of the former organization, or recommends that a member State or international organization commit such an act; and

(b) that State or international organization commits the act in question in reliance on that authorization or recommendation.

3. Paragraphs 1 and 2 apply whether or not the act in question is internationally wrongful for the member State or international organization to which the decision, authorization or recommendation is directed.

*Article 16 [15].<sup>409</sup> Effect of this chapter*

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

CHAPTER V<sup>410</sup>

CIRCUMSTANCES PRECLUDING WRONGFULNESS

*Article 17.<sup>411</sup> Consent*

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

*Article 18.<sup>412</sup> Self-defence*

The wrongfulness of an act of an international organization is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the principles of international law embodied in the Charter of the United Nations.

*Article 19.<sup>413</sup> Countermeasures*

...<sup>414</sup>

*Article 20.<sup>415</sup> Force majeure*

1. The wrongfulness of an act of an international organization not in conformity with an international obligation of that organization is precluded if the act is due to *force majeure*, that is, the occurrence of an irresistible force or of an unforeseen event, beyond the control of the organization, making it materially impossible in the circumstances to perform the obligation.

2. Paragraph 1 does not apply if:

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

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

*Article 21.<sup>416</sup> Distress*

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

2. Paragraph 1 does not apply if:

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

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

*Article 22.<sup>417</sup> Necessity*

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

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

(b) 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.

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

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

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

*Article 23.<sup>418</sup> Compliance with peremptory norms*

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

<sup>413</sup> *Idem.*

<sup>414</sup> Draft article 19 concerns countermeasures by an international organization in respect of an internationally wrongful act of another international organization or a State as circumstances precluding wrongfulness. The text of this draft article will be drafted at a later stage, when the issues relating to countermeasures by an international organization will be examined in the context of the implementation of the responsibility of an international organization.

<sup>415</sup> For the commentary to this article, see *Yearbook ... 2006*, vol. II (Part Two), chapter VII, section C.2, paragraph 91, p. 123.

<sup>416</sup> For the commentary to this article, see *ibid.*, p. 124.

<sup>417</sup> *Idem*, pp. 124–125.

<sup>418</sup> *Idem*, p. 125.

<sup>407</sup> *Idem*, pp. 46–47.

<sup>408</sup> *Idem*, pp. 47–48. The square bracket refers to the corresponding article in the third report of the Special Rapporteur, *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/553.

<sup>409</sup> For the commentary to this article, see *Yearbook ... 2005*, vol. II (Part Two), chapter VI, section C.2, paragraph 206, p. 48.

<sup>410</sup> For the commentary to this chapter, see *Yearbook ... 2006*, vol. II (Part Two), chapter VII, section C.2, paragraph 91, p. 121.

<sup>411</sup> For the commentary to this article, see *ibid.*, pp. 121–122.

<sup>412</sup> *Idem*, pp. 122–123.

*Article 24.<sup>419</sup> Consequences of invoking a circumstance precluding wrongfulness*

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

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

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

CHAPTER (X)<sup>420</sup>

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

*Article 25.<sup>421</sup> Aid or assistance by a State in the commission of an internationally wrongful act by an international organization*

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

(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and

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

*Article 26.<sup>422</sup> Direction and control exercised by a State over the commission of an internationally wrongful act by an international organization*

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

(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and

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

*Article 27.<sup>423</sup> Coercion of an international organization by a State*

A State which coerces an international organization to commit an act is internationally responsible for that act if:

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

(b) that State does so with knowledge of the circumstances of the act.

*Article 28.<sup>424</sup> International responsibility in case of provision of competence to an international organization*

1. A State member of an international organization incurs international responsibility if it circumvents one of its international obligations by providing the organization with competence in relation to that obligation, and the organization commits an act that, if committed by that State, would have constituted a breach of that obligation.

2. Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization.

*Article 29.<sup>425</sup> Responsibility of a State member of an international organization for the internationally wrongful act of that organization*

1. Without prejudice to draft articles 25 to 28, a State member of an international organization is responsible for an internationally wrongful act of that organization if:

(a) it has accepted responsibility for that act; or

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

2. The international responsibility of a State which is entailed in accordance with paragraph 1 is presumed to be subsidiary.

*Article 30.<sup>426</sup> Effect of this chapter*

This chapter is without prejudice to the international responsibility, under other provisions of these draft articles, of the international organization which commits the act in question, or of any other international organization.

PART TWO<sup>427</sup>

**CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION**

CHAPTER I

**GENERAL PRINCIPLES**

*Article 31.<sup>428</sup> Legal consequences of an internationally wrongful act*

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

*Article 32.<sup>429</sup> Continued duty of performance*

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

*Article 33.<sup>430</sup> Cessation and non-repetition*

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

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

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

*Article 34.<sup>431</sup> Reparation*

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

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

*Article 35.<sup>432</sup> Irrelevance of the rules of the organization*

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

2. Paragraph 1 is without prejudice to the applicability of the rules of an international organization in respect of the responsibility of the organization towards its member States and organizations.

<sup>419</sup> *Idem*, at p. 126.

<sup>420</sup> The location of this chapter will be determined at a later stage. For the commentary to this chapter, see *ibid*.

<sup>421</sup> For the commentary to this article, see *ibid*.

<sup>422</sup> *Idem*, at p. 135.

<sup>423</sup> *Idem*, at pp. 135–136.

<sup>424</sup> *Idem*, at pp. 136–137.

<sup>425</sup> *Idem*, at pp. 137–139.

<sup>426</sup> *Idem*, at p. 139.

<sup>427</sup> The commentary to this Part is in section C.2 below, at p. 77.

<sup>428</sup> The commentary to this article is in section C.2 below, at p. 78.

<sup>429</sup> *Idem*, at p. 78.

<sup>430</sup> *Idem*, at pp. 78–79.

<sup>431</sup> *Idem*, at p. 79.

<sup>432</sup> *Idem*, at pp. 79–80.

*Article 36.<sup>433</sup> Scope of international obligations set out in this Part*

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

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

## CHAPTER II

## REPARATION FOR INJURY

*Article 37.<sup>434</sup> Forms of reparation*

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

*Article 38.<sup>435</sup> Restitution*

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

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

*Article 39.<sup>436</sup> Compensation*

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

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

*Article 40.<sup>437</sup> Satisfaction*

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

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

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

*Article 41.<sup>438</sup> Interest*

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

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

*Article 42.<sup>439</sup> Contribution to the injury*

In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission

of the injured State or international organization or of any person or entity in relation to whom reparation is sought.

*Article 43.<sup>440 441</sup> Ensuring the effective performance of the obligation of reparation*

The members of a responsible international organization are required to take, in accordance with the rules of the organization, all appropriate measures in order to provide the organization with the means for effectively fulfilling its obligations under this chapter.

## CHAPTER III

## SERIOUS BREACHES OF OBLIGATIONS UNDER PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW

*Article 44 [43].<sup>442</sup> Application of this chapter*

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

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

*Article 45 [44].<sup>443</sup> Particular consequences of a serious breach of an obligation under this chapter*

1. States and international organizations shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 44 [43].

2. No State or international organization shall recognize as lawful a situation created by a serious breach within the meaning of article 44 [43], nor render aid or assistance in maintaining that situation.

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

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

344. The text of draft articles together with commentaries thereto provisionally adopted by the Commission at its fifty-ninth session is reproduced below.

## PART TWO

## CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION

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

<sup>440</sup> *Idem*, at pp. 83–84.

<sup>441</sup> The following text was proposed, discussed and supported by some members: “The responsible international organization shall take all appropriate measures in accordance with its rules in order to ensure that its members provide the organization with the means for effectively fulfilling its obligations under this chapter.”

<sup>442</sup> For the commentary, see section C.2 below, at p. 84. The square bracket refers to the corresponding article in the fifth report of the Special Rapporteur (A/CN.4/583).

<sup>443</sup> *Idem*, at pp. 84–85.

<sup>433</sup> *Idem*, at p. 80.

<sup>434</sup> *Idem*, at p. 81.

<sup>435</sup> *Idem*, at p. 81.

<sup>436</sup> *Idem*, at pp. 81–82.

<sup>437</sup> *Idem*, at p. 82.

<sup>438</sup> *Idem*, at p. 82.

<sup>439</sup> *Idem*, at p. 83.

on responsibility of States for internationally wrongful acts.<sup>444</sup>

(2) Chapter I (arts. 31 to 36) lays down certain general principles and sets out the scope of Part Two. Chapter II (arts. 37 to 43) specifies the obligation of reparation in its various forms. Chapter III (arts. 44 [43] and 45 [44]) considers the additional consequences that are attached to internationally wrongful acts consisting of serious breaches of obligations under peremptory norms of general international law.

#### CHAPTER I

### GENERAL PRINCIPLES

#### *Article 31. Legal consequences of an internationally wrongful act*

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

#### *Commentary*

This provision has an introductory character. It corresponds to article 28 of the draft articles on responsibility of States for internationally wrongful acts,<sup>445</sup> with the only difference that the term “international organization” replaces the term “State”. There would be no justification for using a different wording in the present draft.

#### *Article 32. Continued duty of performance*

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

#### *Commentary*

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

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

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

(4) With regard to the statement of the continued duty of performance after a breach, there is no reason for distinguishing between the situation of States and that of international organizations. Thus the present article uses the same wording as article 29 of the draft articles on responsibility of States for internationally wrongful acts,<sup>446</sup> with the only difference that the term “State” is replaced with the term “international organization”.

#### *Article 33. Cessation and non-repetition*

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

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

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

#### *Commentary*

(1) The principle that the breach of an obligation under international law does not *per se* affect the existence of that obligation, as stated in article 32, has the corollary that, if the wrongful act is continuing, the obligation has still to be complied with. Thus, the wrongful act is required to cease by the primary rule providing for the obligation.

(2) When the breach of an obligation occurs and the wrongful act continues, the main object pursued by the injured State or international organization will often be cessation of the wrongful conduct. Although a claim would refer to the breach, what would actually be sought is compliance with the obligation under the primary rule. This is not a new obligation that arises as a consequence of the wrongful act.

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

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

<sup>444</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, para. 76.

<sup>445</sup> *Ibid.*, pp. 87–88.

<sup>446</sup> *Ibid.*, pp. 87–89.



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

(6) Given the similarity of the situation of States and that of international organizations in respect of cessation and assurances and guarantees of non-repetition, the present article follows the same wording as article 30 of the draft articles on responsibility of States for internationally wrongful acts,<sup>447</sup> with the replacement of the word “State” with “international organization”.

### *Article 34. Reparation*

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

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

#### *Commentary*

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

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

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

(4) The fact that international organizations sometimes grant compensation *ex gratia* is not due to abundance of resources, but rather to a reluctance, which

organizations share with States, to admit their own international responsibility.

(5) In setting out the principle of full reparation, the present article mainly refers to the more frequent case in which an international organization is solely responsible for an internationally wrongful act. The assertion of a duty of full reparation for the organization does not necessarily imply that the same principle applies when the organization is held responsible for a certain act together with one or more States or one or more other organizations: for instance, when the organization aids or assists a State in the commission of the wrongful act.<sup>448</sup>

(6) The present article reproduces article 31 of the draft articles on responsibility of States for internationally wrongful acts,<sup>449</sup> with the replacement in both paragraphs of the term “State” with “international organization”.

### *Article 35. Irrelevance of the rules of the organization*

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

**2. Paragraph 1 is without prejudice to the applicability of the rules of an international organization in respect of the responsibility of the organization towards its member States and organizations.**

#### *Commentary*

(1) Paragraph 1 states the principle that an international organization cannot invoke its rules in order to justify non-compliance with its obligations under international law entailed by the commission of an internationally wrongful act. This principle finds a parallel in the principle that a State may not rely on its internal law as a justification for failure to comply its obligations under Part Two of the articles on responsibility of States for internationally wrongful acts. The text of paragraph 1 replicates article 32 on State responsibility,<sup>450</sup> with two changes: the term “international organization” replaces “State” and the reference to the rules of the organization replaces that to the internal law of the State.

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

(3) In the relations between an international organization and a non-member State or organization, it seems clear that the rules of the former organization cannot *per se* affect the obligations that arise as a consequence of an internationally wrongful act. The same principle does

<sup>448</sup> See draft article 12 of the present draft articles, adopted by the Commission at its fifty-seventh session, in 2005, *Yearbook ... 2005*, vol. II (Part Two), Chapter VI, section C.2, p.45, para. 206.

<sup>449</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 91–94.

<sup>450</sup> *Ibid.*, p. 94.

<sup>447</sup> *Ibid.*, pp. 88–91.

not necessarily apply to the relations between an organization and its members. Rules of the organization could affect the application of the principles and rules set out in this Part. They may, for instance, modify the rules on the forms of reparation that a responsible organization may have to make towards its members.

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

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

**Article 36. Scope of international obligations set out in this Part**

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

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

*Commentary*

(1) In the articles on responsibility of States for internationally wrongful acts, Part One considers any breach of an obligation under international law that may be attributed to a State, irrespective of the nature of the entity or person to whom the obligation is owed. The scope of Part Two of those articles is limited to obligations that arise for a State towards another State. This seems due to the difficulty of considering the consequences of an internationally wrongful act and thereafter the implementation of responsibility in respect of an injured party whose

breaches of international obligations are not covered in Part One. The reference to responsibility existing towards the international community as a whole does not raise a similar problem, since it is hardly conceivable that the international community as a whole incur international responsibility.

(2) Should one take a similar approach with regard to international organizations in the present draft, one would have to limit the scope of Part Two to obligations arising for international organizations towards other international organizations or towards the international community as a whole. However, it seems logical also to include obligations that organizations have towards States, given the existence of the articles on State responsibility. As a result, Part Two of the draft will encompass obligations that an international organization may have towards one or more other organizations, one or more States, or the international community as a whole.

(3) With the change in the reference to the responsible entity and with the explained addition, paragraph 1 follows the wording of article 33, paragraph 1, of the draft articles on State responsibility.<sup>451</sup>

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

(5) With regard to international responsibility of international organizations, one significant area in which rights accrue to persons other than States or organizations is that of breaches by international organizations of their obligations under rules of international law concerning employment. Another area is that of breaches committed by peacekeeping forces and affecting individuals.<sup>452</sup> While the consequences of these breaches, as stated in paragraph 1, are not covered by the draft, certain issues of international responsibility arising in the context of employment are arguably similar to those that are examined in the draft.

CHAPTER II

REPARATION FOR INJURY

**Article 37. Forms of reparation**

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

<sup>451</sup> *Ibid.*, p. 94.

<sup>452</sup> See, for instance, resolution 52/247 of the General Assembly, of 26 June 1998, on “Third-party liability: temporal and financial limitations”.

*Commentary*

(1) The above provision is identical to article 34 on responsibility of States for internationally wrongful acts.<sup>453</sup> This seems justified since the forms of reparation consisting of restitution, compensation and satisfaction are applied in practice to international organizations as well as to States. Certain examples relating to international organizations are given in the commentaries to the following articles, which specifically address the various forms of reparation.

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

Although there may be circumstances when the giving of satisfaction by the Agency may be appropriate, it is proposed to give consideration only to reparation properly so called. Generally speaking, reparation properly so called may be either restitution in kind or payment of compensation.<sup>454</sup>

It has to be noted that, according to the prevailing use, which is reflected in article 34 on State responsibility and the article above, reparation is considered to include satisfaction.

*Article 38. Restitution*

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

- (a) is not materially impossible;**
- (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.**

*Commentary*

The concept of restitution and the related conditions, as defined in article 35 on responsibility of States for internationally wrongful acts,<sup>455</sup> appear to be applicable also to international organizations. There is no reason that would suggest a different approach with regard to the latter. The text above therefore reproduces article 35 of the draft articles on State responsibility, with the only difference that the term “State” is replaced by “international organization”.

*Article 39. Compensation*

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

<sup>453</sup> *Ibid.*, pp. 95–96.

<sup>454</sup> GOV/COM.22/27, para. 27. See *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/545, annex. The note is on file with the Codification Division of the Office of Legal Affairs.

<sup>455</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 96–98.

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

*Commentary*

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

stated that it would not evade responsibility where it was established that United Nations agents had in fact caused unjustifiable damage to innocent parties.<sup>456</sup>

With regard to the same operation, further settlements were made with France, Zambia, the United States of America, the United Kingdom,<sup>457</sup> and also with the International Committee of the Red Cross.<sup>458</sup>

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

It has always been the policy of the United Nations, acting through the Secretary-General, to compensate individuals who have suffered damages for which the Organization was legally liable. This policy is in keeping with generally recognized legal principles and with the Convention on Privileges and Immunities of the United Nations. In addition, in regard to the United Nations activities in the Congo, it is reinforced by the principles set forth in the international conventions concerning the protection of the life and property of civilian population during hostilities as well as by considerations of equity and humanity which the United Nations cannot ignore.<sup>459</sup>

<sup>456</sup> Exchange of letters constituting an agreement relating to the settlement of claims filed against the United Nations in the Congo by Belgian nationals (New York, 20 February 1965), United Nations, *Treaty Series*, vol. 535, No. 7780, p. 197; Exchange of letters (with annex) constituting an agreement relating to the settlement of claims filed against the United Nations in the Congo by Swiss nationals (New York, 3 June 1966), *ibid.*, vol. 564, p. 193; Exchange of letters constituting an agreement relating to the settlement of claims filed against the United Nations in the Congo by Greek nationals (New York, 20 June 1966), *ibid.*, vol. 565, No. 8230, p. 3; Exchange of letters constituting an agreement relating to the settlement of claims filed against the United Nations in the Congo by Luxembourg nationals (New York, 28 December 1966), *ibid.*, vol. 585, No. 8487, p. 147; and Exchange of letters constituting an agreement relating to the settlement of claims filed against the United Nations in the Congo by Italian nationals (New York, 18 January 1967), *ibid.*, vol. 588, No. 8525, p. 197.

<sup>457</sup> See K. Schmalenbach, *Die Haftung Internationaler Organisationen im Rahmen von Militäreinsätzen und Territorialverwaltungen*, Frankfurt am Main. Peter Lang, 2004, at pp. 314–321.

<sup>458</sup> The text of the agreement was reproduced by K. Ginther, *Die völkerrechtliche Verantwortlichkeit internationaler Organisationen gegenüber Drittstaaten*, Vienna/New York, Springer, 1969) pp. 166–167.

<sup>459</sup> United Nations, *Juridical Yearbook 1965* (Sales No. 67.V.3), p. 41, note 26 (document S/6597). The view that the United Nations placed its responsibility at the international level was maintained by J. J. A. Salmon, “Les accords Spaak–U Thant du 20 février 1965”, *Annuaire français de droit international*, vol. 11 (1965), p. 468, at pp. 483 and 487.

(3) A reference to the obligation on the United Nations to pay compensation was also made by the ICJ in its advisory opinion on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*.<sup>460</sup>

(4) With regard to compensation there would not be any reason for departing from the text of article 36 of the draft articles on responsibility of States for internationally wrongful acts,<sup>461</sup> apart from replacing the term “State” with “international organization”.

#### **Article 40. Satisfaction**

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

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

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

#### *Commentary*

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

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

The United Nations experience in Bosnia was one of the most difficult and painful in our history. It is with the deepest regret and remorse that we have reviewed our own actions and decisions in the face of the assault on Srebrenica.<sup>462</sup>

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

All of us must bitterly regret that we did not do more to prevent it. There was a United Nations force in the country at the time, but it was neither mandated nor equipped for the kind of forceful action which would have been needed to prevent or halt the genocide. On behalf of the United Nations, I acknowledge this failure and express my deep remorse.<sup>463</sup>

<sup>460</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.

<sup>461</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 98–105.

<sup>462</sup> Report of the Secretary-General pursuant to General Assembly resolution 53/35: the fall of Srebrenica (A/54/549), para. 503.

<sup>463</sup> [www.un.org/News/Press/docs/1999/19991216.sgs7263.doc.html](http://www.un.org/News/Press/docs/1999/19991216.sgs7263.doc.html) (last accessed 25 October 2013). See the report of the Independent

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

I think we have done what anybody would do in these circumstances, first of all we have acknowledged responsibility clearly, unambiguously, quickly; we have expressed our regrets to the Chinese authorities.<sup>464</sup>

A further apology was addressed on 12 May 1999 by German Chancellor Gerhard Schröder on behalf of Germany, NATO and NATO Secretary-General Javier Solana to Foreign Minister Tang Jiaxuan and Premier Zhu Rongji.<sup>465</sup>

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

(6) Thus, the paragraphs of article 37 of the draft articles on responsibility of States for internationally wrongful acts<sup>466</sup> may be transposed, with the replacement of the term “State” with “international organization” in paragraphs 1 and 3.

#### **Article 41. Interest**

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

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

#### *Commentary*

The rules contained in article 38 of the draft articles on responsibility of States for internationally wrongful acts<sup>467</sup> with regard to interest are intended to ensure application of the principle of full reparation. Similar considerations in this regard apply to international organizations. Therefore, both paragraphs of article 38 of the draft articles on State responsibility are here reproduced without change.

Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda in S/1999/1257, enclosure.

<sup>464</sup> [www.ess.uwe.ac.uk/Kosovo/Kosovo-Mistakes2.htm](http://www.ess.uwe.ac.uk/Kosovo/Kosovo-Mistakes2.htm) (accessed 19 March 2013).

<sup>465</sup> “NATO apologises to Beijing”, <http://news.bbc.co.uk/2/hi/asia-pacific/341533.stm> (accessed 12 March 2013).

<sup>466</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 105–107.

<sup>467</sup> *Ibid.*, pp. 107–109.

### Article 42. Contribution to the injury

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

#### Commentary

(1) No apparent reason would preclude extending to international organizations the provision set out in article 39 of the draft articles on responsibility of States for internationally wrongful acts.<sup>468</sup> Such an extension is made in two directions: first, international organizations are also entitled to invoke contribution to the injury in order to diminish their responsibility; second, the entities that may have contributed to the injury include international organizations. The latter extension would require the addition of the words “or international organization” after “State” in the corresponding article on State responsibility.

(2) One instance of relevant practice in which contribution to the injury was invoked concerns the shooting of a civilian vehicle in the Congo. In this case, compensation by the United Nations was reduced because of the contributory negligence by the driver of the vehicle.<sup>469</sup>

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

(4) The reference to “any person or entity in relation to whom reparation is sought” has to be read in conjunction with the definition given in article 36 of the scope of the international obligations set out in Part Two. This scope is limited to obligations arising for a responsible international organization towards States, other international organizations or the international community as a whole. The above reference seems appropriately worded in this context. The existence of rights that directly accrue to other persons or entities is thereby not prejudiced.

### Article 43. Ensuring the effective performance of the obligation of reparation

**The members of a responsible international organization are required to take, in accordance with the rules of the organization, all appropriate measures in order to provide the organization with the means for effectively fulfilling its obligations under this chapter.**

#### Commentary

(1) International organizations that are considered to have a separate international legal personality are in principle the only subjects whose internationally wrongful

acts may entail legal consequences. When an international organization is responsible for an internationally wrongful act, States and other organizations incur responsibility because of their membership in a responsible organization according to the conditions stated in articles 28 and 29. The present article does not envisage any further instance in which States and international organizations would be held internationally responsible for the act of the organization of which they are members.

(2) Consistent with the views expressed by several States that responded to a question raised by the Commission in its 2006 report to the General Assembly,<sup>470</sup> no subsidiary obligation of members towards the injured party is considered to arise when the responsible organization is not in a position to make reparation.<sup>471</sup> The same opinion was expressed in statements by the International Monetary Fund and the Organization for the Prohibition of Chemical Weapons.<sup>472</sup> This approach appears to conform to practice, which does not show any support for the existence of the obligation in question under international law.

(3) Thus, the injured party would have to rely only on the fulfilment by the responsible international organization of its obligations. It is expected that in order to comply with its obligation to make reparation, the responsible organization would use all available means that exist under its rules. In most cases this would involve requesting contributions by the members of the organization concerned.

(4) A proposal was made to state expressly that “[t]he responsible international organization shall take all appropriate measures in accordance with its rules in order to ensure that its members provide the organization with the means for effectively fulfilling its obligations under this chapter”. This proposal received some support. However, the majority of the Commission considered that such a provision was not necessary, because the stated obligation would already be implied in the obligation to make reparation.

<sup>470</sup> *Yearbook ... 2006*, vol. II (Part Two), p. 21, para. 28 (see footnote 386 above).

<sup>471</sup> The delegation of the Netherlands noted that there would be “no basis for such an obligation” (*Official Records of the General Assembly, Sixty-first Session, Sixth Committee, 14th meeting, A/C.6/61/SR.14*, para. 23). Similar views were expressed by Denmark, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (*ibid.*, 13th meeting, A/C.6/61/SR.13, para. 32); Belgium (*ibid.*, 14th meeting, A/C.6/61/SR.14, paras. 41–42); Spain (*ibid.*, paras. 52–53); France (*ibid.*, para. 63); Italy (*ibid.*, para. 66); United States (*ibid.*, para. 83); Belarus (*ibid.*, para. 100); Switzerland (*ibid.*, 15th meeting, A/C.6/61/SR.15, para. 5); Cuba (*ibid.*, 16th meeting, A/C.6/61/SR.16, para. 13); Romania (*ibid.*, 19th meeting, A/C.6/61/SR.19, para. 60). The delegation of Belarus, however, suggested that a “scheme of subsidiary responsibility for compensation could be established as a special rule, for example in cases where the work of the organization was connected with the exploitation of dangerous resources” (*ibid.*, 14th meeting, A/C.6/61/SR.14, para. 100). Although sharing the prevailing view, the delegation of Argentina (*ibid.*, 13th meeting, A/C.6/61/SR.13, para. 49) requested the Commission to “analyse whether the special characteristics and rules of each organization, as well as considerations of justice and equity, called for exceptions to the basic rule, depending on the circumstances of each case”.

<sup>472</sup> A/CN.4/582, sect. II. U.1 (reproduced in *Yearbook ... 2007*, vol. II (Part One)).

<sup>468</sup> *Ibid.*, pp. 109–110.

<sup>469</sup> See P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens*, Brussels, Bruylant/Editions de l’Université de Bruxelles, 1998, at p. 606.

(5) The majority of the Commission was in favour of including the present article, which had not been proposed in the Special Rapporteur's report. This article is essentially of an expository character. It intends to remind members of a responsible international organization that they are required to take, in accordance with the rules of the organization, all appropriate measures in order to provide the organization with the means for effectively fulfilling its obligation to make reparation.

(6) The reference to the rules of the organization is meant to define the basis of the requirement in question.<sup>473</sup> While the rules of the organization may not necessarily consider the matter in an express manner, an obligation for members to finance the organization as part of the general duty to cooperate with the organization may be taken as generally implied under the relevant rules. As was noted by Judge Sir Gerald Fitzmaurice in his separate opinion relating to the advisory opinion of the ICJ on *Certain Expenses of the United Nations*:

Without finance, the Organization could not perform its duties. Therefore, even in the absence of Article 17, paragraph 2, a general obligation for Member States collectively to finance the Organization would have to be read into the Charter, on the basis of the same principle as the Court applied in the *Injuries to United Nations Servants* case, namely "by necessary implication as being essential to the performance of its [i.e. the Organization's] duties" (*I.C.J. Reports 1949*, p. 182).<sup>474</sup>

(7) The majority of the Commission maintained that no duty arose for members of an international organization under general international law to take all appropriate measures in order to provide the responsible organization with the means for fulfilling its obligation to make reparation. However, some members were of the contrary opinion, while still other members expressed the view that such an obligation should be stated as a rule of progressive development. This obligation would supplement any obligation existing under the rules of the organization.

### CHAPTER III

## SERIOUS BREACHES OF OBLIGATIONS UNDER PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW

### *Article 44 [43]. Application of this chapter*

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

<sup>473</sup> See the statements by the delegations of Denmark, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (*Official Records of the General Assembly, Sixty-first Session, Sixth Committee*, 13th meeting, A/C.6/61/SR.13, para. 32); Belgium (*ibid.*, 14th meeting, A/C.6/61/SR.14, para. 42); Spain (*ibid.*, para. 53); France (*ibid.*, para. 63); and Switzerland (*ibid.*, 15th meeting, A/C.6/61/SR.15, para. 5). Also the Institute of International Law held that an obligation to put a responsible organization in funds only existed "pursuant to its Rules" (Institute of International Law, *Yearbook*, vol. 66 (1996), Session of Lisbon (1995), Part II, p. 451).

<sup>474</sup> *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, *Advisory Opinion of 20 July 1962*, *I.C.J. Reports 1962*, p. 151, at p. 208.

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

### *Commentary*

(1) The scope of Chapter III corresponds to the scope defined in article 40 of the draft articles on responsibility of States for internationally wrongful acts.<sup>475</sup> The breach of an obligation under a peremptory norm of general international law may be less likely on the part of international organizations than on the part of States. However, the risk that such a breach takes place cannot be entirely ruled out. If a serious breach does occur, it calls for the same consequences that are applicable to States.

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

### *Article 45 [44]. Particular consequences of a serious breach of an obligation under this chapter*

**1. States and international organizations shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 44 [43].**

**2. No State or international organization shall recognize as lawful a situation created by a serious breach within the meaning of article 44 [43], nor render aid or assistance in maintaining that situation.**

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

### *Commentary*

(1) This article sets out that, should an international organization commit a serious breach of an obligation under a peremptory norm of general international law, States and international organizations have duties corresponding to those applying to States according to article 41 of the draft articles on responsibility of States for internationally wrongful acts.<sup>476</sup> Therefore, the same wording is used here as in that article, with only the additions of the words "and international organizations" in paragraph 1 and "or international organization" in paragraph 2.

(2) In response to a question raised by the Commission in its 2006 report to the General Assembly,<sup>477</sup> several States expressed the view that the legal situation of an international organization should be the same as that of a State having committed a similar breach.<sup>478</sup> Moreover,

<sup>475</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 112–113.

<sup>476</sup> *Ibid.*, pp. 113–116.

<sup>477</sup> *Yearbook ... 2006*, vol. II (Part Two), p. 21, para. 28 (see footnote 386 above).

<sup>478</sup> See the interventions by Denmark, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (*Official Records of the General Assembly, Sixty-first Session, Sixth Committee*, 13th meeting, A/C.6/61/SR.13, para. 33); Argentina (*ibid.*, para. 50); the

several States maintained that international organizations would also be under an obligation to cooperate to bring the breach to an end.<sup>479</sup>

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

States should definitely be under an obligation to cooperate to bring such a breach to an end because in the case when an international organization acts in breach of a peremptory norm of general international law, its position is not much different from that of a State.<sup>480</sup>

With regard to the obligation to cooperate on the part of international organizations, the same Organization noted that an international organization “must always act within its mandate and in accordance with its rules”.<sup>481</sup>

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

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

Netherlands (*ibid.*, 14th meeting, A/C.6/61/SR.14, para. 25); Belgium (*ibid.*, paras. 43–46); Spain (*ibid.*, para. 54); France (*ibid.*, para. 64); Belarus (*ibid.*, para. 101); Switzerland (*ibid.*, 15th meeting, A/C.6/61/SR.15, para. 8); Jordan (*ibid.*, 16th meeting, A/C.6/61/SR.16, para. 5); the Russian Federation (*ibid.*, 18th meeting, A/C.6/61/SR.18, para. 68); and Romania (*ibid.*, 19th meeting, A/C.6/61/SR.19, para. 60).

<sup>479</sup> Thus the interventions by Denmark, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (*ibid.*, 13th meeting, A/C.6/61/SR.13, para. 33); Argentina (*ibid.*, para. 50); the Netherlands (*ibid.*, 14th meeting, A/C.6/61/SR.14, para. 25); Belgium (*ibid.*, para. 45); Spain (*ibid.*, para. 54); France (*ibid.*, para. 64); Belarus (*ibid.*, para. 101); Switzerland (*ibid.*, 15th meeting, A/C.6/61/SR.15, para. 8); and the Russian Federation (*ibid.*, 18th meeting, A/C.6/61/SR.18, para. 68).

<sup>480</sup> A/CN.4/582 (see footnote 472 above), sect. II, U.2.

<sup>481</sup> *Ibid.* The International Monetary Fund went one step further in saying that “any obligation of international organizations to cooperate would be subject to, and limited by, provisions of their respective charters” (*ibid.*).

(6) In this context it may be useful to recall that in the operative part of its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* the ICJ first stated the obligation incumbent upon Israel to cease the works of construction of the wall and, “[g]iven the character and the importance of the rights and obligations involved”, the obligation for all States “not to recognize the illegal situation resulting from the construction of the wall ... [and] not to render aid or assistance in maintaining the situation created by such construction”.<sup>482</sup> The Court then added:

The United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion.<sup>483</sup>

(7) Some instances of practice relating to serious breaches committed by States concern the duty of international organizations not to recognize as lawful a situation created by one of those breaches. For example, with regard to the annexation of Kuwait by Iraq, paragraph 2 of Security Council resolution 662 (1990) of 9 August 1990 called upon “all States, international organizations and specialized agencies not to recognize that annexation, and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation”. Another example is provided by the Declaration that member States of the European Community made in 1991 on the “Guidelines on the recognition of new States in Eastern Europe and in the Soviet Union”.<sup>484</sup> This text included the following sentence: “The Community and its member States will not recognize entities which are the result of aggression.”<sup>485</sup>

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

<sup>482</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (see footnote 99 above), p. 200, para. 159. See also subparagraph (3) B and D of the operative paragraph, *ibid.*, pp. 201–202, para. 163.

<sup>483</sup> *Ibid.*, p. 202, para. 163, subparagraph (3) E of the operative paragraph. The same language appears in paragraph 160 of the advisory opinion, *ibid.*, p. 200.

<sup>484</sup> *Bulletin of the European Communities*, vol. 24, no. 12 (1991), pp. 119–120.

<sup>485</sup> European Community, Declaration on Yugoslavia and on the Guidelines on the Recognition of New States, 16 December 1991, reproduced in ILM, vol. 31 (1992), p. 1485, at p. 1487.