

ARTICLES ON THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

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1. Introduction

During the long period in which the International Law Commission was engaged in the study of the international responsibility of States, it was decided to leave aside the issues relating to the responsibility of international organizations.

This does not mean that those issues were left completely unaffected. The relevance of the articles on State responsibility for international organizations is rather complex. Part One of these articles considers the wrongful acts of States in general terms, including those acts which consist in the breach of an obligation that a State may have towards an international organization. Part Two of the same articles, which concerns the content of international responsibility, addresses only the relations between the responsible State and another State or the international community as a whole (see article 33). The same should apply to Part Three dealing with the implementation of State responsibility, although this is not expressly stated. Article 57 in Part Four, which contains general provisions, enounces that “[t]hese articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization”. However, it would be difficult to assume that the rules adopted with regard to States do not have some implications with regard to the responsibility of international organizations. Certain rules, although enounced with regard to States, have a more general character.

When the articles on responsibility of States for internationally wrongful acts were near their completion, the International Law Commission included in its long-term programme of work the subject “responsibility of international organizations”, on the basis of a proposal made by Mr. Alain Pellet. The General Assembly recommended in 2001 that the Commission engage in this study. The following year the Commission appointed the present writer as Special Rapporteur. In 2009, after discussing seven reports presented in seven successive years, the Commission adopted at first reading the draft articles on the responsibility of international organizations and requested comments and observations from States and international organizations. After taking these views into account and considering the eighth report, the Commission completed its work on this subject in 2011.

2. Scope of the Articles

The articles on the responsibility of international organizations intend to cover issues of responsibility that concern international organizations and that were not addressed in the articles on the responsibility of States for internationally wrongful acts. The more recent articles consider first of all the internationally wrongful acts committed by international organizations and the content and implementation of responsibility when an organization is responsible towards another organization or a State or the international community as a whole. These articles also address questions relating to the responsibility

of States for the conduct of an international organization, as well as the responsibility of an organization for the conduct of a State or another organization.

Like the articles on State responsibility with regard to States, the articles on the responsibility of international organizations define all the cases in which an international organization incurs international responsibility. However, they do not consider the content of responsibility towards and its invocation by an entity other than a State or another international organization. As in the articles on State responsibility, this eventuality has not been totally ignored. Article 33, paragraph 2, specifies that Part Three, concerning the content of responsibility, 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”. A similar point has been made in article 50 with regard to the invocation of the responsibility of an international organization. The purpose of these “without prejudice” provisions is to convey that the articles are not intended to exclude any such entitlement.

The present articles do not cover the gap left by the articles on the responsibility of States for internationally wrongful acts with regard to the invocation of the responsibility of States by an international organization and the content of responsibility in that case. For instance, article 43, paragraph 1, of the articles on State responsibility reads: “An injured State which invokes the responsibility of another State shall give notice of its claim to that State”. Assuming that an identical rule could be expressed on the basis of an analogy with regard to the relations between a responsible State and an injured international organization, one would have to insert in article 43 a new paragraph with a text such as the following: “An injured international organization which invokes the responsibility of a State shall give notice of its claim to that State”. This would have required modifying the articles on the responsibility of States. The Commission was understandably reluctant to undertake such an exercise. Moreover, analogy allows one to reach the same conclusion without the need of adding a new text. This remark applies to several provisions in Part Two and Part Three of the articles on State responsibility.

No attempt has been made in the articles on international organizations to give a general definition of international organizations. A definition is provided only in order to determine the scope of the articles. The relevant text departs from the traditional definition, first expressed in article 2, paragraph 1 (i), of the Vienna Convention on the Law of Treaties, according to which an international organization is simply described as an “intergovernmental organization”. Article 2 (a) states that “‘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”. The definition included in the articles on the responsibility of international organizations thus attempts to be more precise. In particular, it specifies that organizations to which the articles apply include organizations which have certain features that are fairly frequent in practice, in particular a membership that does not comprise only States. It is clear, and hardly needed to be stated, that an international organization may incur international responsibility only if it possesses an international legal personality.

3. Variety of International Organizations

There are considerable differences among States but these have not prevented codification conventions and other instruments from setting forth rules applying to all States. Unlike States, international organizations are established for specific functions which characterize their activities. They are very diverse, given the enormous variety in their size, membership, functions and resources.

However, the variety existing among international organizations does not exclude the possibility that some rules apply to every international organization. The articles on the responsibility of international organizations contain many examples of such rules. One of them is provided by article 10, paragraph 1, according to which “[t]here 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 the origin or character of the obligation concerned”. Some other rules stated in the articles may be relevant only for certain organizations. For instance, article 21 on self-defence as a circumstance precluding wrongfulness may probably be applicable to only a few international organizations in view of their functions. The fact of stating in article 21 a general rule does not mean that this necessarily becomes relevant also for other organizations. By expressing a general rule the articles only pursue the objective of making it possible for some organizations to invoke self-defence as a circumstance precluding wrongfulness.

Article 64 considers that some special rules apply to the international responsibility of certain categories of organizations or to some specific organizations. These special rules are not identified in the text. Although the existence of these special rules has often been invoked by international organizations, few examples are provided. The commentary to article 64 refers to an alleged rule that would attribute to the European Union the conduct taken by its member States when they implement European Union law.

Article 64 also envisages the possibility that rules different from the general rules stated in the articles apply only to the relations between an organization and some other entities, especially its members. These rules may be special rules of international law or rules pertaining to a different system of law, for instance rules of European Union law governing the relations between the European Union and its member States. They come under the definition of “rules of the organization”, which is given in article 2 (b) as follows: “‘Rules of the organization’ means, in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization”. This definition is a slightly revised version of article 2, paragraph 1 (j), of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

Whether they are part of international law or not, the rules of the organization cannot be invoked to justify an organization’s failure to comply with an international obligation towards a State or organization that is not bound by those rules (article 32).

4. Relations with the Articles on State Responsibility

The articles on the responsibility of international organizations are not based on any presumption that the rules on the responsibility of States for internationally wrongful acts are generally applicable to international organizations. However, after an examination of the various issues, a certain number of rules have been considered by the Commission to apply both to States and international organizations. Where the Commission has reached this conclusion, the wording of the articles on the responsibility of international organizations closely follows that of the earlier articles.

This introduction is mainly intended to highlight those articles on the responsibility of international organizations that provide the more significant rules specifically applying to international organizations.

5. Structure of the Articles

The structure of the articles on the responsibility of international organizations has been modelled on the pattern of the articles on responsibility of States for internationally wrongful acts. However, the articles are divided into six parts instead of four, because there are two parts (the first and the fifth) which do not have a parallel in the earlier articles.

Part One consists of an introduction containing some provisions on the scope of the articles and the use of terms. Part Two concerns the internationally wrongful act of an international organization, which leads to the responsibility of the organization. Part Three addresses the content of the responsibility and Part Four its implementation: the invocation of responsibility and countermeasures. Part Five concerns various questions relating to State responsibility in connection with the conduct of an international organization, in particular the question of responsibility of States when a wrongful act is committed by the organization of which they are members. Part Six concludes the text with some general provisions, including one article which considers the role of special rules.

6. The Rules on Attribution

Like the articles on State responsibility, those on the responsibility of international organizations for internationally wrongful acts do not in principle address the so-called primary rules, which establish whether an organization is bound by a certain international obligation, but only the secondary rules, relating to the consequences of its breach. However, in order to be operational, the articles also address questions such as those of attribution which may equally be considered an aspect of the primary rules. For instance, the interpretation of a primary rule includes answering the question whether, when a State is prohibited from taking a certain act, the State is required not to take that act also through a person other than an organ acting under its instructions.

As for States, international responsibility of an international organization generally presupposes the existence of conduct (a positive act or an omission) that is attributed to the responsible subject.

Like a State, an international organization acts through its organs, which in article 2 (c) are defined as “any person or entity which has that status in accordance with the rules of the organization”. However, an international organization often acts instead through an

agent, who is defined as “an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions” (article 2 (d)). While an international organization may have reasons for outsourcing some of its activities to entities or persons who are apparently independent and cannot be considered officials, this does not rule out that the activities that these entities or persons perform at the request and on behalf of the organization are attributed to the latter under international law. Attribution would in that case be based also on a factual link.

One question of attribution that has frequently been raised before national and international courts concerns the conduct of armed forces which have been put by a State at the disposal of the United Nations. Given the fact that the contributing State retains some measure of control over its forces, in particular by keeping its competence with regard to criminal and disciplinary matters, article 7 attributes the conduct of these forces to the organization only insofar as “the organization exercises effective control over that conduct”. With regard to the military operations run by forces put at the disposal of the United Nations, effective control will generally rest with the United Nations. However, there have been circumstances under which the contributing State has played a decisive role in the conduct of its forces. Conduct will then have to be attributed to the State or, as the case may be, jointly to the State and the Organization.

Under the different scenario where a State does not put forces at the disposal of an international organization but acts on the basis of an authorization by an organization, the conduct of the forces has to be attributed to the State. This follows from the articles on State responsibility. Like those articles, the articles on the responsibility of international organizations contain only positive rules on attribution. They do not specify when an act should not be attributed to an international organization.

7. The Breach of an International Obligation

The articles focus on the consequences of a breach of an obligation under international law and do not attempt to identify the obligations binding an international organization. Thus the articles do not determine to what extent the rules of the organization have to be considered as part of international law. Article 10, paragraph 2, simply states that the articles include the breach of an obligation that “may arise for an international organization towards its members under the rules of the organization”.

8. Responsibility in Connection with an Act of a State or another International Organization

An international organization may incur responsibility for its contribution to a breach of an international obligation by a State or another international organization. Articles 14 to 16 apply to international organizations rules that are similar to those applicable to States according to the articles on State responsibility, with regard to aid or assistance in the commission of a breach, direction and control exercised over a breach, and coercion. In the case of aid or assistance, or direction and control, the organization thus incurs responsibility only if the act “would be internationally wrongful if committed by that organization”.

The articles provide a further instance of responsibility of an international organization which is connected with the conduct of a State or another organization that is not necessarily wrongful for the latter entities. Article 17 considers that an international organization might circumvent its international obligations by taking advantage of the

separate legal personality of its members, which may not be bound by the same obligations. Responsibility is envisaged under different conditions according to whether the organization imposes an obligation on its members or only authorizes them to take some action. One could say that the obligations of an international organization are extended to cover actions required or authorized by the organization. This provision is clearly innovative. It is intended to fill a possible gap, although circumvention, which implies an element of intention, may be difficult to ascertain.

9. Countermeasures

Countermeasures are considered in the articles from two different perspectives. First, in article 22 as circumstances that may justify an act of an international organization that is not in conformity with an international obligation. Second, in articles 51 to 56 as measures against an international organization which is responsible for an internationally wrongful act. In view of the principle of cooperation underlying the relations between an organization and its members, additional conditions are considered to apply to countermeasures affecting those relations. Countermeasures against one of its members by the international organization or against an international organization by one of its members are allowed only if they are not inconsistent with the rules of the organization and if there are no appropriate means available for otherwise inducing compliance with the obligations of the responsible entity (articles 22 and 52).

10. Reparation for Injury

The obligations that a responsible international organization incurs as a consequence of an internationally wrongful act are substantially the same as those incurred by States.

One specific issue is addressed in article 40. It concerns the question whether members of an international organization are under an obligation to provide the organization with sufficient means to make reparation when it is responsible for injury. Article 40 requires members to take “all appropriate measures” under the rules of the organization in order to enable the organization to fulfil its duty to make reparation. An obligation rests also with the international organization to ensure that its members provide the necessary means, but again this obligation is required to be in accordance with the rules of the organization.

11. Invocation of Responsibility

When the obligation that is breached by an international organization is owed to the international community, one may query whether another international organization may invoke responsibility as a “non-injured” entity. States may do so. In the case of international organizations article 49, paragraph 3, requires that “safeguarding the interest of the international community as a whole underlying the obligation breached is within the functions of the international organization invoking responsibility”. This reflects the principle of speciality. In substance, what States can do directly, they can delegate to an international organization.

12. Responsibility of a State in Connection with the Conduct of an International Organization

Part Five deals with various questions of State responsibility that were deliberately left aside in the articles on State responsibility (see article 57 thereof). What applies to

States that are members of an international organization also concerns member organizations.

The main issue is whether member States of an international organization incur responsibility when that organization commits an internationally wrongful act. Article 62 is based on the idea that, given the separate legal personality of the organization, responsibility does not as a rule fall on its members. There are two exceptions which do not contradict this principle. They simply envisage, first, an acceptance of responsibility binding a member State towards the injured party, and, second, an attitude of a member State which “led the injured party to rely on its responsibility”. An example of this second exception may be the case of the members of a small organization prompting a third party to deal with the organization with the assurance that they would be responsible for any wrongful act committed by the latter.

The separate legal personality could lead to a different form of circumvention than the one considered in article 17. Article 61 envisages the case of a member State circumventing one of its international obligations by “causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation”. This may be viewed as an extension of an obligation binding the member State. What has already been noted about the difficulty of ascertaining circumvention restricts the practical importance of this provision.

Articles 58 to 60 deal with the responsibility that States may incur when aiding or assisting, directing and controlling, or coercing an international organization that commits an internationally wrongful act. These provisions are similar to those concerning the responsibility of a State in connection with the conduct of another State (articles 16 to 18 on State responsibility) and the responsibility of an international organization in connection with the conduct of another organization (articles 14 to 16 on the responsibility of international organizations). However, articles 58 and 59 specify that “an act by a member State of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of that State” for aiding or assisting, or for directing and controlling the organization in the commission of an internationally wrongful act. While States retain their international obligations when they act as members of an international organization and may therefore breach an international obligation when acting as members, the fact of contributing to the functioning of the organization does not *per se* establish their responsibility.

13. References to the Articles in Judicial Practice

Practice concerning the responsibility of international organizations is scarce. International organizations have developed their activities only over a relatively recent period. They generally refrain from submitting their disputes to arbitration and invoke immunity in national judicial proceedings. As noted in the commentary to the present articles, the fact that several articles “are based on limited practice moves the border between codification and progressive development in the direction of the latter”. However, the need for rules concerning the responsibility of international organizations reflects the importance that their activities have acquired in the international society. This may explain why, with regard to the question of attribution, the present articles have already been extensively considered by the European Court of Human Rights (Grand Chamber) in *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* (decision of 2 May 2007), and in *Al-Jedda v. United Kingdom* (judgment of 7 July 2011), and by some national courts, in particular the House of Lords in *Al-Jedda* (decision of 12

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Related Materials

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