ANNEX I

THE SETTLEMENT OF INTERNATIONAL DISPUTES TO WHICH INTERNATIONAL ORGANIZATIONS ARE PARTIES

(Sir Michael Wood)

A. Introduction

1. The present syllabus for a possible topic flows from earlier work of the Commission. It will be recalled that in 2011, the Commission adopted on second reading articles on the responsibility of international organizations,[1] of which the General Assembly has taken note.[2] Already in 2002, the Commission's Working Group on the responsibility of international organizations had mentioned "the widely perceived need to improve methods for settling … disputes" concerning the responsibility of international organizations.[3] In 2010 and 2011, the Commission held a general debate on the peaceful settlement of disputes, at which various suggestions for future topics were considered.[4]

2. The proposed topic would be limited to the settlement of disputes to which international organizations are parties.[5] This would include disputes between international organizations and States (both member and non-member States) and disputes between international organizations. It would not cover disputes to which international organizations are not parties, but are involved in some other way. In that sense, dispute settlement under the auspices of an international organization (as in, for example, the United Nations being involved in a dispute among its Member States through measures taken pursuant to Chapter VI of the Charter of the United Nations) would be excluded. Similarly, disputes in which an international organization merely has an interest, such as a dispute among Member States over the interpretation of the organization's constituent instrument,[6] would fall outside the topic.

3. The present syllabus focuses primarily on disputes that are international, in the sense that they arise from a relationship governed by international law. It does not cover disputes involving the staff of international organizations ("international administrative law"). Nor does it cover questions arising out of the immunity of international organizations. It would be for future decision whether certain disputes of a private law character, such as those arising under a contract or out of a tortious act by or against an international organization, might also be covered.[7]

4. The question of the possible output of a topic in this field would need careful consideration. It could include proposals for developing existing and new procedures for the settlement of disputes to which international organizations are parties, and/or for model clauses for inclusion in relevant instruments or treaties. In addition, the Commission might wish to review the Manila Declaration on the Peaceful Settlement of International Disputes of 1982,[8] to see how far its provisions might apply to international organizations.

B. Issues that might be considered within the proposed topic

5. There are some obvious difficulties common to the resolution of all international disputes to which international organizations are parties. These stem from the restricted *access* that international organizations have to the traditional methods of international dispute resolution, as well from barriers to the *admissibility* of claims brought both by and against international organizations. On the other hand, there are policy issues involved in an extension of traditional inter-State dispute settlement mechanisms to international organizations. International organizations are not States.

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[1] *Yearbook … 2011*, vol. II (Part Two), pp. 40 *et seq.*, paras. 87–88.

[2] General Assembly resolution 66/100 of 9 December 2011.

[3] *Yearbook … 2002*, vol. II (Part Two), p. 96, para. 486.

[4] See the summary records of the 3070th meeting of the Commission, held on 29 July 2010 (*Yearbook … 2010*, vol. I, p. 261), and of its 3095th and 3096th meetings, held on 31 May and 1 June 2011 (*Yearbook … 2011*, vol. I, pp. 123 and 130). In 2010 the Commission had before it a note by the Secretariat on settlement of disputes clauses (*Yearbook … 2010*, vol. II (Part One), document A/CN.4/623) and in 2011 a working paper prepared by Sir Michael Wood on the peaceful settlement of disputes (*Yearbook … 2011*, vol. II (Part One), document A/CN.4/641).

[5] The term "international organization" is to be understood along the lines of the definition in the articles on the responsibility of international organizations (art. 2 (*a*): "'international organization' means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities" (*Yearbook … 2011*, vol. II (Part Two), p. 49)).

[6] See, for example, *Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972*, p. 46, at p. 60, para. 26, where the International Court of Justice noted: "The case is presented to the Court in the guise of an ordinary dispute between States (and such a dispute underlies it). Yet in the proceedings before the Court, it is the act of a third entity—the Council of ICAO—which one of the parties is impugning and the other defending."

[7] Dispute settlement concerning such matters has to take account of the immunities enjoyed by international organizations, as well as the latter's obligation to make provisions for appropriate modes of settlement under certain treaties. It is quite common for provision to be made for special procedures, including arbitration, to cover such cases. The Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe has on its agenda an item on "Settlement of disputes of a private character to which an international organisation is a party" (see report of the 50th meeting of CAHDI, Strasbourg, 24–25 September 2015, CAHDI (2015) 23, paras. 23–29). On the basis of a questionnaire, CAHDI has sought the comments of States, which are not yet publicly available (CAHDI (2016) 9 prov).

[8] General Assembly resolution 37/10 of 15 November 1982, annex.

6. *Access*: There are various obstacles to the submission of disputes to which international organizations are parties to the dispute settlement mechanisms available to States.[9] Most obviously, international organizations may not appear as applicants or respondents in contentious cases before the International Court of Justice, though certain other permanent courts and tribunals established in specific fields are open to them. Arbitration remains an option, but little practice exists to date to guide the procedure and international organizations are rarely bound by jurisdictional clauses. Resort may be had to non-legal methods like mediation, conciliation and enquiry, but, unlike States, international organizations often do not belong to institutions that may facilitate these processes. Member States of the United Nations or a regional organization, for example, may raise their disputes in a political forum so as to settle them with the aid of multilateral political input and procedures such as fact-finding missions. With such barriers to access before third-party dispute resolution mechanisms, the settlement of disputes to which international organizations are parties relies primarily on negotiation or mechanisms internal to the organization itself.

7. *Admissibility*: Difficulties facing the admissibility of claims by and against international organizations are most prominent in regard to the right of diplomatic protection and the corresponding requirement of the exhaustion of local remedies. Can international organizations, for example, assert the rights of their staff members in a manner analogous to the way that a State may assert the rights of its nationals? Alternatively, does the requirement of exhaustion of local (internal) remedies apply when a State is asserting the right of one of its nationals against an international organization?

1. International Court of Justice and other permanent courts and tribunals

8. Article 34, paragraph 1, of the Statute of the International Court of Justice limits *locus standi* before the Court to States.[10] Although paragraphs 2 and 3 provide for a certain level of cooperation between the Court and "public international organizations",[11] such organizations are unable to appear as parties in contentious cases. Nevertheless, the United Nations and authorized specialized agencies may seek advisory opinions on legal questions.[12]

9. In the light of these limitations in the Statute, the desire to utilize the Court in the settlement of international disputes to which international organizations are parties has manifested itself in two ways: the so-called "binding" advisory opinion, and calls for the amendment of the Statute.

10. Although an advisory opinion as such is non-binding, certain agreements stipulate the use of the advisory opinion procedure to settle disputes with "decisive" effect. A classic example is found in the Convention on the Privileges and Immunities of the United Nations of 1946:

> If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties.[13]

11. The Headquarters Agreement between the United Nations and the United States of America envisages a somewhat similar procedure in the context of binding arbitration as provided for in that agreement: either party may ask the General Assembly to request an advisory opinion on a legal question arising in the course of arbitral proceedings, to which the arbitral tribunal will "hav[e] regard" in rendering its final decision.[14]

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[9] In principle, it is uncontested that the mechanisms for the peaceful settlement of disputes are open to international organizations (see *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174, where the Court addressed, among other things, the capacity of the United Nations to bring international claims against States). Such mechanisms include "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of [the parties'] own choice" (Article 33 of the Charter of the United Nations). See also F. Dopagne, "Les différends opposant l'organisation internationale à un État ou une autre organisation internationale", *in* E. Lagrange and J.-M. Sorel (eds.), *Droit des organisations internationales* (Paris, Librairie générale de droit et de jurisprudence, 2013), p. 1101, at p. 1109.

[10] "Only States may be parties in cases before the Court."

[11] "2. The Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative. 3. Whenever the construction of the constituent instrument of a public international organization or of an international convention adopted thereunder is in question in a case before the Court, the Registrar shall so notify the public international organization concerned and shall communicate to it copies of all the written proceedings." See also paragraphs 2 and 3 of article 43 of the Rules of Court, added in 2005.

[12] Article 96 of the Charter of the United Nations. Specialized agencies, when authorized, may only request advisory opinions on legal questions arising within the scope of their activities.

[13] Convention on the Privileges and Immunities of the United Nations, art. VIII, sect. 30. See also, for example, Convention on the Privileges and Immunities of the Specialized Agencies, art. IX, sect. 32; Agreement on the Privileges and Immunities of the International Atomic Energy Agency, art. X, sect. 34; Agreement between the Government of Chile and the United Nations Economic Commission for Latin America regulating Conditions for the Operation, in Chile, of the Headquarters of the Commission, art. XI, sect. 21 (Santiago, 16 February 1953), United Nations, *Treaty Series*, vol. 314, No. 4541, p. 49; Agreement between the United Nations and the Government of Thailand relating to the Headquarters of the Economic Commission for Asia and the Far East in Thailand, art. XIII, sect. 26 (Geneva, 26 May 1954), *ibid.*, vol. 260, No. 3703, p. 35; all cited in J. Sztucki, "International Organizations as Parties to Contentious Proceedings before the International Court of Justice?", *in* A. S. Muller, D. Raič and J. M. Thuránszky (eds.), *The International Court of Justice: Its Future Role After Fifty Years* (The Hague, Martinus Nijhoff, 1997), pp. 141, footnotes 24–25.

[14] Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations (Lake Success, New York, 26 June 1947), United Nations, *Treaty Series*, vol. 11, No. 147, p. 11), art. VIII, sect. 21:

"(*a*) Any dispute between the United Nations and the United States concerning the interpretation or application of this agreement or of any supplemental agreement, which is not settled by negotiation or other agreed mode of settlement, shall be referred for final decision to a tribunal of three arbitrators, one to be named by the Secretary-General, one to be named by the Secretary of State of the United States, and the third to be chosen by the two, or, if they should fail to agree upon a third, then by the President of the International Court of Justice.

(*b*) The Secretary-General or the United States may ask the General Assembly to request of the International Court of Justice an advisory opinion on any legal question arising in the course of such proceedings. Pending the receipt of the opinion of the Court, an interim decision of the arbitral tribunal shall be observed on both parties. Thereafter, the arbitral tribunal shall render a final decision, having regard to the opinion of the Court."

See also article VII, sect. 31, of the Agreement between the International Civil Aviation Organization and the Government of Canada

12. There are obvious difficulties, however, in using the advisory jurisdiction of the Court for what are in reality contentious matters. Critics of the binding advisory procedure see it as a poor substitute for direct access to the Court by international organizations. The jurisdictional rules applicable to advisory procedures are too permissive. They are, however, also too limiting in other ways that both upset the equality of access among the parties and privilege the settlement of certain disputes over others.

13. Both of these undesirable results follow from the fact that only the United Nations and its specialized agencies may request an advisory opinion from the Court.[15] Thus, in a dispute between one of these bodies and a State, only that body will be able to initiate a "claim". Of course, where a treaty obligation requires the submission of a dispute to the advisory procedure, the United Nations or specialized agency would be bound to do so. Even here, however, the relationship among the parties is asymmetrical, as "the question to be submitted to the Court is in the hands of a particular organ without the member State concerned [or other party] being able to control the drafting process".[16]

14. Similarly, the fact that only the United Nations and its authorized specialized agencies may request an advisory opinion means that the use of advisory procedures to settle disputes involving an international organization is primarily limited to disputes to which one of those international organizations is a party. Other disputants may of course petition the General Assembly or some other authorized body to request an opinion, but they could not be sure that an opinion would indeed by sought, or in the form desired.[17] As the Commission itself has previously noted, an advisory opinion of this sort would be "imperfect", "uncertain" and "fraught with too many uncertainties for a binding character to be attached to the opinion thus obtained".[18]

15. In the light of the limitations on the Court's ability to settle disputes to which an international organization is party,[19] over the years a large number of proposals have been put forward to amend the Statute. In 1970, a discussion on the "Review of the role of the International Court of Justice" took place in the General Assembly, which was followed up by survey including a question on "the possibility of enabling intergovernmental organizations to be parties before the Court". Of the 31 responses to the survey (out of 130 parties to the Statute at the time), 15 members replied positively to this question (Argentina, Austria, Canada, Cyprus, Denmark, Finland, Guatemala, Iraq, Madagascar, Mexico, New Zealand, Sweden, Switzerland, the United Kingdom and the United States), and one replied negatively (France).[20] In 1997–1999, the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization of the General Assembly considered proposals by Guatemala[21] and Costa Rica[22] to provide access to the Court to international organizations. The Guatemalan proposal was withdrawn in 1999, "its adoption in the foreseeable future [appearing] most unlikely".[23]

16. Quite apart from the political difficulties of amending the Statute, the various proposals have drawn attention to the questions of scope *ratione personae* and *ratione materiae* that must be addressed in any amendment to the Statute to confer standing before the Court on international organizations.

17. By contrast with the International Court of Justice, certain other permanent courts and tribunals operating

regarding the Headquarters of the International Civil Aviation Organization (Montreal, 14 April 1951), United Nations, *Treaty Series*, vol. 96, No. 1335, p. 155.

[15] Article 65 of the Statute of the International Court of Justice refers to Article 96 of the Charter of the United Nations: "1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question. 2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities." Authorized organs include the Economic and Social Council, the Trusteeship Council and the Interim Committee of the General Assembly. Authorized specialized agencies include the International Labour Organization, the Food and Agriculture Organization of the United Nations, the United Nations Educational, Scientific and Cultural Organization, the World Health Organization, the International Bank for Reconstruction and Development, the International Finance Corporation, the International Development Association, the International Monetary Fund, the International Civil Aviation Organization, the International Telecommunication Union, the International Fund for Agricultural Development, the World Meteorological Organization, the International Maritime Organization, the World Intellectual Property Organization and the United Nations Industrial Development Organization. The International Atomic Energy Agency has also been authorized to request advisory opinions, although it is not a United Nations specialized agency. See "Organs and agencies authorized to request advisory opinions", available from www.icj-cij.org/en/organs-agencies-authorized.

[16] K. Wellens, *Remedies against International Organisations* (Cambridge, Cambridge University Press, 2002), p. 233. See also *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999*, p. 62, at p. 81, para. 36.

[17] In this regard, see the complex dispute settlement clause in article 66, para. 2, of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986).

[18] *Yearbook ... 1980*, vol. II (Part Two), pp. 87–88, paras. (9)–(11) of the commentary to article 66 of the draft articles on treaties concluded between States and international organizations or between international organizations adopted by the Commisson at its thirty-second session; see also *Yearbook ... 1982*, vol. II (Part Two), p. 65, paras. (4)–(6) of the commentary to article 66 of the draft articles on the law of treaties between States and international organizations or between international organizations in the final version adopted by the Commisson at its thirty-third and thirty-fourth sessions. As the previous footnote reveals, States rejected these recommendations to leave advisory procedures out of the dispute settlement clause of what would become the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

[19] Considerations of judicial economy have also been cited after the Federal Republic of Yugoslavia had to bring separate claims against all members of the North Atlantic Treaty Organization (NATO), rather than a single claim against NATO, in the *Legality of Use of Force* cases.

[20] *Review of the Role of the International Court of Justice, Report of the Secretary-General* (A/8382), question III (*a*), paras. 5 and 200–224. See also documents A/8382/Add.1, p. 6; A/8382/Add.3, p. 4; and A/8382/Add.4, p. 3.

[21] A/AC.182/L.95/Rev.1.

[22] A/AC.182/L.97.

[23] See Wellens (footnote 16 above), pp. 237–238; see also P. Couvreur, "Développements récents concernant l'accès des organisations intergouvernementales à la procédure contentieuse devant la Cour internationale de Justice", *in* E. Yakpo and T. Boumedra (eds.), *Liber Amicorum Judge Mohammed Bedjaoui* (The Hague, Kluwer Law International, 1999), p. 293, at pp. 302–322.

under particular treaties are open to international organizations parties to the treaty concerned. This is the case, for example, with the International Tribunal for the Law of the Sea (ITLOS), established by the United Nations Convention on the Law of the Sea of 1982,[24] as well as the Appellate Body of the World Trade Organization.

2. International arbitration

18. Arbitration is potentially a useful tool for the settlement of international disputes to which international organizations are parties. It not only avoids the difficulties of standing that arise before the International Court of Justice, but it also presents the parties with a flexible system that, if needed, can maintain confidentiality.

19. Previous efforts to encourage the use of arbitration to settle disputes involving an international organization date back to the International Law Association's 1966 resolution on international arbitration, which:

> *Draws the attention* of all States to the availability of international arbitral tribunals for the settlement of a variety of international disputes, including: (*a*) International disputes which cannot be submitted to the International Court of Justice … (*c*) Disputes between States and international organizations …[25]

20. Similarly, in 1992 the Working Group on the United Nations Decade of International Law of the Sixth Committee entertained a "proposal urging a wider use of the Permanent Court of Arbitration for the settlement of disputes between States as well as disputes between States and international organizations."[26] The main question that arises is the extent to which international organizations are or indeed can be bound to submit their international disputes with States and other international organizations to arbitration. Unlike with States, there is at present no general treaty open to international organizations under which they could accept the obligation to submit such disputes to arbitration. There are no doubt a number of bilateral agreements containing such clauses, but no general survey exists of arbitration clauses in international agreements to which an international organization is a party, or of arbitration pursuant to such clauses. To date, there seem to be only four arbitrations between an international organization and a State that are in the public domain.[27]

21. A related issue is how arbitration clauses are drafted. Current practice is to include an arbitration clause reading as follows:

> Any dispute between the Parties arising out of, or relating to this Agreement, which is not settled by negotiation or another agreed mode of settlement, shall, at the request of either Party, be submitted to a Tribunal of three arbitrators. Each Party shall appoint one arbitrator, and the two arbitrators so appointed shall appoint a third, who shall be the chairperson of the Tribunal. If, within thirty days of the request for arbitration, a Party has not appointed an arbitrator, or if, within fifteen days of the appointment of two arbitrators, the third arbitrator has not been appointed, either Party may request the President of the International Court of Justice to appoint the arbitrator referred to. The Tribunal shall determine its own procedures, provided that any two arbitrators shall constitute a quorum for all purposes, and all decisions shall require the agreement of any two arbitrators. The expenses of the Tribunal shall be borne by the Parties as assessed by the Tribunal. The arbitral award shall contain a statement of the reasons on which it is based and shall be final and binding on the Parties.[28]

22. Questions could also arise with regard to procedure. Insofar as these questions pertain to arbitral rules, however, they have largely been dealt with by the Optional Rules for Arbitration involving International Organizations and States (1996) of the Permanent Court of Arbitration. As those rules have been drawn up in the light of "the public international law character of disputes involving international organizations and States, and diplomatic practice appropriate to such disputes",[29] there might be little value in the Commission, for example, adapting its Model Rules on Arbitral Procedure of 1958[30] to disputes involving an international organization.

3. Non-legal mechanisms

23. In keeping with its remedial focus, the International Law Association's final report on accountability of international organizations draws attention to the "preventive potential" of "less formal action by

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[24] See annex IX to the 1982 Convention, article 7 of which makes special provision for the case where an international organization and one or more of its member States are joint parties to a dispute, or parties in the same interest. The European Union has been a party to one case before ITLOS: Case No. 7, *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Union)*.

[25] International Law Association, "Charter of the United Nations (Interational Arbitration)", *Report of the Fifty-second Conference*, Helsinki, 14–20 August 1966, p. xii, para. 1.

[26] A/C.6/47/L.12, para. 15.

[27] *Question of the tax regime governing pensions paid to retired UNESCO officials residing in France*, Decision of 14 January 2003, UNRIAA, vol. XXV (Sales No. E/F.05.V.5), p. 231; *European Molecular Biology Laboratory Arbitration (EMBL v. Germany)*, 29 June 1990, ILR, vol. 105 (1997), p. 1. Another recent case, terminated without an award, was *District Municipality of La Punta (Peru) v. United Nations Office for Project Services (UNOPS),* Permanent Court of Arbitration, Case No. 2014-38 (https://pcacases.com/web/view/109); *The Atlanto-Scandian Herring Arbitration (The Kingdom of Denmark in respect of the Faroe Islands v. The European Union),* Permanent Court of Arbitration, Case No. 2013-30 (https://pcacases.com/web/view/25), under Part XV of the United Nations Convention on the Law of the Sea, also concluded without an award.

[28] Agreement between the Government of the Arab Republic of Egypt and the Untied Nations Development Programme (UNDP) for the establishment of the UNDP Regional Centre for Arab States in Cairo (New York, 29 July 2010), United Nations, *Treaty Series*, vol. 2790, No. 49092, p. 157, art. XXV, sect. 32. Examples of recent agreements with provisions along these lines include: the 2010 Agreement between the United Nations and the Government of the Republic of Korea regarding the establishment of the United Nations Office for Disaster Risk Reduction in Incheon; the Agreement between the United Nations Children's Fund and Egypt; and the Agreement between the Government of Malaysia and the United Nations Development Programme concerning the establishment of the UNDP Global Shared Service Centre (Kuala Lumpur, 24 *October* 2011), United Nations, *Treaty Series*, vol. 2794, No. 49154, p. 67. For an earlier form of arbitration clause see, by way of example, article VIII, sect. 21 (*a*), of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations (footnote 14 above), p. 11. For an analysis of the obligation to arbitrate under such earlier clauses, see *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, p. 12; and *Interpretation of Peace Treaties, Advisory Opinion, I.C.J. Reports 1950*, p. 65, at p. 77.

[29] Permanent Court of Arbitration, *Optional Rules for Arbitration involving International Organizations and States* (1996), introduction.

[30] *Yearbook … 1958*, vol. II, document A/3859, pp. 83–86, para. 22.

[an international organization]".[31] Accordingly, its recommendations centre, in the first instance, on the creation of standing mechanisms internal to the international organization itself, including ombudsman offices and bodies along the lines of the World Bank Inspection Panel.[32] For present purposes, such mechanisms are likely to be relevant only where a State is exercising diplomatic protection on behalf of its nationals (as to which, see the next section).

24. If the Commission's work focuses on dispute settlement in regard to disputes arising under international law, the relevant non-legal mechanisms will primarily be third-party mechanisms, such as enquiry,[33] mediation and conciliation. The Commission could consider ways of encouraging recourse to such mechanisms. Although they are non-legal in form, these mechanisms may play an important role in settling legal disputes.

4. Admissibility of claims: functional protection

25. The previous sections have dealt with questions regarding access to dispute settlement mechanisms. Even where access exists, however, issues are likely to arise as to how customary rules relating to admissibility of claims apply to international organizations. One particularly problematic area relates to the transferability of customary rules relating to diplomatic protection and exhaustion of local remedies.[34]

26. According to the *Reparation for injuries* Advisory Opinion of the International Court of Justice, an international organization has the capacity "to exercise a measure of functional protection of its agents",[35] broadly analogous to the right of a State to exercise diplomatic protection on behalf its nationals. As a result of this analogy, it has been suggested that the requirement of exhaustion of local remedies[36] applies in the context of "functional protection" as it does in the context of diplomatic protection.[37]

27. Yet a closer look shows that the comparison may not be exact. The Court's reasoning in the *Reparation for injuries* Advisory Opinion is actually quite different from the rationale underlying diplomatic protection. On the one hand, diplomatic protection derives from a State's "right to ensure, in the person of its subjects, respect for the rules of international law".[38] It is a general right that the State holds, deriving from the link of nationality. Functional protection, on the other hand, arises as an implied power of the organization necessary for the fulfilment of the organization's functions.[39] As such, it is a limited power extending only insofar as it is required to allow the agent to perform his or her duties successfully.

28. Another question posed in relation to the exercise of functional protection by an international organization is whether it may be used to bring a claim against the staff member's State of nationality.[40] The distinction between diplomatic protection arising from nationality and functional protection arising from functional considerations might suggest an affirmative answer.[41] In this regard, it should be mentioned that the *Cumaraswamy* and *Mazilu* Advisory Opinions both concerned disputes between the United Nations and the officials' States of nationality.[42]

29. Different concerns arise when diplomatic protection is asserted against an international organization. In principle, the requirement of exhaustion of local remedies

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[31] International Law Association (Shaw and Wellens, co-rapporteurs), "Final report on accountability of international organisations", *Report of the Seventy-first Conference*, Berlin, 16–21 August 2004, p. 164, at p. 224.

[32] *Ibid*., pp. 223–224, recommendations 2–5.

[33] The International Law Association recommends that an international organization "may consider the establishment of an international commission of inquiry into any matter that has become the subject of serious public concern" (*ibid*., p. 224, recommendation 6). It points in particular to the report of the Independent Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda (S/1999/1257, annex) and the report of the Secretary-General pursuant to General Assembly resolution 53/35 into the fall of Srebrenica (A/54/549) (*ibid*., p. 226).

[34] Practice prior to 1967 was briefly covered in a study prepared by the Secretariat on the practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities (*Yearbook … 1967*, vol. II, document A/CN.4/L.118 and Add.1 and 2, pp. 218–220, paras. 49–56 (in regard to the United Nations), and p. 302, para. 23 (in regard to the specialized agencies)).

[35] *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion (see footnote 9 above), p. 184. Article 1 of the articles on diplomatic protection adopted by the Commission at its fifty-eighth session, in 2006, defines diplomatic protection as "the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility" (General Assembly resolution 62/67 of 6 December 2007, annex; for the commentary thereto, see *Yearbook … 2006*, vol. II (Part Two), para. 50).

[36] Articles 14–15 of the articles on diplomatic protection (*ibid*.) define the scope of the exhaustion requirement in the context of diplomatic protection.

[37] See C. Eagleton, "International organization and the law of responsibility", *Collected Courses of the Hague Academy of International Law, 1950*, vol. 76, p. 319, at pp. 351–352; Dopagne (footnote 9 above), p. 1108; A. A. Cançado Trindade, "Exhaustion of local remedies and the law of international organizations", *Revue de Droit International, de sciences diplomatiques et politiques*, vol. 57, No. 2 (April–June 1979), p. 81, at pp. 82–83. Eagleton goes so far as to assert that the requirement of exhaustion applies to every claim by the United Nations, even "when it alleges injury against itself by a [S]tate" (at p. 352). This derives from the erroneous view that the exhaustion requirement applies also to direct injuries to a foreign State, and not just when a State is exercising diplomatic protection on behalf of a national. Amerasinghe rightly notes that, as for direct injuries to States, "the rule [of exhaustion] would not apply where a direct injury to the organization has been perpetrated" (C. F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd ed. (Cambridge, Cambridge University Press, 2005), p. 482).

[38] Permanent Court of International Justice, *The Mavrommatis Palestine Concessions, P.C.I.J., Series A, No. 2 (1924)*, p. 12.

[39] See *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion* (footnote 9 above), pp. 181–184.

[40] See article 7 of the articles on diplomatic protection (footnote 35 above): "A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the date of injury and at the date of the official presentation of the claim."

[41] See Amerasinghe (footnote 37 above), pp. 487–488.

[42] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion* (see footnote 16 above); and *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989*, p. 177.

could apply *mutatis mutandis*; in this connection it would be better to speak of internal remedies, rather than local remedies.[43] However, the Institute of International Law, in a 1971 resolution, expressed a presumption against the requirement for exhaustion in the exercise of diplomatic protection against international organizations.[44] It has been further suggested that the rule is inapplicable, as it derives from the "jurisdictional connection between the individual and the respondent State".[45] An instance where States seem to have exercised their right to diplomatic protection can be found in the 1965 and 1966 settlement agreements between the United Nations and Belgium, Greece, Italy Luxembourg and Switzerland. In those agreements, the United Nations agreed to pay compensation for damages caused by its operations in the Congo to nationals of the concerned States.[46]

[43] See J.-P. Ritter, "La protection diplomatique à l'égard d'une organisation internationale", *Annuaire français de droit international*, vol. 8 (1962), p. 427, at p. 454.

[44] Institute of International Law (de Visscher, rapporteur), resolution on "Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which United Nations Forces May be Engaged ", art. 8: "It is equally desirable that if such bodies have been designated or set up by a binding decision of the United Nations, or if the jurisdiction of similar bodies has been accepted by the State of which the injured person is a national, no claims may be presented to the United Nations by that State unless the injured person has exhausted the remedy thus made available to it" (*Yearbook of the Institute of International Law*, vol. 54, Part II (Session of Zagreb, 1971), p. 454 (available from the website of the Institute: www.idi-iil.org)).

[45] Amerasinghe (footnote 37 above), p. 486.

[46] Exchange of letters constituting an agreement between the United Nations and Belgium 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 constituting an agreement between the United Nations and Greece 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 between the United Nations and Italy relating to the settlement of claims filed against the United Nations in the Congo by Italian nationals (New York, 18 January 1967), *ibid.*, vol. 588, No. 8525, p. 197; exchange of letters constituting an agreement between the United Nations and Luxembourg 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 between the United Nations and Switzerland relating to the settlement of claims filed against the United Nations in the Congo by Swiss nationals (New York, 3 June 1966), *ibid.*, vol. 564, No. 621, p. 193. See also M. Guillaume, "La réparation des dommages causés par les contingents français en ex-Yougoslavie et en Albanie", *Annuaire français de droit international*, vol. 43 (1997), p. 151; and K. Schmalenbach, "Dispute Settlement (Article VIII Sections 29–30 General Convention)", *in* A. Reinisch (ed.), *The Conventions on the Privileges and Immunities of the United Nations and its Specialized Agencies: A Commentary* (Oxford, Oxford University Press, 2016), p. 529, at p. 530.

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