REGIONAL COURSES IN INTERNATIONAL LAW

Addis Ababa, Ethiopia
1-26 April 2013

STUDY MATERIALS
PART VI

Codification Division of the United Nations Office of Legal Affairs

Acknowledgments

The Codification Division of the Office of Legal Affairs of the United Nations expresses its gratitude to Oxford University Press and the American Journal of International Law for granting permission to use the following materials for the United Nations Regional Course in International Law held in Addis Ababa, Ethiopia, from 1 to 26 April 2013:

- Erika de Wet, "The Governance of Kosovo: Security Council Resolution 1244 and the Establishment and Functioning of Eulex", *American Journal of International Law*, Vol. 103, 2009, pp. 83-96

- Riccardo Pavoni, "Human Rights and the Immunities of Foreign States and International Organizations", *Hierarchy in International Law: The Place of Human Rights*, Erika de Wet & Jure Vidmar (eds.), Oxford University Press, 2012, pp. 71-113

- *Mothers of Srebrenica* v. *Netherlands and United Nations*, Supreme Court of The Netherlands, 12 April 2012 from "Oxford Reports on International Law in Domestic Courts (NL 2012)" (2012)

Addis Ababa, Ethiopia
12 April 2013

INTERNATIONAL ORGANIZATIONS

PROFESSOR ERIKA DE WET

Codification Division of the United Nations Office of Legal Affairs

MRS. ERIKA DE WET
Professor of International Law
Co-Director of the Institute for International and Comparative Law in Africa
University of Pretoria

Mrs. Erika de Wet (South Africa) completed her B Iur and LLB as well as her LLD at the University of the Free State (South Africa). She holds an LLM from Harvard University and completed her *Habilitationsschrift* at the University of Zurich (Switzerland) in December 2002.

Professor de Wet joined the University of Pretoria in January 2011 as Professor of International Law and Co-Director of the Institute for International and Comparative Law in Africa. Between 2004 and 2010 she was tenured Professor of International Constitutional Law at the Amsterdam Center for International Law, University of Amsterdam, a position which she still holds part-time. She lectures in international law at the University of Zurich (Switzerland) and the University of Bonn (Germany) on a regular basis. Between 2007 and 2010 she served as a member of the Advisory Committee on Issues of Public International Law of the Netherlands.

Together with Professor André Nollkaemper, Erika de Wet is Editor in Chief of the Oxford Reports on International Law in Domestic Courts (ILDC) Online; she is also one of the General Editors of the Oxford Constitutions Online, with Professors Rüdiger Wolfrum and Rainer Grote of the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, Germany.

INTERNATIONAL ORGANIZATIONS
PROFESSOR ERIKA DE WET

Legal instruments and documents

Case Law

Legal writings [Documents not reproduced in electronic version]

9. Erika de Wet, "The Governance of Kosovo: Security Council Resolution 1244 and the Establishment and Functioning of EULEX", *American Journal of International Law*, Vol. 103, 2009, pp. 83-96
10. Riccardo Pavoni, "Human Rights and the Immunities of Foreign States and International Organizations", *Hierarchy in International Law: The Place of Human Rights*, Erika de Wet & Jure Vidmar (eds.), Oxford University Press, 2012, pp. 71-113

Draft articles on the responsibility of international organizations, with commentaries, Report of the International Law Commission, sixty-third session (26 April – 3 June and 4 July-12 August 2011) (A/66/10)

Draft articles on the responsibility of international organizations, with commentaries

2011

Adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10). The report, which also contains commentaries to the draft articles (para. 88), will appear in *Yearbook of the International Law Commission, 2011*, vol. II, Part Two.

Responsibility of international organizations

General commentary

(1) In 2001 the International Law Commission adopted a set of articles on the responsibility of States for internationally wrongful acts. As stated in those articles, they "are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization" (art. 57). Given the number of existing international organizations and their ever increasing functions, these issues appeared to be of particular importance. Thus the Commission decided in 2002 to pursue its work for the codification and the progressive development of the law of international responsibility by taking up the two questions that had been left without prejudice in article 57 on State responsibility. The present draft articles represent the result of this further study. In conducting the study the Commission has been assisted by the comments and suggestions received from States and international organizations.

(2) The scope of application of the present draft articles reflects what was left open in article 57 on State responsibility. Most of the present draft articles consider the first issue that was mentioned in that provision: the responsibility of an international organization for an act which is internationally wrongful. Only a few draft articles, mainly those contained in Part Five, consider the second issue: the responsibility of a State for the conduct of an international organization. The second issue is closely connected with the first one because the conduct in question of an international organization will generally be internationally wrongful and entail the international responsibility of the international organization concerned. However, under certain circumstances which are considered in articles 60 and 61 and the related commentaries, the conduct of an international organization may not be wrongful and no international responsibility would arise for that organization.

(3) In addressing the issue of responsibility of international organizations, the present draft articles follow the same approach adopted with regard to State responsibility. The draft articles thus rely on the basic distinction between primary rules of international law, which establish obligations for international organizations, and secondary rules, which consider the existence of a breach of an international obligation and its consequences for the responsible international organization. Like the articles on State responsibility, the present draft articles express secondary rules. Nothing in the draft articles should be read as implying the existence or otherwise of any particular primary rule binding on international organizations.

(4) While the present draft articles are in many respects similar to the articles on State responsibility, they represent an autonomous text. Each issue has been considered from the specific perspective of the responsibility of international organizations. Some provisions address questions that are peculiar to international organizations. When in the study of the responsibility of international organizations the conclusion is reached that an identical or similar solution to the one expressed in the articles on State responsibility should apply with respect to international organizations, this is based on appropriate reasons and not on a general presumption that the same principles apply.

(5) One of the main difficulties in elaborating rules concerning the responsibility of international organizations is due to the limited availability of pertinent practice. The main reason for this is that practice concerning responsibility of international organizations has developed only over a relatively recent period. One further reason is the limited use of procedures for third-party settlement of disputes to which international organizations are parties. Moreover, relevant practice resulting from exchanges of correspondence may not be always easy to locate, nor are international organizations or States often willing to disclose it. The fact that several of the present draft articles are based on limited practice moves the border between codification and progressive development in the direction of the

latter. It may occur that a provision in the articles on State responsibility could be regarded as representing codification, while the corresponding provision on the responsibility of international organizations is more in the nature of progressive development. In other words, the provisions of the present draft articles do not necessarily yet have the same authority as the corresponding provisions on State responsibility. As was also the case with the articles on State responsibility, their authority will depend upon their reception by those to whom they are addressed.

(6) The commentaries on the articles of State responsibility are generally more extensive, reflecting the greater availability of practice. When the wording of one of the present draft articles is similar or identical to an article on State responsibility, the commentary of the former will give the reasons for its adoption and the essential explanations. In so far as provisions of the present draft articles correspond to those of the articles on State responsibility, and there are no relevant differences between organizations and States in the application of the respective provisions, reference may also be made, where appropriate, to the commentaries on the latter articles.

(7) International organizations are quite different from States, and in addition present great diversity among themselves. In contrast with States, they do not possess a general competence and have been established in order to exercise specific functions ("principle of speciality"). There are very significant differences among international organizations with regard to their powers and functions, size of membership, relations between the organization and its members, procedures for deliberation, structure and facilities, as well as the primary rules including treaty obligations by which they are bound. Because of this diversity and its implications, the draft articles where appropriate give weight to the specific character of the organization, especially to its functions, as for instance article 8 on excess of authority or contravention of instructions. The provision on *lex specialis* (art. 64) has particular importance in this context. Moreover, the diversity of international organizations may affect the application of certain articles, some of which may not apply to certain international organizations in the light of their powers and functions.

(8) Certain special rules on international responsibility may apply in the relations between an international organization and its members (art. 64). These rules are specific to each organization and are usually referred to as rules of the organization. They include the constituent instrument of the organization and the rules flowing from it (art. 2). The present draft articles do not attempt to identify these special rules, but do consider the impact that they may have on the international responsibility of the organization towards its members and on the responsibility of members for the conduct of the organization. The rules of the organization do not *per se* bind non-members. However, some rules of the organization may be relevant also for non-members. For instance, in order to establish whether an international organization has expressed its consent to the commission of a given act (art. 20), it may be necessary to establish whether the organ or agent which gives its consent is competent to do so under the rules of the organization.

(9) The present draft articles are divided into Six Parts. Part One defines the scope of the articles and gives the definition of certain terms. Parts Two to Four (arts. 3 to 57) follow the general lay-out of the articles on State responsibility. Part Two sets forth the preconditions for the international responsibility of an international organization to arise. Part Three addresses the legal consequences flowing for the responsible organization, in particular the obligation to make reparation. Part Four concerns the implementation of responsibility of an international organization, especially the question of which States or international organizations are entitled to invoke that responsibility. Part Five addresses the responsibility of States in connection with the conduct of an international organization. Finally, Part Six contains certain general provisions applicable to the whole set of draft articles.

Part One
Introduction

Article 1
Scope of the present draft articles

1. The present draft articles apply to the international responsibility of an international organization for an internationally wrongful act.

2. The present draft articles also apply to the international responsibility of a State for an internationally wrongful act in connection with the conduct of an international organization.

Commentary

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

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

(3) An international organization's responsibility may be asserted under different systems of law. Before a national court, a natural or legal person will probably invoke the organization's responsibility or liability under some municipal law. The reference in paragraph 1 of article 1 and throughout the draft articles to international responsibility makes it clear that the draft articles only take the perspective of international law and consider whether an international organization is responsible under that law. Thus, issues of responsibility or liability under municipal law are not as such covered by the draft articles. This is without prejudice to the possible applicability of certain principles or rules of international law when the question of an organization's responsibility or liability arises under municipal law.

(4) Paragraph 1 of article 1 concerns the cases in which an international organization incurs international responsibility. The most frequent case will be that of the organization committing an internationally wrongful act. However, there are other instances in which an international organization's responsibility may arise. One may envisage, for example, cases analogous to those referred to in Chapter IV of Part One of the articles on the responsibility of States for internationally wrongful acts.[36] An international organization may thus be held responsible if it aids or assists a State or another organization in committing an internationally wrongful act, or if it directs and controls a State or another organization in the commission of such an act, or if it coerces a State or another organization to commit an act that would, but for the coercion, be an internationally wrongful act. Another case in which an international organization may be held responsible is that of an internationally wrongful act committed by another international organization of which the first organization is a member.

(5) The reference in paragraph 1 to acts that are wrongful under international law implies that the present draft articles do not address the question of liability for injurious consequences arising out of acts not prohibited by international law. The choice made by the Commission to separate, with regard to States, the question of liability for acts not

[36] *Yearbook ... 2001*, vol. II (Part Two), pp. 64–71.

prohibited by international law from the question of international responsibility prompts a similar choice in relation to international organizations. Thus, as in the case of States, international responsibility is linked with a breach of an obligation under international law. International responsibility may thus arise from an activity that is not prohibited by international law only when a breach of an obligation under international law occurs in relation to that activity, for instance if an international organization fails to comply with an obligation to take preventive measures in relation to an activity that is not prohibited.

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

> "[they] are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization".[37]

The main question that was left out in the articles on responsibility of States for internationally wrongful acts, and that is considered in the present draft articles, is the issue of the responsibility of a State which is a member of an international organization for a wrongful act committed by the organization.

(7) The wording of Chapter IV of Part One of the articles on the responsibility of States for internationally wrongful acts only refers to the cases in which a State aids or assists, directs and controls, or coerces another State.[38] Should the question of similar conduct by a State with regard to an international organization not be regarded as covered, at least by analogy, in the articles on responsibility of States for internationally wrongful acts, the present draft articles fill the resulting gap.

(8) Paragraph 2 does not include questions of attribution of conduct to a State, whether an international organization is involved or not. Chapter II of Part One of the articles on the responsibility of States for internationally wrongful acts deals, albeit implicitly, with attribution of conduct to a State when an international organization or one of its organs acts as a State organ, generally or only under particular circumstances. Article 4 refers to the "internal law of the State" as the main criterion for identifying State organs, and internal law will rarely include an international organization or one of its organs among State organs. However, article 4 does not consider the status of such organs under internal law as a necessary requirement.[39] Thus, an organization or one of its organs may be considered as a State organ under article 4 also when it acts as a *de facto* organ of a State. An international organization may also be, under the circumstances, as provided for in article 5, a "person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority".[40] Article 6 then considers the case in which an organ is "placed at the disposal of a State by another State".[41] A similar eventuality, which may or may not be considered as implicitly covered by article 6, could arise if an international organization places one of its organs at the disposal of a State. The commentary on article 6 notes that this eventuality "raises difficult questions of the relations between States and international organizations".[42] International organizations are not referred to in the commentaries on articles 4 and 5. While it appears that all questions of attribution of conduct to States are nevertheless within the scope of the responsibility of States for internationally wrongful acts, and should therefore not be considered anew, some aspects of attribution of conduct to either a State or an international organization will be further elucidated in the discussion of attribution of conduct to international organizations.

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

(10) The present draft articles do not address issues relating to the international responsibility that a State may incur towards an international organization. Although the articles on the responsibility of States for internationally wrongful acts do not mention international organizations when considering circumstances precluding wrongfulness, the content of international responsibility or the invocation of the international responsibility of a State, they may be applied by analogy also to the relation between a responsible State and an international organization. When, for instance, article 20 sets forth that "[v]alid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent",[43] the provision may be understood as covering by analogy also the case where a valid consent to the commission of the act of the State is given by an international organization.

Article 2
Use of terms

For the purposes of the present draft articles,

(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;

(b) "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;

(c) "organ of an international organization" means any person or entity which has that status in accordance with the rules of the organization;

(d) "agent of an international organization" means 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, and thus through whom the organization acts.

Commentary

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

[37] *Ibid.*, p. 141.
[38] *Ibid.*, pp. 64–71.
[39] *Ibid.*, p. 40.
[40] *Ibid.*, p. 42.
[41] *Ibid.*, pp. 43–44.
[42] *Ibid.*, para. (9) of the commentary on article 6, p. 45.
[43] *Ibid.*, p. 72.

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

(3) Starting with the Vienna Convention on the Law of Treaties of 23 May 1969,[44] several codification conventions have succinctly defined the term "international organization" as "intergovernmental organization".[45] In each case the definition was given only for the purposes of the relevant convention and not for all purposes. The text of some of these codification conventions added some further elements to the definition: for instance, the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 21 March 1986 only applies to those intergovernmental organizations which have the capacity to conclude treaties.[46] No additional element would be required in the case of international responsibility apart from possessing an obligation under international law. However, the adoption of a different definition is preferable for several reasons. First, it is questionable whether by defining an international organization as an intergovernmental organization one provides much information: it is not even clear whether the term "intergovernmental organization" refers to the constituent instrument or to actual membership. Second, the term "intergovernmental" is in any case inappropriate to a certain extent, because several important international organizations have been established with the participation also of State organs other than governments. Third, an increasing number of international organizations include among their members entities other than States as well as States; the term "intergovernmental organization" might be thought to exclude these organizations, although with regard to international responsibility it is difficult to see why one should reach solutions that differ from those applying to organizations of which only States are members.

(4) Most international organizations are established by treaties. Thus, a reference in the definition to treaties as constituent instruments reflects prevailing practice. However, forms of international cooperation are sometimes established without a treaty. In certain cases, for instance with regard to the Nordic Council, a treaty was subsequently concluded.[47] In order to cover organizations established by States on the international plane without a treaty, article 2 refers, as an alternative to treaties, to any "other instrument governed by international law". This wording is intended to include instruments, such as resolutions adopted by an international organization or by a conference of States. Examples of international organizations that have been so established include the Pan American Institute of Geography and History (PAIGH),[48] and the Organization of the Petroleum Exporting Countries (OPEC).[49]

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

(6) The definition in article 2 does not cover organizations that are established through instruments governed by municipal law, unless a treaty or other instrument governed by international law has been subsequently adopted and has entered into force.[50] Thus the definition does not include organizations such as the World Conservation Union (IUCN), although over 70 States are among its members,[51] or the Institut du Monde Arabe, which was established as a foundation under French law by 20 States.[52]

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

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

The purpose of this type of provision in the constituent instrument is to impose on the member States an obligation to recognize the organization's legal personality under their internal laws. A similar obligation is imposed on the host State when a similar text is included in the headquarters agreement.[53]

(8) The acquisition by an international organization of legal personality under international law is appraised in different ways. According to one view, the mere existence for an organization of an obligation under international law implies that the organization possesses legal personality. According to another view, further elements are required. While the International Court of Justice has not identified particular prerequisites, its dicta on the legal personality of international organizations do not appear to set stringent

---

[44] United Nations, *Treaty Series*, vol. 1155, p. 331. The relevant provision is article 2 (1) (i).

[45] See article 1 (1) (1) of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975, A/CONF.67/16, art. 2 (1) (n) of the Vienna Convention on Succession of States in respect of Treaties of 23 August 1978, United Nations, *Treaty Series*, vol. 1946, p. 3; and article 2 (1) (i) of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 21 March 1986, A/CONF.129/15.

[46] See article 6 of the Convention (*ibid*.). As the Commission noted with regard to the corresponding draft articles:

> "Either an international organization has the capacity to conclude *at least* one treaty, in which case the rules in the draft articles will be applicable to it, or, despite its title, it does not have that capacity, in which case it is pointless to state explicitly that the draft articles do not apply to it." *Yearbook ... 1981*, vol. II (Part Two), p. 124.

[47] The text of the Treaty of Cooperation of 23 March 1962, as amended, is available at the website of the Nordic Council: http://www.norden.org/en/publications/2005-713.

[48] See A.J. Peaslee (ed.), *International Governmental Organizations* (3rd ed.), Part III and Part IV (The Hague/Boston/London: Nijhoff, 1979), pp. 389–403.

[49] See P.J.G. Kapteyn, P.H. Lauwaars, P.H. Kooijmans, H.G. Schermers and M. van Leeuwen Boomkamp, *International Organization and Integration* (The Hague: Nijhoff, 1984), II.K.3.2.a.

[50] This was the case of the Nordic Council, footnote 47 above.

[51] See http://www.iucn.org.

[52] A description of the status of this organization may be found in a reply by the Minister of Foreign Affairs of France to a parliamentary question. *Annuaire Français de Droit International*, vol. 37 (1991), pp. 1024–1025.

[53] Thus in its judgement No. 149 of 18 March 1999, *Istituto Universitario Europeo v. Piette*, *Giustizia civile*, vol. 49 (1999), I, p. 1309 at p. 1313, the Italian Court of Cassation found that "the provision in an international agreement of the obligation to recognize legal personality to an organization and the implementation by law of that provision only mean that the organization acquires legal personality under the municipal law of the contracting States".

requirements for this purpose. In its advisory opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* the Court stated:

> "International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties."[54]

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

> "The Court need hardly point out that international organizations are subjects of international law which do not, unlike States, possess a general competence."[55]

While it may be held that, when making both these statements, the Court had an international organization of the type of the World Health Organization (WHO) in mind, the wording is quite general and appears to take a liberal view of the acquisition by international organizations of legal personality under international law.

(9) In the passages quoted in the previous paragraph, and more explicitly in its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*,[56] the Court appeared to favour the view that when legal personality of an organization exists, it is an "objective" personality. Thus, it would not be necessary to enquire whether the legal personality of an organization has been recognized by an injured State before considering whether the organization may be held internationally responsible according to the present articles.

(10) The legal personality of an organization which is a precondition of the international responsibility of that organization needs to be "distinct from that of its member States".[57] This element is reflected in the requirement in article 2, subparagraph (a), that the international legal personality should be the organization's "own", a term that the Commission considers as synonymous with the phrase "distinct from that of its member States". The existence for the organization of a distinct legal personality does not exclude the possibility of a certain conduct being attributed both to the organization and to one or more of its members or to all its members.

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

> "International organizations are governed by the 'principle of speciality', that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them."[58]

[54] *I.C.J. Reports 1980*, pp. 89–90, para. 37.

[55] *I.C.J. Reports 1996*, p. 78, para. 25.

[56] *I.C.J. Reports 1949*, p. 185.

[57] This wording was used by G.G. Fitzmaurice in the definition of the term "international organization" that he proposed in the context of the law of treaties, see *Yearbook ... 1956*, vol. II, p. 108, and by the Institut de Droit International in its 1995 Lisbon resolution on "The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties", *Annuaire de l'Institut de Droit International*, vol. 66-II (1996), p. 445.

[58] *I.C.J. Reports 1996*, p. 78, para. 25.

Many international organizations have only States as members. In other organizations, which have a different membership, the presence of States among the members is essential for the organization to be considered in the present articles.[59] This requirement is intended to be conveyed by the words "in addition to States".

(12) The fact that paragraph (a) considers that an international organization "may include as members, in addition to States, other members" does not imply that a plurality of States as members is required. Thus an international organization may be established by a State and another international organization. Examples may be provided by the Special Court for Sierra Leone[60] and the Special Tribunal for Lebanon.[61]

(13) The presence of States as members may take the form of participation as members by individual State organs or agencies. Thus, for instance, the Arab States Broadcasting Union, which was established by a treaty, lists "broadcasting organizations" as its full members.[62]

(14) The reference in the second sentence of article 2, subparagraph (a), to entities other than States — such as international organizations,[63] territories[64] or private entities[65] — as additional members of an organization points to a significant trend in practice, in which international organizations increasingly tend to have a mixed membership in order to make cooperation more effective in certain areas.

(15) International organizations within the scope of the present articles are significantly varied in their functions, type and size of membership and resources. However, since the principles and rules set forth in the articles are of a general character, they are intended to apply to all these international organizations, subject to special rules of international law that may relate to one or more international organizations. In the application of these principles and rules, the specific, factual or legal circumstances pertaining to the international organization concerned should be taken into account, where appropriate. It is clear, for example, that most technical organizations are unlikely to be ever in the position

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

[60] Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, done at Freetown, on 16 January 2002.

[61] Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon, annexed to Security Council resolution 1757 (2007) of 30 May 2007.

[62] See article 4 of the Convention of the Arab States Broadcasting Union. The text is reproduced in A.J. Peaslee, footnote 48 above, Part V (The Hague/Boston/London: Nijhoff, 1976), p. 24 ff.

[63] For instance, the European Community has become a member of the Food and Agriculture Organization (FAO), whose Constitution was amended in 1991 in order to allow the admission of regional economic integration organizations. The amended text of the FAO Constitution may be found in P.J.G. Kapteyn, R.H. Lauwaars, P.H. Kooijmans, H.G. Schermers and M. van Leeuwen Boomkamp (eds.), footnote 49 above, Supplement to vols. I.A-I.B (The Hague/Boston/London: Nijhoff, 1997), suppl. I.B.1.3.a.

[64] For instance, article 3 (d) (e) of the Constitution of the World Meteorological Organization (WMO) entitles entities other than States, referred to as "territories" or "groups of territories", to become members. *Ibid.*, suppl. I.B.1.7.a.

[65] One example is the World Tourism Organization, which includes States as "full members", "territories or groups of territories" as "associate members" and "international bodies, both intergovernmental and non-governmental" as "affiliate members". See P.J.G. Kapteyn, R.H. Lauwaars, P.H. Kooijmans, H.G. Schermers and M. van Leeuwen Boomkamp (eds.), footnote 49 above, vol. I.B (The Hague/Boston/London: Nijhoff, 1982), I.B.2.3.a.

of coercing a State, or that the impact of a certain countermeasure is likely to vary greatly according to the specific character of the targeted organization.

(16) The definition of "rules of the organization" in subparagraph (b) is to a large extent based on the definition of the same term that is included in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations.[66] Apart from a few minor stylistic changes, the definition in subparagraph (b) differs from the one contained in that codification convention only because it refers, together with "decisions" and "resolutions", to "other acts of the organization". This addition is intended to cover more comprehensively the great variety of acts that international organizations adopt. The words "in particular" have nevertheless been retained, since the rules of the organization may also include such instruments as agreements concluded by the organization with third parties and judicial or arbitral decisions binding the organization. For the purpose of attribution of conduct, decisions, resolutions and other acts of the organization are relevant, whether they are regarded as binding or not, insofar as they give functions to organs or agents in accordance with the constituent instruments of the organization. The latter instruments are referred to in the plural, consistently with the wording of the Vienna Convention,[67] although a given organization may well possess a single constituent instrument.

(17) One important feature of the definition of "rules of the organization" in subparagraph (b) is that it gives considerable weight to practice. The influence that practice may have in shaping the rules of the organization was described in a comment by NATO, which noted that NATO was an organization where "the fundamental internal rule governing the functioning of the organization — that of consensus decision-making — is to be found neither in the treaties establishing NATO nor in any formal rules and is, rather, the result of the practice of the organization".[68]

(18) The definition seeks to strike a balance between the rules enshrined in the constituent instruments and formally accepted by the members of the organization, on the one hand, and the need for the organization to develop as an institution, on the other hand. As the International Court of Justice said in its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*:

> "Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice."[69]

(19) The definition of "rules of the organization" is not intended to imply that all the rules pertaining to a given international organization are placed at the same level. The rules of the organization concerned will provide, expressly or implicitly, for a hierarchy among the different kinds of rules. For instance, the acts adopted by an international organization will generally not be able to derogate from its constituent instruments.

(20) A definition of the term "organ [of the organization]" is given in subparagraph (c). International organizations show a variety of approaches with regard to the use of this term. Some constituent instruments contain a list of organs, which may be more or less wide,[70] while in the rules of certain other organizations the term "organ" is not used.

(21) Notwithstanding this variety of approaches, it is preferable not to adopt a uniform definition which would be at odds with the rules of various organizations. The different scope that the term "organ" may have according to the rules of the organization concerned does not affect attribution of conduct to the organization, given the fact that also the conduct of agents is attributed to the organization according to article 6. Thus, subparagraph (c) refers to the rules of the organization and considers that an organ is "any person or entity which has that status according to the rules of the organization".

(22) The definition in subparagraph (c) is similar to the one of organ of State, which is given in Article 4, paragraph 2, of the articles on the responsibility of States for internationally wrongful acts. According to this text, "[a]n organ includes any person or entity which has that status in accordance with the internal law of the State". Subparagraph (c) leaves it to the international organization concerned to define its own organs.

(23) Subparagraph (d) provides a definition of the term "agent" which is based on a passage in the advisory opinion of the International Court of Justice on *Reparation for Injuries Suffered in the Service of the United Nations*. When considering the capacity of the United Nations to bring a claim in case of an injury, the Court said:

> "The Court understands the word 'agent' in the most liberal sense, that is to say, any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the organization with carrying out, or helping to carry out, one of its functions – in short, any person through whom it acts."[71]

(24) When the Court referred to one of the functions of the organization, it did not exclude that the agent be charged with carrying out, or helping to carry out, more than one function. The reference to "one of its functions" in subparagraph (d) should be understood in the same way.

(25) International organizations do not act only through natural persons, whether officials or not. Thus, the definition of "agent" also covers all the entities through whom the organization acts.

(26) The definition of "agent" is of particular relevance to the question of attribution of conduct to an international organization. It is therefore preferable to develop the analysis of various aspects of this definition in the context of attribution, especially in article 6 and the related commentary.

(27) In order to avoid a possible overlap between the definition of "organ of an international organization" and that of "agent of an international organization", the latter phrase only covers persons or entities which do not come within the definition under subparagraph (c).

---

[66] A/CONF.129/15. Article 2, para. 1 (j) states that "'rules of the organization' means, in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization".

[67] *Ibid*.

[68] A/CN.4/637, sect. II.B.26.

[69] *I.C.J. Reports 1949*, p. 180.

[70] Examples of wider lists are provided by the constituent instruments of the Organization of American States and INTERPOL. Article 51 of the OAS Charter lists as organs the General Assembly, the Meeting of Consultations of Ministers of Foreign Affairs, the Councils, the Inter-American Juridical Committee, the Inter-American Commission of Human Rights, the General Secretariat, the Specialized Conferences and the Specialized Organizations. According to article 5 of the Constitution of INTERPOL, the organization comprises the General Assembly, the Executive Committee, the General Secretariat, the National Central Bureaus, the Advisers and the Commission for the Control of Files. An example of a very economical list is provided by NATO. Article 9 of the North Atlantic Treaty establishes a single organ, the Council, which is given the competence to create "such subsidiary bodies as may be necessary".

[71] *I.C.J. Reports 1949*, p. 177.

Part Two
The internationally wrongful act of an international organization

Chapter I
General principles

Article 3
Responsibility of an international organization for its internationally wrongful acts

Every internationally wrongful act of an international organization entails the international responsibility of that organization.

Commentary

(1) The general principle, as stated in article 3, applies to whichever entity commits an internationally wrongful act. The same may be said of the principle stated in article 4.[72] The formulation of article 3 is modelled on that applicable to States according to the articles on the responsibility of States for internationally wrongful acts. There seems to be little reason for formulating these principles in another manner. It is noteworthy that in a report on peacekeeping operations the United Nations Secretary-General referred to:

> "the principle of State responsibility — widely accepted to be applicable to international organizations — that damage caused in breach of an international obligation and which is attributable to the State (or to the Organization) entails the international responsibility of the State (or of the Organization) [...]".[73]

(2) The wording of article 3 is identical to that of article 1 of the articles on the responsibility of States for internationally wrongful acts, but for the replacement of the word "State" with "international organization".

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

> "[...] the Court wishes to point out that the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity.
>
> "The United Nations may be required to bear responsibility for the damage arising from such acts."[74]

(4) The meaning of international responsibility is not defined in article 3, nor is it in the corresponding provisions of the articles on responsibility of States for internationally wrongful acts. There the consequences of an internationally wrongful act are dealt with in Part Two of the text, which concerns the "content of the international responsibility of a State".[75] Also in the present draft articles the content of international responsibility is addressed in further articles (Part Three).

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

(6) The fact that an international organization is responsible for an internationally wrongful act does not exclude the existence of parallel responsibility of other subjects of international law in the same set of circumstances. For instance, an international organization may have cooperated with a State in the breach of an obligation imposed on both. Another example may be that of conduct which is simultaneously attributed to an international organization and a State and which entails the international responsibility of both the organization and the State.

Article 4
Elements of an internationally wrongful act of an international organization

There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:

(a) is attributable to that organization under international law; and

(b) constitutes a breach of an international obligation of that organization.

Commentary

(1) Article 4 expresses with regard to international organizations a general principle that applies to every internationally wrongful act, whoever its author. As in the case of States, the attribution of conduct to an international organization is one of the two essential elements for an internationally wrongful act to occur. The term "conduct" is intended to cover both acts and omissions on the part of the international organization. The rules pertaining to attribution of conduct to an international organization are set forth in Chapter II.

(2) A second essential element, to be examined in Chapter III, is that conduct constitutes the breach of an obligation under international law. The obligation may result either from a treaty binding the international organization or from any other source of international law applicable to the organization. As the International Court of Justice noted in its advisory opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, international organizations

> "are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties".[76]

A breach is thus possible with regard to any of these international obligations.

(3) Again as in the case of States, damage does not appear to be an element necessary for international responsibility of an international organization to arise. In most cases an internationally wrongful act will entail material damage. However, it is conceivable that the

---

[72] *Yearbook ... 2001*, vol. II (Part Two), pp. 32 and 34. The classical analysis that led the Commission to adopt articles 1 and 2 on the responsibility of States for internationally wrongful acts is contained in Roberto Ago's Third Report on State Responsibility, *Yearbook ... 1971*, vol. II, pp. 214–223, paras. 49–75.

[73] A/51/389, p. 4, para. 6.

[74] *I.C.J. Reports 1999*, pp. 88–89, para. 66.

[75] *Yearbook ... 2001*, vol. II (Part Two), p. 86 ff.

[76] *I.C.J. Reports 1980*, pp. 89–90, para. 37.

breach of an international obligation occurs in the absence of any material damage. Whether the damage will be required or not depends on the content of the primary obligation.

Article 5
Characterization of an act of an international organization as internationally wrongful

The characterization of an act of an international organization as internationally wrongful is governed by international law.

Commentary

(1) By setting forth that the characterization of an act of an international organization as internationally wrongful depends on international law, article 5 adapts to international organizations a statement made for States in the first sentence of article 3 on the responsibility of States for internationally wrongful acts. This statement may appear obvious and already implied in article 4 of the present draft articles, which refers to international law for determining both whether an action or omission is attributable to an international organization and whether it constitutes a breach of an international obligation. However, the need to refer to international law in order to characterize an act as internationally wrongful is an important point which warrants a specific statement.

(2) The second sentence in article 3 on the responsibility of States for internationally wrongful acts cannot easily be adapted to the case of international organizations. When it says that the characterization of an act as wrongful under international law "is not affected by the characterization of the same act as lawful by internal law", the sentence emphasizes that internal law, which depends on the unilateral will of the State, may never justify what constitutes the breach by that State of an obligation under international law. The difficulty in stating a similar principle for international organizations arises from the fact that the rules of an international organization cannot be sharply differentiated from international law. At least the constituent instrument of the international organization is a treaty or another instrument governed by international law; other rules of the organization may be viewed as part of international law.

(3) When the rules of the organization are part of international law they may affect the characterization of an act as internationally wrongful under international law. However, while the rules of the organization may affect international obligations for the relations between an organization and its members, they cannot have a similar effect in relation to non-members.

(4) The question of the legal nature and possible effects of the rules of the organization is examined in greater detail to the commentary on article 10, concerning the existence of a breach of an international obligation.

Chapter II
Attribution of conduct to an international organization

Commentary

(1) According to article 4 of the present articles, attribution of conduct under international law to an international organization is one condition for an international wrongful act of that international organization to arise, the other condition being that the same conduct constitutes a breach of an obligation that exists under international law for the international organization. Articles 6 to 9 below address the question of attribution of conduct to an international organization. As stated in article 4, conduct is intended to include actions and omissions.

(2) The responsibility of an international organization may in certain cases arise also when conduct is not attributable to that international organization.[77] In these cases conduct would be attributed to a State or to another international organization. In the latter case, rules on attribution of conduct to an international organization are also relevant.

(3) Like articles 4 to 11 on the responsibility of States for internationally wrongful acts,[78] articles 6 to 9 of the present articles deal with attribution of conduct, not with attribution of responsibility. Practice often focuses on attribution of responsibility rather than on attribution of conduct. This is also true of several legal instruments. For instance, Annex IX of the United Nations Convention on the Law of the Sea, after requiring that international organizations and their member States declare their respective competences with regard to matters covered by the Convention, considers in article 6 the question of attribution of responsibility in the following terms:

> "Parties which have competence under article 5 of this Annex shall have responsibility for failure to comply with obligations or for any other violation of this Convention."[79]

Attribution of conduct to the responsible party is not necessarily implied.

(4) Although it may not frequently occur in practice, dual or even multiple attribution of conduct cannot be excluded. Thus, attribution of a certain conduct to an international organization does not imply that the same conduct cannot be attributed to a State; nor does attribution of conduct to a State rule out attribution of the same conduct to an international organization. One could also envisage conduct being simultaneously attributed to two or more international organizations, for instance when they establish a joint organ and act through that organ.

(5) Like the articles on the responsibility of States for internationally wrongful acts, the present draft articles only provide positive criteria of attribution. Thus, they do not point to cases in which conduct cannot be attributed to the organization. For instance, the articles do not say, but only imply, that conduct of military forces of States or international organizations is not attributable to the United Nations when the Security Council authorizes States or international organizations to take necessary measures outside a chain of command linking those forces to the United Nations.

(6) Articles 6 to 9 of the present draft articles cover most issues that are dealt with in regard to States in articles 4 to 11 of the articles on the responsibility of States for internationally wrongful acts. However, there is no text in the present articles covering the issues addressed in articles 9 and 10 on State responsibility.[80] The latter articles relate to conduct carried out in the absence or default of the official authorities, and, to conduct of an insurrectional or other movement. These cases are unlikely to arise with regard to international organizations, because they presuppose that the entity to which conduct is attributed exercises control of territory. Although one may find a few examples of an international organization administering territory,[81] the likelihood of any of the above issues becoming relevant in that context appears too remote to warrant a specific provision.

---

[77] Some examples are given in Chapter IV.

[78] *Yearbook ... 2001*, vol. II (Part Two), pp. 38–54.

[79] United Nations, *Treaty Series*, vol. 1833, p. 397 at p. 580.

[80] *Yearbook ... 2001*, vol. II (Part Two), pp. 49–50.

[81] For instance, on the basis of Security Council resolution 1244 (1999) of 10 June 1999, which authorized "the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo [...]".

It is, however, understood that, should such an issue nevertheless arise in respect of an international organization, one would have to apply to that organization by analogy the pertinent rule which is applicable to States, either article 9 or article 10 of the articles on responsibility of States for internationally wrongful acts.

(7) Some of the practice which addresses questions of attribution of conduct to international organizations does so in the context of issues of civil liability rather than of issues of responsibility for internationally wrongful acts. The said practice is nevertheless relevant for the purpose of attribution of conduct under international law when it states or applies a criterion that is not intended as relevant only to the specific question under consideration, but rather reflects a general understanding of how acts are attributed to an international organization.

Article 6
Conduct of organs or agents of 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 an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.

2. The rules of the organization shall apply in the determination of the functions of its organs and agents.

Commentary

(1) According to article 4 on the responsibility of States for internationally wrongful acts,[82] attribution of conduct to a State is premised on the characterization as "State organ" of the acting person or entity. However, as the commentary makes clear,[83] attribution could hardly depend on the use of a particular terminology in the internal law of the State concerned. Similar reasoning could be made with regard to the corresponding system of law relating to international organizations.

(2) It is noteworthy that, while some provisions of the Charter of the United Nations use the term "organs",[84] the International Court of Justice, when dealing with the status of persons acting for the United Nations, considered relevant only the fact that a person had been conferred functions by an organ of the United Nations. The Court used the term "agent" and did not consider relevant the fact that the person in question had or did not have an official status. In its advisory opinion on *Reparation for injuries suffered in the service of the United Nations*, the Court noted that the question addressed by the General Assembly concerned the capacity of the United Nations to bring a claim in case of injury caused to one of its agents and said:

> "The Court understands the word 'agent' in the most liberal sense, that is to say, any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the organization with carrying out, or helping to carry out, one of its functions – in short, any person through whom it acts."[85]

In the later advisory opinion on the *Applicability of article VI, section 22, of the Convention on the Privileges and Immunities of the United Nations*, the Court noted that:

> "In practice, according to the information supplied by the Secretary-General, the United Nations has had occasion to entrust missions — increasingly varied in nature — to persons not having the status of United Nations officials."[86]

With regard to privileges and immunities, the Court also said in the same opinion:

> "The essence of the matter lies not in their administrative position but in the nature of their mission."[87]

(3) More recently, in its advisory opinion on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, the Court noted that in case of:

> "[...] damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity ... [t]he United Nations may be required to bear responsibility for the damage arising from such acts."[88]

Thus, according to the Court, conduct of the United Nations includes, apart from that of its principal and subsidiary organs, acts or omissions of its "agents". This term is intended to refer not only to officials but also to other persons acting for the United Nations on the basis of functions conferred by an organ of the organization.

(4) What was said by the International Court of Justice with regard to the United Nations applies more generally to international organizations, most of which act through their organs (whether so defined or not) and a variety of agents to which the carrying out of the organization's functions is entrusted. As was stated in a decision of the Swiss Federal Council of 30 October 1996:

> "As a rule, one attributes to an international organization acts and omissions of its organs of all rank and nature and of its agents in the exercise of their competences."[89]

(5) The distinction between organs and agents does not appear to be relevant for the purpose of attribution of conduct to an international organization. The conduct of both organs and agents is attributable to the organization.

(6) An organ or agent of an international organization may be an organ or agent who has been seconded by a State or another international organization. The extent to which the conduct of the seconded organ or agent has to be attributed to the receiving organization is discussed in the commentary on article 7.

(7) The requirement in paragraph 1 that the organ or agent acts "in the performance of functions of that organ or agent" is intended to make it clear that conduct is attributable to the international organization when the organ or agent exercises functions that have been given to that organ or agent, and at any event is not attributable when the organ or agent acts in a private capacity. The question of attribution of *ultra vires* conduct is addressed in article 8.

(8) According to article 4, paragraph 1, on the responsibility of States for internationally wrongful acts, attribution to a State of conduct of an organ takes place "whether the organ

---

[82] *Yearbook ... 2001*, vol. II (Part Two), p. 40.
[83] *Ibid.*, p. 42.
[84] Article 7 of the Charter of the United Nations refers to "principal organs" and to "subsidiary organs". This latter term appears also in Articles 22 and 30 of the Charter.
[85] *I.C.J. Reports 1949*, p. 177. This passage was already quoted in the text corresponding to footnote 71.
[86] *I.C.J. Reports 1989*, p. 194, para. 48.
[87] *Ibid*., p. 194, para. 47.
[88] *I.C.J. Reports 1999*, pp. 88–89, para. 66.
[89] This is a translation from the original French, which reads as follows: "En règle générale, sont imputables à une organisation internationale les actes et omissions de ses organes de tout rang et de toute nature et de ses agents dans l'exercice de leurs compétences." Document VPB 61.75, published on the Swiss Federal Council's website.

exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State".[90] The latter specification could hardly apply to an international organization. The other elements could be retained, but it is preferable to use simpler wording, also in view of the fact that, while all States may be held to exercise all the above-mentioned functions, organizations vary significantly from one another also in this regard. Thus paragraph 1 simply states "whatever position the organ or agent holds in respect of the organization".

(9) The international organization concerned establishes which functions are entrusted to each organ or agent. This is generally done, as indicated in paragraph 2, by the "rules of the organization". By not making the rules of the organization the only criterion, the wording of paragraph 2 is intended to leave the possibility open that, in exceptional circumstances, functions may be considered as given to an organ or agent even if this could not be said to be based on the rules of the organization.

(10) Article 5 of the articles on the responsibility of States for internationally wrongful acts concerns "conduct of persons or entities exercising elements of governmental authority".[91] This terminology is generally not appropriate for international organizations. One would have to express in a different way the link that an entity may have with an international organization. It is however superfluous to put in the present draft articles an additional provision in order to include persons or entities in a situation corresponding to the one envisaged in article 5 of the articles on the responsibility of States for internationally wrongful acts. The term "agent" is given in subparagraph (d) of article 2 a wide meaning that adequately covers these persons or entities.

(11) A similar conclusion may be reached with regard to the persons or groups of persons referred to in article 8 of the articles on the responsibility of States for internationally wrongful acts.[92] This provision concerns persons or groups of persons acting in fact on the instructions, or under the direction or control, of a State. Should persons or groups of persons act under the instructions, or the direction or control, of an international organization, they would have to be regarded as agents according to the definition given in subparagraph (d) of article 2. As was noted above in paragraph (9) of the present commentary, in exceptional cases, a person or entity would be considered, for the purpose of attribution of conduct, as entrusted with functions of the organization, even if this was not pursuant to the rules of the organization.

Article 7
Conduct of organs of a State or organs or agents of an international organization placed at the disposal of 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.

Commentary

(1) When an organ of a State is placed at the disposal of an international organization, the organ may be fully seconded to that organization. In this case the organ's conduct would clearly be attributable only to the receiving organization. The same consequence would apply when an organ or agent of one international organization is fully seconded to another organization. In these cases, the general rule set out in article 6 would apply. Article 7 deals with the different situation in which the seconded organ or agent still acts to a certain extent as organ of the seconding State or as organ or agent of the seconding organization. This occurs for instance in the case of military contingents that a State places at the disposal of the United Nations for a peacekeeping operation, since the State retains disciplinary powers and criminal jurisdiction over the members of the national contingent.[93] In this situation the problem arises whether a specific conduct of the seconded organ or agent is to be attributed to the receiving organization or to the seconding State or organization.

(2) Since the articles on the responsibility of States for internationally wrongful acts do not use the term "agent" within this context, article 7 only considers the case of an organ of a State being placed at the disposal of the organization. However, the term "organ", with reference to a State, has to be understood in a wide sense, as comprising those entities and persons whose conduct is attributable to a State according to articles 5 and 8 on the responsibility of States for internationally wrongful acts.

(3) The seconding State or organization may conclude an agreement with the receiving organization over placing an organ or agent at the latter organization's disposal. The agreement may state which State or organization would be responsible for conduct of that organ or agent. For example, according to the model contribution agreement relating to military contingents placed at the disposal of the United Nations by one of its Member States, the United Nations is regarded as liable towards third parties, but has a right of recovery from the contributing State under circumstances such as "loss, damage, death or injury [arising] from gross negligence or wilful misconduct of the personnel provided by the Government".[94] The agreement appears to deal only with distribution of responsibility and not with attribution of conduct. At any event, this type of agreement is not conclusive because it governs only the relations between the contributing State or organization and the receiving organization and could thus not have the effect of depriving a third party of any right that that party may have towards the State or organization which is responsible under the general rules.

(4) The criterion for attribution of conduct either to the contributing State or organization or to the receiving organization is based according to article 7 on the factual control that is exercised over the specific conduct taken by the organ or agent placed at the receiving organization's disposal. As was noted in the comment by one State, account needs to be taken of the "full factual circumstances and particular context".[95] Article 6 of the articles on the responsibility of States for internationally wrongful acts[96] takes a similar approach, although it is differently worded. According to the latter article, what is relevant is that "the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed". However, the commentary on article 6 on the responsibility of States for internationally wrongful acts explains that, for conduct to be attributed to the receiving State, it must be "under its exclusive direction and control, rather than on instructions from the sending State".[97] At any event, the wording of article 6 cannot be replicated here, because the reference to "the exercise of elements of governmental authority" is unsuitable to international organizations.

---

[90] *Yearbook ... 2001*, vol. II (Part Two), p. 40 and paras. (6)–(7) of the related commentary, pp. 40–41.
[91] *Ibid.*, p. 42.
[92] *Ibid.*, p. 47.
[93] This is generally specified in the agreement that the United Nations concludes with the contributing State. See the Secretary-General's report (A/49/691), para. 6.
[94] Article 9 of the model contribution agreement (A/50/995, annex; A/51/967, annex).
[95] United Kingdom, A/C.6/64/SR.16, para. 23.
[96] *Yearbook ... 2001*, vol. II (Part Two), pp. 43–44.
[97] *Ibid*., p. 44, para. (2) of the commentary on article 6.

(5) With regard to States, the existence of control has been mainly discussed in relation to the question whether conduct of persons or of groups of persons, especially irregular armed forces, is attributable to a State.[98] In the context of the placing of an organ or agent at the disposal of an international organization, control plays a different role. It does not concern the issue whether a certain conduct is attributable at all to a State or an international organization, but rather to which entity — the contributing State or organization or the receiving organization — conduct has to be attributed.

(6) The United Nations assumes that in principle it has exclusive control of the deployment of national contingents in a peacekeeping force. This premise led the United Nations Legal Counsel to state:

> "As a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization, and if committed in violation of an international obligation entails the international responsibility of the Organization and its liability in compensation."[99]

This statement sums up United Nations practice relating to the United Nations Operation in the Congo (ONUC),[100] the United Nations Peacekeeping Force in Cyprus (UNFICYP)[101] and later peacekeeping forces.[102] In a recent comment, the United Nations Secretariat observed that "[f]or a number of reasons, notably political", the practice of the United Nations had been that of "maintaining the principle of United Nations responsibility vis-à-vis third parties" in connection with peacekeeping operations.[103]

(7) Practice relating to peacekeeping forces is particularly significant in the present context because of the control that the contributing State retains over disciplinary and criminal matters.[104] This may have consequences with regard to attribution of conduct. For instance, the Office of Legal Affairs of the United Nations took the following line with regard to compliance with obligations under the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora:[105]

> "Since the Convention places the responsibility for enforcing its provisions on the States parties and since the troop-contributing States retain jurisdiction over the criminal acts of their military personnel, the responsibility for enforcing the provisions of the Convention rests with those troop-contributing States which are parties to the Convention."[106]

Attribution of conduct to the contributing State is clearly linked with the retention of some powers by that State over its national contingent and thus on the control that the State possesses in the relevant respect.

(8) As has been held by several scholars,[107] when an organ or agent is placed at the disposal of an international organization, the decisive question in relation to attribution of a given conduct appears to be who has effective control over the conduct in question. For instance, it would be difficult to attribute to the United Nations conduct of forces in circumstances such as those described in the report of the commission of inquiry which was established in order to investigate armed attacks on UNOSOM II personnel:

> "The Force Commander of UNOSOM II was not in effective control of several national contingents which, in varying degrees, persisted in seeking orders from their home authorities before executing orders of the Forces Command. Many major operations undertaken under the United Nations flag and in the context of UNOSOM's mandate were totally outside the command and control of the United Nations, even though the repercussions impacted crucially on the mission of UNOSOM and the safety of its personnel."[108]

Taking the same approach, the Court of First Instance of Brussels found that the decision by the commander of the Belgian contingent of the United Nations Assistance Mission for Rwanda (UNAMIR) to abandon a *de facto* refugee camp at Kigali in April 1994 was "taken under the aegis of Belgium and not of UNAMIR".[109]

(9) The United Nations Secretary-General held that the criterion of the "degree of effective control" was decisive with regard to joint operations:

---

98 *Ibid.*, pp. 47–49.

99 Letter of 3 February 2004 by the United Nations Legal Counsel to the Director of the Codification Division, A/CN.4/545, sect. II.G.

100 See the agreements providing for compensation that were concluded by the United Nations with Belgium (United Nations, *Treaty Series*, vol. 535, p. 191), Greece (*ibid.*, vol. 565, p. 3), Italy (*ibid.*, vol. 588, p. 197), Luxembourg (*ibid.*, vol. 585, p. 147) and Switzerland (*ibid.*, vol. 564, p. 193).

101 *United Nations Juridical Yearbook* (1980), pp. 184–185.

102 See Report of the Secretary-General on financing of United Nations peacekeeping operations (A/51/389), p. 4, paras. 7–8.

103 A/CN.4/637/Add. 1, sect. II.B.3, para. 3.

104 See above, para. (1) of present commentary and footnote 93 above.

105 United Nations, *Treaty Series*, vol. 993, p. 243.

106 *United Nations Juridical Yearbook* (1994), p. 450.

107 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. 442; R. Simmonds, *Legal Problems Arising from the United Nations Military Operations* (The Hague: Nijhoff, 1968), p. 229; B. Amrallah, "The International Responsibility of the United Nations for Activities Carried Out by U.N. Peace-Keeping Forces", *Revue Egyptienne de Droit International*, vol. 32 (1976), p. 57 at pp. 62–63 and 73–79; E. Butkiewicz, "The Premises of International Responsibility of Inter-Governmental Organizations", *Polish Yearbook of International Law*, vol. 11 (1981–1982), p. 117 at pp. 123–125 and 134–135; M. Pérez González, "Les organisations internationales et le droit de la responsabilité", *Revue Générale de Droit International Public*, vol. 92 (1988), p. 63 at p. 83; M. Hirsch, *The Responsibility of International Organizations toward Third Parties* (Dordrecht/London: Nijhoff, 1995), pp. 64–67; C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd ed. (Cambridge: Cambridge University Press, 2005), pp. 401–403; P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (Bruxelles: Bruylant/Editions de l'Université de Bruxelles, 1998), pp. 379–380; I. Scobbie, "International Organizations and International Relations" in R.J. Dupuy (ed.), *A Handbook of International Organizations*, 2nd ed. (Dordrecht/Boston/London: Nijhoff, 1998), p. 891; C. Pitschas, *Die völkerrechtliche Verantwortlichkeit der europäischen Gemeinschaften und ihrer Mitgliedstaaten* (Berlin: Duncker & Humblot, 2001), p. 51; J.-M. Sorel, "La responsabilité des Nations Unies dans les opérations de maintien de la paix", *International Law Forum*, vol. 3 (2001), p. 127 at p. 129. Some authors refer to "effective control", some others to "operational control". The latter concept was used also by M. Bothe, *Streitkräfte internationaler Organisationen* (Köln/Berlin: Heymanns Verlag, 1968), p. 87. Difficulties in drawing a line between operational and organizational control were underlined by L. Condorelli, "Le statut des forces de l'ONU et le droit international humanitaire", *Rivista di Diritto Internazionale*, vol. 78 (1995), p. 881 at pp. 887–888. The Committee on Accountability of International Organizations of the International Law Association referred to a criterion of "effective control (operational command and control)", International Law Association, *Report of the Seventy-First Conference*, Berlin (2004), p. 200.

108 S/1994/653, paras. 243–244, p. 45.

109 Unpublished judgment, *Mukeshimana-Ngulinzira and others v. Belgian State and others*, para. 38. In the original French the quoted passage reads: "une décision prise sous l'égide de la Belgique et non de l'UNAMIR".

> "The international responsibility of the United Nations for combat-related activities of United Nations forces is premised on the assumption that the operation in question is under the exclusive command and control of the United Nations [...] In joint operations, international responsibility for the conduct of the troops lies where operational command and control is vested according to the arrangements establishing the modalities of cooperation between the State or States providing the troops and the United Nations. In the absence of formal arrangements between the United Nations and the State or States providing troops, responsibility would be determined in each and every case according to the degree of effective control exercised by either party in the conduct of the operation."[110]

What has been held with regard to joint operations, such as those involving UNOSOM II and the Quick Reaction Force in Somalia, should also apply to peacekeeping operations, insofar as it is possible to distinguish in their regard areas of effective control respectively pertaining to the United Nations and the contributing State. While it is understandable that, for the sake of efficiency of military operations, the United Nations insists on claiming exclusive command and control over peacekeeping forces, attribution of conduct should also in this regard be based on a factual criterion.

(10) The European Court of Human Rights considered, first in *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*,[111] its jurisdiction *ratione personae* in relation to the conduct of forces placed in Kosovo at the disposal of the United Nations (United Nations Interim Administration Mission in Kosovo (UNMIK)) or authorized by the United Nations (Kosovo Force (KFOR)). The Court referred to the present work of the International Law Commission and in particular to the criterion of "effective control" that had been provisionally adopted by the Commission. While not formulating any criticism to this criterion, the Court considered that the decisive factor was whether "the United Nations Security Council retained ultimate authority and control so that operational command only was delegated".[112] While acknowledging "the effectiveness or unity of NATO command in *operational* matters" concerning KFOR,[113] the Court noted that the presence of KFOR in Kosovo was based on a resolution adopted by the Security Council and concluded that "KFOR was exercising lawfully delegated Chapter VII powers of the UNSC so that the impugned action was, in principle, 'attributable' to the UN within the meaning of the word outlined [in article 4 of the present articles]".[114] One may note that, when applying the criterion of effective control, "operational" control would seem more significant than "ultimate" control, since the latter hardly implies a role in the act in question.[115] It is therefore not surprising that in his report of June 2008 on the United Nations Interim Administration Mission in Kosovo, the United Nations Secretary-General distanced himself from the latter criterion and stated: "It is understood that the international responsibility of the United Nations will be limited in the extent of its effective operational control."[116]

(11) In *Kasumaj v. Greece*[117] and *Gajić v. Germany*[118] the European Court of Human Rights reiterated its view concerning the attribution to the United Nations of conduct taken by national contingents allocated to KFOR. Likewise in *Berić and others v. Bosnia and Herzegovina*[119] the same Court quoted verbatim and at length its previous decision in *Behrami and Saramati* when reaching the conclusion that the conduct of the High Representative in Bosnia and Herzegovina had to be attributed to the United Nations.

(12) Also the decision of the House of Lords in *Al-Jedda*[120] contained ample references to the present work of the Commission. One of the majority opinions stated that "[i]t was common ground between the parties that the governing principle [was] that expressed by the International Law Commission in article [7] of its draft articles on Responsibility of International Organizations".[121] The House of Lords was confronted with a claim arising from the detention of a person by British troops in Iraq. In its resolution 1546 (2004) the Security Council had previously authorized the presence of the multinational force in that country. The majority opinions appeared to endorse the views expressed by the European Court of Human Rights in *Behrami and Saramati*, but distinguished the facts of the case and concluded that it could not "realistically be said that US and UK forces were under the effective command and control of the UN, or that UK forces were under such command

---

110 A/51/389, paras. 17–18, p. 6.

111 Decision (Grand Chamber) of 2 May 2007 on the admissibility of applications No. 71412/01 and No. 78166/01.

112 *Ibid.*, para. 133.

113 *Ibid.*, para. 139.

114 *Ibid.*, para. 141.

115 Various authors pointed out that the European Court did not apply the criterion of effective control in the way that had been envisaged by the Commission. See C.A. Bell, "Reassessing multiple attribution: the International Law Commission and the *Behrami and Saramati* decision", *New York University Journal of International Law and Politics*, vol. 42 (2010), p. 501; P. Bodeau-Livinec, G.P. Buzzini and S. Villalpando, note, *American Journal of International Law*, vol. 102 (2008), p. 323 at pp. 328–329; P. Klein, "Responsabilité pour les faits commis dans le cadre d'opérations de paix et étendue du pouvoir de contrôle de la Cour européenne des droits de l'homme: quelques considérations critiques sur l'arrêt *Behrami et Saramati*", *Annuaire Français de Droit International*, vol. 53 (2007), p. 43 at p. 55; Ph. Lagrange, "Responsabilité des Etats pour actes accomplis en application du chapitre VII de la Charte des Nations Unies", *Revue Générale de Droit International Public*, vol. 112 (2008), p. 85 at pp. 94–95; C. Laly-Chevalier, "Les opérations militaires et civiles des Nations Unies et la Convention européenne des droits de l'homme", *Revue Belge de Droit International*, vol. 40 (2007), p. 627 at pp. 642–644; K.M. Larsen, "Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test", *European Journal of International Law*, vol. 19 (2008), p. 509 at pp. 521–522; F. Messineo, "The House of Lords in Al-Jedda and Public International Law: Attribution of Conduct to UN-Authorized Forces and the Power of the Security Council to Displace Human Rights", *Netherlands International Law Review*, vol. 56 (2009), p. 35 at pp. 39–43; M. Milanović and T. Papić, "As Bad as It Gets: The European Court of Human Rights *Behrami* and *Saramati* Decision and General International Law", *International and Comparative Law Quarterly*, vol. 58 (2009), p. 267 at pp. 283–286; A. Orakhelashvili, note, *American Journal of International Law*, vol. 102 (2008), p. 337 at p. 341; P. Palchetti, "Azioni di forze istituite o autorizzate dalle Nazioni Unite davanti alla Corte europea dei diritti dell'uomo: i casi *Behrami* e *Saramati*", *Rivista di Diritto Internazionale*, vol. 90 (2007), p. 681 at pp. 689–690; A. Sari, "Jurisdiction and International Responsibility in Peace Support Operations: The *Behrami* and *Saramati Cases*", *Human Rights Law Review*, vol. 8 (2008), p. 151 at p. 164; L.-A. Sicilianos, "L'(ir)responsabilité des forces multilatérales?", in L. Boisson de Chazournes and M. Kohen (eds.), *International Law and the Quest for its Implementation*; Liber Amicorum *Vera Gowland-Debbas*, (Leiden/Boston: Brill, 2010), p. 95 at pp. 98–106; and H. Strydom, "The Responsibility of International Organisations for Conduct Arising out of Armed Conflict Situations", *South African Yearbook of International Law*, vol. 34 (2009), p. 101 at pp. 116–120.

116 S/2008/354, para. 16.

117 Decision of 5 July 2007 on the admissibility of application No. 6974/05.

118 Decision of 28 August 2007 on the admissibility of application No. 31446/02.

119 Decision of 16 October 2007 on the admissibility of applications Nos. 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793/05 and 25496/05.

120 Decision of 12 December 2007, *R (on the application of Al-Jedda) (FC) v. Secretary of State for Defence.*

121 *Ibid*., para. 5 of the opinion of Lord Bingham of Cornhill.

and control when they detained the appellant".[122] This conclusion appears to be in line with the way in which the criterion of effective control was intended.

(13) After the judgment of the House of Lords an application was made by Mr. Al-Jedda to the European Court of Human Rights. In *Al-Jedda v. United Kingdom* this Court quoted several texts concerning attribution, including the article (identical to the present article) which had been adopted by the Commission at first reading and some paragraphs of the commentary.[123] The Court considered that "the United Nations Security Council had neither effective control nor ultimate authority and control over the acts and omissions of foreign troops within the Multi-National Force and that the applicant's detention was not, therefore, attributable to the United Nations".[124] The Court unanimously concluded that the applicant's detention had to be attributed to the respondent State.[125]

(14) The question of attribution was also considered in a judgement of the District Court of The Hague concerning the attribution of the conduct of the Dutch contingent in the United Nations Protection Force (UNPROFOR) in relation to the massacre in Srebrenica. This judgment contained only a general reference to the Commission's articles.[126] The Court found that "the reprehended acts of Dutchbat should be assessed as those of an UNPROFOR contingent" and that "these acts and omissions should be attributed strictly, as a matter of principle, to the United Nations".[127] The Court then considered that if "Dutchbat was instructed by the Dutch authorities to ignore UN orders or to go against them, and Dutchbat behaved in accordance with this instruction from the Netherlands, this constitutes a violation of the factual basis on which the attribution to the UN rests."[128] The Court did not find that there was sufficient evidence for reaching such a conclusion. On appeal from the judgement of the District Court the Court of Appeal of The Hague referred to the draft article (identical to the present article) which had been adopted by the Commission at first reading. The Court applied the criterion of "effective control" to the circumstances of the case and reached the conclusion that the respondent State was responsible for its involvement in the events at Srebrenica which had led to the killing of three Bosnian Muslim men after they had been evicted from the compound of Dutchbat.[129]

[122] Thus the opinion of Lord Bingham of Cornhill, paras. 22–24 (the quotation is taken from para. 23). Baroness Hale of Richmond (para. 124), Lord Carswell (para. 131) and Lord Brown of Eaton-under-Heywood (paras. 141–149, with his own reasons) concurred on this conclusion, while Lord Rodger of Earlsferry dissented.

[123] Judgment (Grand Chamber), 7 July 2011, http://cimskp.echr.coe.int, para. 56.

[124] *Ibid.*, para. 84. The Court found that Al-Jedda's "internment took place within a detention facility in Basrah City, controlled exclusively by British forces, and [that] the applicant was therefore within the authority and control of the United Kingdom throughout" (para. 85).

[125] *Ibid.*, para. 3 of the operative part.

[126] Judgment of 10 September 2008, case No. 265615/HA ZA 06-1671, para. 4.8. English translation at http://zoeken.rechtspraak.nl.

[127] *Ibid.*, para. 4.11.

[128] *Ibid.*, para. 4.14.1.

[129] Judgment of 5 July 2011, http://zoeken.rechtspraak.nl, especially paras. 5.8 and 5.9. The Court argued that the Netherlands had been able to prevent the removal of the victims. When giving a wide meaning to the concept of "effective control" so as to include also the ability to prevent, the Court followed the approach taken by T. Dannenbaum, "Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should Be Apportioned for Violations of Human Rights by Member State Troops Contingents as United Nations Peacekeepers", *Harvard International Law Review*, vol. 51 (2010), p. 113 at p. 157. The Court considered the possibility of a dual attribution of conduct to the State of origin and the United Nations. This solution had been advocated by C. Leck, "International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct", *Melbourne Journal of International Law*, vol. 10 (2009), p. 346 at pp. 362–364.

(15) The principles applicable to peacekeeping forces may be extended to other State organs placed at the disposal of the United Nations, such as disaster relief units, about which the United Nations Secretary-General wrote:

> "If the disaster relief unit is itself established by the United Nations, the unit would be a subsidiary organ of the United Nations. A disaster relief unit of this kind would be similar in legal status to, for example, the United Nations Force in Cyprus (UNFICYP) [...]"[130]

(16) Similar conclusions would have to be reached in the rarer case that an international organization places one of its organs at the disposal of another international organization. An example is provided by the Pan American Sanitary Conference, which, as a result of an agreement between the World Health Organization (WHO) and the Pan American Health Organization (PAHO), serves "respectively as the Regional Committee and the Regional Office of the World Health Organization for the Western Hemisphere, within the provisions of the Constitution of the World Health Organization".[131] The Legal Counsel of WHO noted that:

> "On the basis of that arrangement, acts of PAHO and of its staff could engage the responsibility of WHO."[132]

Article 8
Excess of authority or contravention of instructions

> The conduct of an organ or agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in an official capacity and within the overall functions of that organization, even if the conduct exceeds the authority of that organ or agent or contravenes instructions.

Commentary

(1) Article 8 deals with *ultra vires* conduct of organs or agents of an international organization. *Ultra vires* conduct may be within the competence of the organization, but exceed the authority of the acting organ or agent. It also may exceed the competence of the organization,[133] in which case it will also exceed the authority of the organ or of the agent who performed it.

(2) Article 8 has to be read in the context of the other provisions relating to attribution, especially article 6. It is to be understood that, in accordance with article 6, organs and agents are persons and entities exercising functions of the organization. Apart from exceptional cases (paragraph (11) of the commentary on article 6) the rules of the

[130] *United Nations Juridical Yearbook* (1971), p. 187.

[131] Article 2 of the Agreement of 24 May 1949 (http://www.who.int/en/).

[132] Letter of 19 December 2003 from the Legal Counsel of WHO to the United Nations Legal Counsel, A/CN.4/545, sect. II.H.

[133] As the International Court of Justice said in its advisory opinion on *Legality of the use by a State of nuclear weapons in armed conflicts*:

> "[...] international organizations [...] do not, unlike States, possess a general competence. International organizations are governed by the 'principle of speciality', that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them."

I.C.J. Reports 1996, p. 78, para. 25.

organization, as defined in article 2, subparagraph (b), will govern the issue whether an organ or agent has authority to undertake a certain conduct. It is implied that instructions are relevant to the purpose of attribution of conduct only if they are binding the organ or agent. Also in this regard the rules of the organization will generally be decisive.

(3) The wording of article 8 closely follows that of article 7 on the responsibility of States for internationally wrongful acts.[134] One textual difference is due to the fact that the latter article takes the wording of articles 4 and 5 on State responsibility into account and thus considers the *ultra vires* conduct of "an organ of a State or a person or entity empowered to exercise elements of governmental authority", while the present article only needs to be aligned with article 6 and thus more simply refers to "an organ or an agent of an international organization".

(4) The key element for attribution in article 7 on the responsibility of States for internationally wrongful acts is the requirement that the organ or agent acts "in that capacity". This wording is intended to convey the need for a close link between the *ultra vires* conduct and the organ's or agent's functions. As was said in the commentary on article 7 on State responsibility, the text "indicates that the conduct referred to comprises only the actions and omissions of organs purportedly or apparently carrying out their official functions, and not the private actions or omissions of individuals who happen to be organs or agents of the State".[135] In order to make this point clearer, the present article expressly specifies the requirement that the organ or agent of an international organization "acts in an official capacity and within the overall functions of that organization".[136]

(5) Article 8 only concerns attribution of conduct and does not prejudice the question whether an *ultra vires* act is valid or not under the rules of the organization. Even if the act was considered to be invalid, it may entail the responsibility of the organization. The need to protect third parties requires attribution not to be limited to acts that are regarded as valid.

(6) The possibility of attributing to an international organization acts that an organ takes *ultra vires* has been admitted by the International Court of Justice in its advisory opinion on *Certain expenses of the United Nations*, in which the Court said:

> "If it is agreed that the action in question is within the scope of the functions of the Organization but it is alleged that it has been initiated or carried out in a manner not in conformity with the division of functions among the several organs which the Charter prescribes, one moves to the internal plane, to the internal structure of the Organization. If the action was taken by the wrong organ, it was irregular as a matter of that internal structure, but this would not necessarily mean that the expense incurred was not an expense of the Organization. Both national or international law contemplate cases in which the body corporate or politic may be bound, as to third parties, by an *ultra vires* act of an agent."[137]

The fact that the Court considered that the United Nations would have to bear expenses deriving from *ultra vires* acts of an organ reflects policy considerations that appear even stronger in relation to wrongful conduct. Denying attribution of conduct may deprive third parties of all redress, unless conduct could be attributed to a State or to another organization.

(7) A distinction between the conduct of organs and officials and that of other agents would find little justification in view of the limited significance that the distinction carries in the practice of international organizations.[138] The International Court of Justice appears to have asserted the organization's responsibility for *ultra vires* acts also of persons other than officials. In its advisory opinion on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, the Court stated:

> "[...] it need hardly be said that all agents of the United Nations, in whatever official capacity they act, must take care not to exceed the scope of their functions, and should so comport themselves as to avoid claims against the United Nations."[139]

One obvious reason why an agent — in this case an expert on mission — should take care not to exceed the scope of his or her functions in order to avoid that claims be preferred against the organization is that the organization could well be held responsible for the agent's conduct.

(8) The rule stated in article 8 also finds support in the following statement of the General Counsel of the International Monetary Fund:

> "Attribution may apply even though the official exceeds the authority given to him, he failed to follow rules or he was negligent. However, acts of an official that were not performed in his official capacity would not be attributable to the organization."[140]

(9) Practice of international organizations confirms that *ultra vires* conduct of an organ or agent is attributable to the organization when that conduct is linked with the organ's or agent's official functions. This appears to underlie the position taken by the Office of Legal Affairs of the United Nations in a memorandum concerning claims involving off-duty acts of members of peacekeeping forces:

> "United Nations policy in regard to off-duty acts of the members of peacekeeping forces is that the Organization has no legal or financial liability for death, injury or damage resulting from such acts [...] We consider the primary factor in determining an 'off-duty' situation to be whether the member of a peacekeeping mission was acting in a nonofficial/non-operational capacity when the incident occurred and not whether he/she was in military or civilian attire at the time of the incident or whether the incident occurred inside or outside the area of operation [...] [W]ith regard to United Nations legal and financial liability a member of the Force on a state of alert may nonetheless assume an offduty status if he/she independently acts in an individual capacity, not attributable to the performance of official duties, during that designated 'state-of-alert' period. [...] [W]e wish to note that the factual circumstances of each case vary and, hence, a determination of whether the status of a member of a peacekeeping mission is on duty or off duty may depend in part on

---

134 *Yearbook ... 2001*, vol. II (Part Two), p. 45.

135 *Ibid.*, p. 46, para. (8) of the commentary on article 7.

136 The inclusion of a reference to the functions of the organization was advocated by J.M. Cortés Martín, *Las Organizaciones Internacionales: Codificación y Desarrollo Progresivo de su Responsabilidad Internacional* (Instituto Andaluz de Administración Pública: Sevilla, 2008), pp. 211–223.

137 *I.C.J. Reports 1962*, p. 168.

138 The Committee on Accountability of International Organizations of the International Law Association suggested the following rule:

> "The conduct of organs, officials, or agents of an IO shall be considered an act of that IO under international law if the organ, official, or agent was acting in its official capacity, even if that conduct exceeds the authority granted or contravenes instructions given (*ultra vires*)."

International Law Association, *Report of the Seventy-First Conference*, Berlin (2004), p. 200.

139 *I.C.J. Reports 1999*, p. 89, para. 66.

140 A/CN.4/545, sect. II.H.

the particular factors of the case, taking into consideration the opinion of the Force Commander or Chief of Staff."[141]

While the "off-duty" conduct of a member of a national contingent would not be attributed to the organization,[142] the "on-duty" conduct may be so attributed. One would then have to examine whether the *ultra vires* conduct in question is related to the functions entrusted to the person concerned.

(10) The fact that conduct is taken by an organ or agent off duty does not necessarily exclude the responsibility of the international organization if the latter breached an obligation of prevention that may exist under international law. This is likely to be the situation to which the Office of Legal Affairs of the United Nations referred in 1974 when it considered, with reference to off-duty conduct of members of UNEF, that "there may well be situations involving actions by Force members off duty which the United Nations could appropriately recognise as engaging its responsibility".[143]

Article 9
Conduct acknowledged and adopted by an international organization as its own

Conduct which is not attributable to an international organization under articles 6 to 8 shall nevertheless be considered an act of that organization under international law if and to the extent that the organization acknowledges and adopts the conduct in question as its own.

Commentary

(1) Article 9 concerns the case in which an international organization "acknowledges and adopts" as its own a certain conduct which would not be attributable to that organization under the preceding articles. Attribution is then based on the attitude taken by the organization with regard to a certain conduct. The reference to the "extent" reflects the possibility that acknowledgement and adoption relate only to part of the conduct in question.

(2) Article 9 mirrors the content of article 11 on the responsibility of States for internationally wrongful acts,[144] which is identically worded but for the reference to a State instead of an international organization. As the commentary on article 11 explains, attribution can be based on acknowledgement and adoption of conduct also when that conduct "may not have been attributable".[145] In other words, the criterion of attribution now under consideration may be applied even when it has not been established whether attribution may be effected on the basis of other criteria.

(3) In certain instances of practice, relating both to States and to international organizations, it may not be clear whether what is involved by the acknowledgement is attribution of conduct or responsibility. This is not altogether certain, for instance, with regard to the following statement made on behalf of the European Community in the oral pleading before a WTO panel in the case *European Communities – Customs Classification of Certain Computer Equipment*. The European Community declared that it was:

"ready to assume the entire international responsibility for all measures in the area of tariff concessions, whether the measure complained about has been taken at the EC level or at the level of Member States".[146]

(4) The question of attribution was clearly addressed by a decision of Trial Chamber II of the International Criminal Tribunal for the former Yugoslavia in *Prosecutor v. Dragan Nikolić*. The question was raised whether the arrest of the accused was attributable to the Stabilization Force (SFOR). The Chamber first noted that the articles on responsibility of States for internationally wrongful acts were "not binding on States". It then referred to article 57 and observed that the articles were "primarily directed at the responsibility of States and not at those of international organizations or entities".[147] However, the Chamber found that, "[p]urely as *general* legal guidance", it would "use the principles laid down in the draft articles insofar as they may be helpful for determining the issue at hand".[148] This led the Chamber to quote extensively article 11 and the related commentary.[149] The Chamber then added:

"The Trial Chamber observes that both Parties use the same and similar criteria of 'acknowledgement', 'adoption', 'recognition', 'approval' and 'ratification', as used by the ILC. The question is therefore whether on the basis of the assumed facts SFOR can be considered to have 'acknowledged and adopted' the conduct undertaken by the individuals 'as its own'".[150]

The Chamber concluded that SFOR's conduct did not "amount to an 'adoption' or 'acknowledgement' of the illegal conduct 'as their own'".[151]

(5) No policy reasons appear to militate against applying to international organizations the criterion for attribution based on acknowledgement and adoption. The question may arise regarding the competence of the international organization in making that acknowledgement and adoption, and concerning which organ or agent would be competent to do so. Although the existence of a specific rule is highly unlikely, the rules of the organization govern also this issue.

Chapter III
Breach of an international obligation

Commentary

(1) Articles 6 to 9 of the present draft articles address the question of attribution of conduct to an international organization. According to article 4, attribution of conduct is one of the two conditions for an internationally wrongful act of an international organization to arise. The other condition is that the same conduct "constitutes a breach of an international obligation of that organization". This condition is examined in the present Chapter.

---

141 *United Nations Juridical Yearbook* (1986), p. 300.

142 A clear case of an "off-duty" act of a member of UNIFIL, who had engaged in moving explosives to the territory of Israel, was considered by the District Court of Haifa in a judgement of 10 May 1979. *United Nations Juridical Yearbook* (1979), p. 205.

143 This passage of an unpublished opinion was quoted in the written comment of the Secretariat of the United Nations, A/CN.4/637/Add.1, sect. II.B.4, para. 4.

144 *Yearbook ... 2001*, vol. II (Part Two), p. 52.

145 *Ibid.*, para. (1) of the commentary on article 11.

146 Unpublished document.

147 Decision on defence motion challenging the exercise of jurisdiction by the Tribunal, 9 October 2002, Case No. IT-94-2-PT, para. 60.

148 *Ibid*., para. 61.

149 *Ibid*., paras. 62–63.

150 *Ibid*., para. 64.

151 *Ibid*., para. 106. The appeal was rejected on a different basis. On the point here at issue the Appeals Chamber only noted that "the exercise of jurisdiction should not be declined in case of abductions carried out by private individuals whose actions, unless instigated, acknowledged or condoned by a State or an international organization, or other entity, do not necessarily in themselves violate State sovereignty". Decision on interlocutory appeal concerning legality of arrest, 5 June 2003, Case No. IT-94-2-AR73, para. 26.

(2) As specified in article 4, conduct of an international organization may consist of "an action or omission". An omission constitutes a breach when the international organization is under an international obligation to take some positive action and fails to do so. A breach may also consist in an action that is inconsistent with what the international organization is required to do, or not to do, under international law.

(3) To a large extent, the four articles included in the present Chapter correspond, in their substance and wording, to articles 12 to 15 on the responsibility of States for internationally wrongful acts.[152] Those articles express principles of a general nature that appear to be applicable to the breach of an international obligation on the part of any subject of international law. There would thus be little reason to take a different approach in the present articles, although available practice relating to international organizations is limited with regard to the various issues addressed in the present Chapter.

Article 10
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 the origin or character of the obligation concerned.

2. Paragraph 1 includes the breach of an international obligation that may arise for an international organization towards its members under the rules of the organization.

Commentary

(1) The wording of paragraph 1 corresponds to that of article 12 on the responsibility of States for internationally wrongful acts,[153] with the replacement of the term "State" with "international organization".

(2) As in the case of State responsibility, the term "international obligation" means an obligation under international law "regardless of the origin" of the obligation concerned. As mentioned in the commentary on article 12 on the responsibility of States for internationally wrongful acts,[154] this is intended to convey that the international obligation "may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order".

(3) An international obligation may be owed by an international organization to the international community as a whole, one or several States, whether members or non-members, another international organization or other international organizations and any other subject of international law.

(4) For an international organization many obligations are likely to arise from the rules of the organization, which are defined in article 2, subparagraph (b), of the present articles as meaning "in particular, the constituent instruments, decisions, resolutions and other acts of the organization adopted in accordance with those instruments, and established practice of the organization". While it may seem superfluous to state that obligations arising from the constituent instruments or binding acts that are based on those instruments are indeed international obligations, the practical importance of obligations under the rules of the organization makes it preferable to dispel any doubt that breaches of these obligations are also covered by the present articles. The wording in paragraph 2 is intended to include any international obligation that may arise from the rules of the organization.

(5) The question may be raised whether all the obligations arising from rules of the organization are to be considered as international obligations. The legal nature of the rules of the organization is to some extent controversial. Many consider that the rules of treaty-based organizations are part of international law.[155] Some authors have held that, although international organizations are established by treaties or other instruments governed by international law, the internal law of the organization, once it has come into existence, does not form part of international law.[156] Another view, which finds support in practice, is that international organizations that have achieved a high degree of integration are a special case.[157] A further view would draw a distinction according to the source and subject matter of the rules of the organization, and exclude, for instance, certain administrative regulations from the domain of international law.

(6) The question of the nature of a particular rule of the organization was addressed by the International Court of Justice in its advisory opinion on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*. In the context of the question referred to it, the Court considered the legal nature of the Constitutional Framework adopted by the Special Representative of the Secretary-General "on the basis of the authority derived from Security Council resolution 1244 (1999), notably its paragraphs 6, 10 and 11, and thus ultimately from the United Nations Charter". The Court noted:

---

[152] *Yearbook ... 2001*, vol. II (Part Two), pp. 54–64.

[153] *Ibid.*, p. 54.

[154] *Ibid.*, p. 55, para. (3) of the commentary on article 12.

[155] The theory that the "rules of the organization" are part of international law has been expounded particularly by M. Decleva, *Il diritto interno delle Unioni internazionali* (Padova: Cedam, 1962) and G. Balladore Pallieri, "Le droit interne des organisations internationales", *Recueil des Cours de l'Académie de Droit International de La Haye*, vol. 127 (1969-II), p. 1. For a recent reassertion see P. Daillier and A. Pellet, *Droit international public* (Nguyen Quoc Dinh), 7th ed. (Paris: L.G.D.J., 2002), pp. 576–577.

[156] Among the authors who defend this view: L. Focsaneanu, "Le droit interne de l'Organisation des Nations Unies", *Annuaire Français de Droit International*, vol. 3 (1957), p. 315 ff.; P. Cahier, "Le droit interne des organisations internationales", *Revue Générale de Droit International Public*, vol. 67 (1963), p. 563 ff. and J.A. Barberis, "Nouvelles questions concernant la personnalité juridique internationale", *Recueil des Cours ...*, vol. 179 (1983-I), p. 145 at pp. 222–225; Ch. Ahlborn, "The Rules of International Organizations and the Law of International Responsibility", ACIL Research Paper No 2011-03 (SHARES Series), www.sharesproject.nl. The distinction between international law and the internal law of international organizations was upheld also by R. Bernhardt, "Qualifikation und Anwendungsbereich des internen Rechts internationaler Organisationen", *Berichte der Deutschen Gesellschaft für Völkerrecht*, vol. 12 (1973), p. 7.

[157] As a model of this type of organization one could cite the European Community (now European Union), for which the European Court of Justice gave the following description in *Costa v. E.N.E.L.*, in 1964:

> "By contrast with ordinary treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the member States and which their courts are bound to apply. By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves."

Case 6/64, Judgment of 15 July 1964, *European Court of Justice Reports*, 1964, p. 1127 at pp. 1158–1159 (French edition).

"The Constitutional Framework derives its binding force from the binding character of resolution 1244 (1999) and thus from international law. In that sense it therefore possesses an international legal character.

At the same time, the Court observes that the Constitutional Framework functions as part of a specific legal order, created pursuant to resolution 1244 (1999), which is applicable only in Kosovo and the purpose of which is to regulate, during the interim phase established by resolution 1244 (1999), matters which would ordinarily be the subject of internal, rather than international, law."[158]

The Court concluded on this point that "Security Council resolution 1244 (1999) and the Constitutional Framework form part of the international law which is to be considered in replying to the question posed by the General Assembly in its request for the advisory opinion."[159]

(7) Although the question of the legal nature of the rules of the organization is far from theoretical for the purposes of the present draft articles, since it affects the applicability of the principles of international law with regard to responsibility for breaches of certain obligations arising from the rules of the organization, paragraph 2 does not attempt to express a clear-cut view on the issue. It simply intends to say that, to the extent that an obligation arising from the rules of the organization has to be regarded as an obligation under international law, the principles expressed in the present article apply. Breaches of obligations under the rules of the organization are not always breaches of obligations under international law.

(8) Paragraph 2 refers to the international obligations arising "for an international organization towards its members", because these are the largest category of international obligations flowing from the rules of the organization. This reference is not intended to exclude the possibility that other rules of the organization may form part of international law.

(9) The rules of an organization may prescribe specific treatment of breaches of international obligations, also with regard to the question of the existence of a breach. This does not need to be stated in article 10, because it could be adequately covered by the general provision on *lex specialis* (art. 64), which points to the possible existence of special rules on any of the matters covered by the present draft articles. These special rules do not necessarily prevail over principles set out in the present draft articles. For instance, with regard to the existence of a breach of an international obligation, a special rule of the organization would not affect breaches of obligations that an international organization may owe to a non-member State. Nor would special rules affect obligations arising from a higher source, irrespective of the identity of the subject to whom the international organization owes the obligation.

(10) As explained in the commentary on article 12 on the responsibility of States for internationally wrongful acts,[160] the reference in paragraph 1 to the character of the obligation concerns the "various classifications of international obligations".

(11) Obligations existing for an international organization may relate in a variety of ways to conduct of its member States or international organizations. For instance, an international organization may have acquired an obligation to prevent its member States from carrying out a certain conduct. In this case, the conduct of member States would not *per se* involve a breach of the obligation. The breach would consist in the failure, on the part of the international organization, to comply with its obligation of prevention. Another possible combination of the conduct of an international organization with that of its member States occurs when the organization is under an obligation to achieve a certain result, irrespective of whether the necessary conduct will be taken by the organization itself or by one or more of its member States.

Article 11
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 organization is bound by the obligation in question at the time the act occurs.

Commentary

Given the fact that no specific issue appears to affect the application to international organizations of the principle expressed in article 13 on the responsibility of States for internationally wrongful acts,[161] the term "State" is simply replaced by "international organization" in the title and text of the present article.

Article 12
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 that 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.

Commentary

Similar considerations to those made in the commentary on article 11 apply in the case of the present article. The text corresponds to that of article 14 on the responsibility of States for internationally wrongful acts,[162] with the replacement of the term "State" with "international organization".

Article 13
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.

---

158 *I.C.J. Reports 2010*, paras. 88–89.

159 *Ibid.*, para. 93.

160 *Yearbook ... 2001*, vol. II (Part Two), p. 56, para. (11) of the commentary on article 12.

161 *Yearbook ... 2001*, vol. II (Part Two), p. 57. A paragraph adopted by the ILA *Report of the Seventy-First Conference* (2004), p. 199, is similarly worded: "An act of an IO does not constitute a breach of an international obligation unless the Organisation is bound by the obligation in question at the time the act occurs."

162 *Ibid*., p. 59.

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.

Commentary

The observation made in the commentary on article 11 also applies with regard to the present article. This corresponds to article 15 on the responsibility of States for internationally wrongful acts,[163] with the replacement of the term "State" with "international organization" in paragraph 1.

Chapter IV
Responsibility of an international organization in connection with the act of a State or another international organization

Commentary

(1) Articles 16 to 18 on the responsibility of States for internationally wrongful acts[164] cover the cases in which a State aids or assists, directs and controls, or coerces another State in the commission of an internationally wrongful act. Article 16 was described as "reflecting a customary rule" by the International Court of Justice in its judgment on the merits in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia v. Serbia*).[165] Parallel situations could be envisaged with regard to international organizations. For instance, an international organization may aid or assist a State or another international organization in the commission of an internationally wrongful act. For the purposes of international responsibility, there would be no reason for distinguishing the case of an international organization aiding or assisting a State or another international organization from that of a State aiding or assisting another State. Thus, even if available practice with regard to international organizations is limited, there is some justification for including in the present articles provisions that are parallel to articles 16 to 18 on the responsibility of States for internationally wrongful acts.

(2) The pertinent provisions on the responsibility of States for internationally wrongful acts are based on the premise that aid or assistance, direction and control, and coercion do not affect attribution of conduct to the State which is aided or assisted, under the direction or control, or under coercion. It is that State which commits an internationally wrongful act, although in the case of coercion wrongfulness could be excluded, while the other State is held responsible not for having actually committed the wrongful act but for its causal contribution to the commission of the act.

(3) The relations between an international organization and its member States or international organizations may allow the former organization to influence the conduct of members also in cases that are not envisaged in articles 16 to 18 on the responsibility of States for internationally wrongful acts. Some international organizations have the power to take decisions binding their members, while most organizations may only influence their members' conduct through non-binding acts. The consequences that this type of relation, which does not have a parallel in the relations between States, may entail with regard to an international organization's responsibility is also examined in the present Chapter.

[163] *Ibid.*, p. 62.
[164] *Ibid.*, pp. 65–69.
[165] *I.C.J. Reports 2007*, p. 150, para. 420.

(4) The question of an international organization's international responsibility in connection with the act of a State has been discussed in several cases before international tribunals or other bodies, but has not been examined by those tribunals or bodies because of lack of jurisdiction *ratione personae*. Reference should be made in particular to the following cases: *M. & Co. v. Germany*[166] before the European Commission of Human Rights; *Cantoni v. France*,[167] *Matthews v. United Kingdom*,[168] *Senator Lines v. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom*,[169] and *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*[170] before the European Court of Human Rights; and *H.v.d.P. v. Netherlands*[171] before the Human Rights Committee. In the latter case, a communication concerning the conduct of the European Patent Office was held to be inadmissible, because that conduct could not,

> "in any way, be construed as coming within the jurisdiction of the Netherlands or of any other State party to the International Covenant on Civil and Political Rights and the Optional Protocol thereto".[172]

Article 14
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) the 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.

Commentary

(1) The international responsibility that an entity may incur under international law for aiding or assisting another entity in the commission of an internationally wrongful act does not appear to depend on the nature and character of the entities concerned.[173] Thus, notwithstanding the limited practice specifically relating to international organizations, the rules applicable to the relations between States should also apply when an international organization aids and assists a State or another international organization in the commission of an internationally wrongful act.

(2) Article 14 only introduces a few changes in relation to article 16 on the responsibility of States for internationally wrongful acts. The reference to the case in which

[166] Decision of 9 February 1990, Application No. 13258/87, *Decisions and Reports*, vol. 64, p. 138.
[167] Judgment of 15 November 1996, *ECHR Reports*, 1996-V, p. 161.
[168] Judgment of 18 February 1999, *ECHR Reports*, 1999-I, p. 251.
[169] Decision of 10 March 2004, *ECHR Reports*, 2004-IV, p. 331.
[170] Decision of 13 September 2001 and judgment of 30 June 2005, *ECHR Reports*, 2005-VI, p. 107.
[171] Decision of 8 April 1987, communication No. 217/1986, *Official Records of the General Assembly, Forty-second Session, Supplement No. 40* (A/42/40), p. 185.
[172] *Ibid*., p. 186, para. 3.2.
[173] The Committee on Accountability of International Organizations of the ILA stated: "There is also an internationally wrongful act of an IO when it aids or assists a State or another IO in the commission of an internationally wrongful act by that State or other IO." *Report of the Seventy-First Conference* (2004), pp. 200–201. This text does not refer to the conditions listed in article 14 under (a) and (b) of the present articles.

a State aids or assists another State has been modified in order to refer to an international organization aiding or assisting a State or another international organization.

(3) Article 14 sets forth certain conditions for aid or assistance to give rise to the international responsibility of an aiding or assisting international organization. The first requirement is "knowledge of the circumstances of the internationally wrongful act". As was noted in the commentary on article 16 on State responsibility, if the "assisting or aiding State is unaware of the circumstances in which its aid or assistance is intended to be used by the other State, it bears no international responsibility".[174]

(4) In the commentary on article 16 on the responsibility of States for internationally wrongful acts, it is also stated as a requirement that "the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct and the internationally wrongful conduct is actually committed by the aided or assisted State".[175] Moreover, for international responsibility to arise, aid or assistance should contribute "significantly" to the commission of the act.[176]

(5) According to article 14, the aiding or assisting international organization only incurs international responsibility if the "act would be internationally wrongful if committed by that organization". Responsibility would be thus linked to the breach of an obligation binding on the international organization, when the organization contributed to the breach.

(6) An example of practice of aid or assistance concerning an international organization is provided by an internal document issued on 12 October 2009 by the United Nations Legal Counsel. This concerned the support given by the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) to the Forces armées de la République démocratique du Congo (FARDC), and the risk, to which an internal memorandum had referred, of violations by the latter forces of international humanitarian law, human rights law and refugee law. The Legal Counsel wrote:

> "If MONUC has reason to believe that FARDC units involved in an operation are violating one or the other of those bodies of law and if, despite MONUC's intercession with the FARDC and with the Government of the DRC, MONUC has reason to believe that such violations are still being committed, then MONUC may not lawfully continue to support that operation, but must cease its participation in it completely. […] MONUC may not lawfully provide logistic or "service" support to any FARDC operation if it has reason to believe that the FARDC units involved are violating any of those bodies of law. […] This follows directly from the Organization's obligations under customary international law and from the Charter to uphold, promote and encourage respect for human rights, international humanitarian law and refugee law."[177]

Article 15
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) the former 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.

Commentary

(1) The text of article 15 corresponds to article 17 on the responsibility of States for internationally wrongful acts,[178] for reasons similar to those explained in the commentary on article 14 of the present draft articles. The appropriate modifications to the text have been introduced. Thus, the reference to the directing and controlling State has been replaced by that to an international organization which directs and controls; moreover, the term "State" has been replaced with "State or another international organization" in the reference to the entity which is directed and controlled.

(2) Article 15 provides that international responsibility will arise when an international organization "directs and controls a State or another organization in the commission of an internationally wrongful act".

(3) If one assumes that the Kosovo Force [KFOR] is an international organization, an example of two international organizations allegedly exercising direction and control in the commission of a wrongful act may be taken from the French Government's preliminary objections in *Legality of Use of Force (Yugoslavia v. France)* before the International Court of Justice, when the French Government argued that:

> "NATO is responsible for the 'direction' of KFOR and the United Nations for 'control' of it."[179]

A joint exercise of direction and control was probably envisaged.

(4) In the relations between an international organization and its member States and international organizations the concept of "direction and control" could conceivably be extended so as to encompass cases in which an international organization takes a decision binding its members. The commentary on article 17 on the responsibility of States for internationally wrongful acts explains that "Article 17 is limited to cases where a dominant State actually directs and controls conduct which is a breach of an international obligation of the dependent State",[180] that "the term 'controls' refers to cases of domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or concern",[181] and that "the word 'directs' does not encompass mere incitement or suggestion but rather connotes actual direction of an operative kind".[182] If one interprets the provision in the light of the passages quoted above, the adoption of a binding decision on the part of an international organization could constitute, under certain circumstances, a form of direction or control in the commission of an internationally wrongful act. The assumption is that the State or international organization which is the addressee of the

---

174 *Yearbook … 2001*, vol. II (Part Two), p. 66, para. (4).
175 *Ibid*. para. (5).
176 *Ibid*.
177 The documents were published in the New York Times, 9 December 2009, www.nytimes.com.
178 *Yearbook … 2001*, vol. II (Part Two), pp. 67–68.
179 Preliminary Objections, p. 33, para. 46. The argument was made for the purpose of attributing the allegedly wrongful conduct to the international organizations concerned. A similar view with regard to NATO and KFOR was held by A. Pellet, "L'imputabilité d'éventuels actes illicites. Responsabilité de l'OTAN ou des Etats membres", in C. Tomuschat (ed.), *Kosovo and the International Community: A Legal Assessment* (The Hague: Kluwer Law International, 2002), p. 193 at p. 199.
180 *Yearbook … 2001*, vol. II (Part Two), para. (6) of the commentary on article 17.
181 *Ibid*., para. (7) of the commentary on article 17.
182 *Ibid*.

decision is not given discretion to carry out conduct that, while complying with the decision, would not constitute an internationally wrongful act.

(5) If the adoption of a binding decision were to be regarded as a form of direction and control within the purview of the present article, this provision would overlap with article 17 of the present draft articles. The overlap would only be partial: it is sufficient to point out that article 17 also covers the case where a binding decision requires a member State or international organization to commit an act which is not unlawful for that State or international organization. In any case, the possible overlap between articles 15 and 17 would not create any inconsistency, since both provisions assert, albeit under different conditions, the international responsibility of the international organization which has taken a decision binding its member States or international organizations.

(6) The requirements set forth under subparagraphs (a) and (b) respectively refer to "knowledge of the circumstances of the internationally wrongful act" and to the fact that "the act would be internationally wrongful if committed by that organization". These requirements are identical to those listed in article 14 concerning aid or assistance in the commission of an internationally wrongful act. The same commentary applies.

Article 16
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.

Commentary

(1) Article 16 envisages coercion on the part of the international organization in the commission of an internationally wrongful act. The nature and character of the coercing or of the coerced entities do not significantly alter the situation. Thus, one may apply also to international organizations a rule similar to article 18 on the responsibility of States for internationally wrongful acts.

(2) The text of the present article corresponds to article 18 on the responsibility of States for internationally wrongful acts,[183] with changes similar to those explained in the commentary on article 14 of the present draft articles. The reference to a coercing State has been replaced with that to an international organization; moreover, the coerced entity is not necessarily a State, but could also be an international organization. Also the title has been modified from "Coercion of another State" to "Coercion of a State or another international organization".

(3) An act of coercion need not be wrongful *per se* for international responsibility to arise for a coercing international organization. It is also not necessary that that organization would commit a wrongful act if it acted directly. What is required for international responsibility to arise is that an international organization coerces a State or another international organization in the commission of an act that would be wrongful for the coerced entity and that the coercing organization "does so with knowledge of the circumstances of the act".

[183] *Ibid.*, p. 69.

(4) In the relations between an international organization and its member States or international organizations, a binding decision by an international organization could give rise to coercion only under exceptional circumstances. The commentary on article 18 on the responsibility of States for internationally wrongful acts stresses that:

> "Coercion for the purpose of article 18 has the same essential character as *force majeure* under article 23. Nothing less than conduct which forces the will of the coerced State will suffice, giving it no effective choice but to comply with the wishes of the coercing State."[184]

(5) Should nevertheless an international organization be considered as coercing a member State or international organization when it adopts a binding decision, there could be an overlap between the present article and article 17. The overlap would only be partial, given the different conditions set by the two provisions, and especially the fact that according to article 17 the act committed by the member State or international organization need not be unlawful for that State or that organization. To the extent that there would be an overlap, an international organization could be regarded as responsible under either article 16 or article 17. This would not give rise to any inconsistency.

Article 17
Circumvention of an international obligation through decisions and authorizations addressed to members

1. An international organization incurs international responsibility if it circumvents one of its international obligations by adopting a decision binding member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization.

2. An international organization incurs international responsibility if it circumvents one of its international obligations by authorizing member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization and the act in question is committed because of that authorization.

3. Paragraphs 1 and 2 apply whether or not the act in question is internationally wrongful for the member States or international organizations to which the decision or authorization is addressed.

Commentary

(1) The fact that an international organization is a subject of international law distinct from its members opens up the possibility for the organization to try to influence its members in order to achieve through them a result that the organization could not lawfully achieve directly, and thus circumvent one of its international obligations. As was noted by the delegation of Austria during the debate in the Sixth Committee:

> "[...] an international organization should not be allowed to escape responsibility by 'outsourcing' its actors."[185]

(2) The Legal Counsel of WIPO considered the case of an international organization requiring a member State to commit an internationally unlawful act, and wrote:

> "[...] in the event a certain conduct, which a member State takes in compliance with a request on the part of an international organization, appears to be in breach of an

[184] *Ibid*., para. (2) of the commentary on article 18.
[185] A/C.6/59/SR.22, para. 24.

international obligation both of that State and of that organization, then the organization should also be regarded as responsible under international law."[186]

(3) The opportunity for circumvention is likely to be higher when the conduct of the member State or international organization would not be in breach of an international obligation, for instance because the circumventing international organization is bound by a treaty with a non-member State and the same treaty does not produce effects for the organization's members.

(4) The term "circumvention" implies an intention on the part of the international organization to take advantage of the separate legal personality of its members in order to avoid compliance with an international obligation. The evidence of such an intention will depend on the circumstances.

(5) In the case of a binding decision paragraph 1 does not stipulate as a precondition, for the international responsibility of an international organization to arise, that the required act be committed by member States or international organizations. Since compliance by members with a binding decision is to be expected, the likelihood of a third party being injured would then be high. It appears therefore preferable to hold the organization already responsible and thus allow the third party that would be injured to seek a remedy even before the act is committed. Moreover, if international responsibility arises at the time of the taking of the decision, the international organization would have to refrain from placing its members in the uncomfortable position of either infringing their obligations under the decision or causing the international responsibility of the international organization, as well as possibly incurring their own responsibility.

(6) A member State or international organization may be given discretion with regard to implementation of a binding decision adopted by an international organization. In its judgment on the merits in *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*, the European Court of Human Rights considered conduct that member States of the European Community take when implementing binding EC acts and observed:

> "[…] [A] State would be fully responsible under the Convention for all acts falling outside its strict international legal obligations […] [N]umerous Convention cases […] confirm this. Each case (in particular, *Cantoni* at para. 26) concerned a review by this Court of the exercise of State discretion for which Community law provided."[187]

(7) Paragraph 1 assumes that compliance with the binding decision of the international organization necessarily entails circumvention of one of its international obligations. As was noted in a statement in the Sixth Committee by the delegation of Denmark on behalf of the five Nordic countries:

> "[...] it appeared essential to find the point where the member State could be said to have so little 'room for manoeuvre' that it would seem unreasonable to make it solely responsible for certain conduct."[188]

Should on the contrary the decision allow the member State or international organization some discretion to take an alternative course which does not imply circumvention, responsibility could arise for the international organization that has taken the decision only if circumvention actually occurs, as stated in paragraph 2.

[186] A/CN.4/556, sect. II.N.

[187] *Bosphorus* case (footnote 170 above), para. 157.

[188] A/C.6/59/SR.22, para. 66.

(8) Paragraph 2 covers the case in which an international organization circumvents one of its international obligations by authorizing a member State or international organization to commit a certain act. When a member State or organization is authorized to commit an act, it is apparently free not to avail itself of the authorization received. However, this may be only in theory, because an authorization often implies the conferral by an organization of certain functions to the member or members concerned so that they would exercise these functions instead of the organization. Moreover, by authorizing an act, the organization generally expects the authorization to be acted upon.

(9) While paragraph 2 uses the term "authorization", it does not require an act of an international organization to be so defined under the rules of the organization concerned. The principle expressed in paragraph 2 also applies to acts of an international organization which may be defined by different terms but present a similar character to an authorization as described above.

(10) For international responsibility to arise, the first condition in paragraph 2 is that the international organization authorizes an act that would be wrongful for that organization and moreover would allow it to circumvent one of its international obligations. Since the authorization may not prompt any conduct which conforms to it, a further condition laid out in paragraph 2 is that the act which is authorized is actually committed.

(11) Moreover, it is specified that the act in question be committed "because of that authorization". This condition requires a contextual analysis of the role that the authorization actually plays in determining the conduct of the member State or international organization.

(12) For the purposes of establishing responsibility, reliance on the authorization should not be unreasonable. The responsibility of the authorizing international organization cannot arise if, for instance, the authorization is outdated and not intended to apply to the current circumstances, because of substantial changes that have intervened since the adoption.

(13) While the authorizing international organization would be responsible if it requested, albeit implicitly, the commission of an act that would represent a circumvention of one of its obligations, that organization would clearly not be responsible for any other breach that the member State or international organization to which the authorization is addressed might commit. To that extent, the following statement contained in a letter addressed on 11 November 1996 by the United Nations Secretary-General to the Prime Minister of Rwanda appears accurate:

> "[...] insofar as 'Opération Turquoise' is concerned, although that operation was 'authorized' by the Security Council, the operation itself was under national command and control and was not a United Nations operation. The United Nations is, therefore, not internationally responsible for acts and omissions that might be attributable to 'Opération Turquoise'."[189]

(14) Paragraph 3 makes it clear that, unlike articles 14 to 16, the present article does not make the international responsibility of the international organization dependent on the unlawfulness of the conduct of the member State or international organization to which the decision or authorization is addressed.

(15) As was noted in the commentaries on articles 15 and 16, when the conduct is unlawful and other conditions are fulfilled, there is the possibility of an overlap between the cases covered in those provisions and those to which article 17 applies. However, the

[189] Unpublished letter. "Opération Turquoise" was established by Security Council resolution S/RES/929 (1994).

consequence would only be the existence of alternative bases for holding an international organization responsible.

Article 18
Responsibility of an international organization member of another international organization

Without prejudice to articles 14 to 17, the international responsibility of an international organization that is a member of another international organization also arises in relation to an act of the latter under the conditions set out in articles 61 and 62 for States that are members of an international organization.

Commentary

(1) This article is "without prejudice to articles 14 to 17" because the international responsibility of an international organization that is a member of another international organization may arise also in the cases that are envisaged in those articles. For instance, when an organization aids or assists another organization in the commission of an internationally wrongful act, the former organization may be a member of the latter.

(2) The responsibility of an international organization that is a member of another international organization may arise under additional circumstances that specifically pertain to members. Although there is no known practice relating to the responsibility of international organizations as members of another international organization, there is no reason for distinguishing the position of international organizations as members of another international organization from that of States members of the same international organization. Since there is significant practice relating to the responsibility of member States, it seems preferable to make in the present article simply a reference to articles 61 and 62 and the related commentaries, which examine the conditions under which responsibility arises for a member State.

Article 19
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.

Commentary

The present article is a "without prejudice" clause relating to the whole chapter. It corresponds in part to article 19 on the responsibility of States for internationally wrongful acts.[190] The latter provision intends to leave unprejudiced "the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other State". References to international organizations have been added in the present article. Moreover, since the international responsibility of States committing a wrongful act is covered by the articles on the responsibility of States for internationally wrongful acts and not by the present articles, the wording of the clause has been made more general.

Chapter V
Circumstances precluding wrongfulness

[190] *Yearbook ... 2001*, vol. II (Part Two), p. 70.

Commentary

(1) Under the heading "Circumstances precluding wrongfulness" articles 20 to 27 on responsibility of States for internationally wrongful acts[191] consider a series of circumstances that are different in nature but are brought together by their common effect. This is to preclude wrongfulness of conduct that would otherwise be in breach of an international obligation. As the commentary to the introduction to the relevant chapter explains,[192] these circumstances apply to any internationally wrongful act, whatever the source of the obligation; they do not annul or terminate the obligation, but provide a justification or excuse for non-performance.

(2) Also with regard to circumstances precluding wrongfulness, available practice relating to international organizations is limited. Moreover, certain circumstances are unlikely to occur in relation to some, or even most, international organizations. However, there would be little reason for holding that circumstances precluding wrongfulness of the conduct of States could not be relevant also for international organizations: that, for instance, only States could invoke *force majeure*. This does not imply that there should be a presumption that the conditions under which an organization may invoke a certain circumstance precluding wrongfulness are the same as those applicable to States.

Article 20
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.

Commentary

(1) Like States, international organizations perform several functions which would give rise to international responsibility were they not consented to by a State or another international organization. What is generally relevant is consent by the State on whose territory the organization's conduct takes place. Also with regard to international organizations, consent could affect the underlying obligation, or concern only a particular situation or a particular course of conduct.

(2) The present article corresponds to article 20 on the responsibility of States for internationally wrongful acts.[193] As the commentary explains,[194] this article "reflects the basic international law principle of consent". It concerns "consent in relation to a particular situation or a particular course of conduct", as distinguished from "consent in relation to the underlying obligation itself".[195]

(3) As an example of consent that renders a specific conduct on the part of an international organization lawful, one could give that of a State allowing an investigation to be carried out on its territory by a commission of inquiry set up by the United Nations Security Council.[196] Another example is consent by a State to the verification of the

[191] *Ibid*., pp. 71–86.
[192] *Ibid*., p. 71, para. (2).
[193] *Ibid*., p. 72.
[194] *Ibid*., p. 72, para. (1).
[195] *Ibid*., pp. 72–73, para. (2).
[196] For the requirement of consent, see para. 6 of the Declaration annexed to General Assembly resolution 46/59 of 9 December 1991.

electoral process by an international organization.[197] A further, and specific, example is consent to the deployment of the Aceh Monitoring Mission in Indonesia, following an invitation addressed in July 2005 by the Government of Indonesia to the European Union and seven contributing States.[198]

(4) Consent given by an international organization concerns compliance with an international obligation that exists towards that organization. It does not affect international obligations to the extent that they may also exist towards the members of the consenting organization, unless that organization has been empowered to express consent also on behalf of the members.

(5) Consent dispensing an international organization with the performance of an obligation in a particular case must be "valid". This term refers to matters "addressed by international law rules outside the framework of State responsibility"[199] or of the responsibility of an international organization, such as whether the organ or agent who gave the consent was authorized to do so on behalf of the relevant State or international organization, or whether the consent was vitiated by coercion or some other factor. The competence of the consenting organ or agent will generally depend on the internal law of the State concerned or, as the case may be, on the rules of organization concerned. The requirement that consent does not affect compliance with peremptory norms is stated in article 26. This is a general provision covering all the circumstances precluding wrongfulness.

(6) The present article follows the wording of article 20 on the responsibility of States for internationally wrongful acts. The only textual changes consist in the addition of a reference to an "international organization" with regard to the entity giving consent and the replacement of the term "State" with "international organization" with regard to the entity to which consent is given.

Article 21
Self-defence

The wrongfulness of an act of an international organization is precluded if and to the extent that the act constitutes a lawful measure of self-defence under international law.

Commentary

(1) According to the commentary on the corresponding article (art. 21) on the responsibility of States for internationally wrongful acts, that article concerns "self-defence as an exception to the prohibition against the use of force".[200] The reference in that article to the "lawful" character of the measure of self-defence is explained as follows:

> "[...] the term 'lawful' implies that the action taken respects those obligations of total restraint applicable in international armed conflict, as well as compliance with the requirements of proportionality and of necessity inherent in the notion of self-defence. Article 21 simply reflects the basic principle for the purposes of Chapter V, leaving questions of the extent and application of self-defence to the applicable primary rules referred to in the Charter."[201]

(2) For reasons of coherency, the concept of self-defence which has thus been elaborated with regard to States should be used also with regard to international organizations, although it is likely to be relevant for precluding wrongfulness only of acts of a small number of organizations, such as those administering a territory or deploying an armed force.

(3) In the practice relating to United Nations forces, the term "self-defence" has often been used in a different sense, with regard to situations other than those contemplated in Article 51 of the United Nations Charter. References to "self-defence" have been made also in relation to the "defence of the mission".[202] For instance, in relation to the United Nations Protection Force (UNPROFOR), a memorandum of the Legal Bureau of the Canadian Department of Foreign Affairs and International Trade held that:

> "'self-defence' could well include the defence of the safe areas and the civilian population in those areas".[203]

While these references to "self-defence" confirm that self-defence represents a circumstance precluding wrongfulness of conduct by an international organization, the term is given a meaning that encompasses cases other than those in which a State or an international organization responds to an armed attack by a State. At any event, the question of the extent to which United Nations forces are entitled to resort to force depends on the primary rules concerning the scope of the mission and need not be discussed here.

(4) Also the conditions under which an international organization may resort to self-defence pertain to the primary rules and need not be examined in the present context. Those rules will set forth to what extent an international organization may invoke self-defence. One of the issues relates to the invocability of collective self-defence on the part of an international organization when one of its member States is the object of an armed attack and the international organization has the power to act in collective self-defence.[204]

(5) In view of the fact that international organizations are not members of the United Nations, the reference to the Charter of the United Nations in article 21 on the responsibility of States for internationally wrongful acts has been replaced here with a reference to international law.

Article 22
Countermeasures

1. Subject to paragraphs 2 and 3, the wrongfulness of an act of an international organization not in conformity with an international obligation towards a State or another international organization is precluded if and to the extent that the act

---

197 With regard to the role of consent in relation to the function of verifying an electoral process, see the report of the Secretary-General on enhancing the effectiveness of the principle of periodic and genuine elections (A/49/675), para. 16.

198 A reference to the invitation by the Government of Indonesia may be found in the preambular paragraph of the European Union Council Joint Action 2005/643/CFSP of 9 September 2005, *Official Journal of the European Union*, 10 September 2005, *L* 234, p. 13.

199 *Yearbook ... 2001*, vol. II (Part Two), p. 73, para. (4) of the commentary on article 20.

200 *Ibid.*, p. 74, para. (1).

201 *Ibid*., p. 75, para. (6).

202 As was noted by the High-level Panel on Threats, Challenges and Change, "the right to use force in self-defence [...] is widely understood to extend to the 'defence of the mission'". A more secure world: our shared responsibility, report of the High-level Panel on Threats, Challenges and Change (A/59/565), para. 213.

203 *Canadian Yearbook of International Law*, vol. 34 (1996), p. 388 at p. 389.

204 A positive answer is implied in article 25 (a) of the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, adopted on 10 December 1999 by the member States of the Economic Community of West Africa (ECOWAS), which provides for the application of the "Mechanism" "in cases of aggression or conflict in any Member State or threat thereof". The text of this provision is reproduced by A. Ayissi (ed.), *Cooperation for Peace in West Africa. An Agenda for the 21st Century* (UNIDIR: Geneva, 2001), p. 127.

constitutes a countermeasure taken in accordance with the substantive and procedural conditions required by international law, including those set forth in Chapter II of Part Four for countermeasures taken against another international organization.

2. Subject to paragraph 3, an international organization may not take countermeasures against a responsible member State or international organization unless:

(a) the conditions referred to in paragraph 1 are met;

(b) the countermeasures are not inconsistent with the rules of the organization; and

(c) no appropriate means are available for otherwise inducing compliance with the obligations of the responsible State or international organization concerning cessation of the breach and reparation.

3. Countermeasures may not be taken by an international organization against a member State or international organization in response to a breach of an international obligation under the rules of the organization unless such countermeasures are provided for by those rules.

Commentary

(1) Countermeasures that an international organization may take against another international organization are dealt with in articles 51 to 57. Insofar as a countermeasure is taken in accordance with the substantive and procedural conditions set forth in those articles, the countermeasure is lawful and represents a circumstance that precludes wrongfulness of an act that, but for the fact that it is a countermeasure, would have been wrongful.

(2) The present draft articles do not examine the conditions for countermeasures to be lawful when they are taken by an injured international organization against a responsible State. Thus paragraph 1, while it refers to articles 51 to 57 insofar as countermeasures are taken against another international organization, only refers to international law for the conditions concerning countermeasures taken against States. However, one may apply by analogy the conditions that are set out for countermeasures taken by a State against another State in articles 49 to 54 on the responsibility of States for internationally wrongful acts.[205] It is to be noted that the conditions for lawful countermeasures in articles 51 to 57 of the present draft articles reproduce to a large extent the conditions in the articles on responsibility of States for internationally wrongful acts.

(3) Paragraphs 2 and 3 address the question whether countermeasures may be taken by an injured international organization against its members, whether States or international organizations, when they are internationally responsible towards the former organization. Sanctions, which an organization may be entitled to adopt against its members according to its rules, are *per se* lawful measures and cannot be assimilated to countermeasures. The rules of the injured organization may restrict or forbid, albeit implicitly, recourse by the organization to countermeasures against its members. The question remains whether countermeasures may be taken in the absence of any express or implicit rule of the organization. Paragraph 2 sets forth the residual rule, while paragraph 3 considers countermeasures in relation to a breach by a member State or organization of an international obligation arising under the rules of the organization.

[205] *Yearbook ... 2001*, vol. II (Part Two), pp. 128–139.

(4) Apart from the conditions that generally apply for countermeasures to be lawful, two additional conditions are listed in paragraph 2 for countermeasures by an injured international organization against its members to be lawful. First, countermeasures cannot be "inconsistent with the rules of the organization"; second, there should not be any available means that may qualify as "appropriate means […] for otherwise inducing compliance with the obligations of the responsible State or international organization concerning cessation of the breach and reparation". Insofar as the responsible entity is an international organization, these obligations are set out in greater detail in Part Three of the present articles, while the obligations of a responsible State are outlined in Part Two of the articles on the responsibility of States for internationally wrongful acts.

(5) It is assumed that an international organization would have recourse to the "appropriate means" referred to in paragraph 2 before resorting to countermeasures against its members. The term "appropriate means" refers to those lawful means that are readily available and proportionate, and offer a reasonable prospect for inducing compliance at the time when the international organization intends to take countermeasures. However, failure on the part of the international organization to make timely use of remedies that were available may result in countermeasures becoming precluded.

(6) Paragraph 3 specifically addresses countermeasures by an international organization relating to the breach of an international obligation under the rules of the organization by a member State or international organization. In this case, given the obligations of close cooperation that generally exist between an international organization and its members, countermeasures are allowed only if the rules of the organization so provide. Should they do so, they will set forth the conditions that are required for that purpose.

(7) Article 52 addresses in similar terms the reverse situation of an injured international organization or an injured State taking countermeasures against a responsible international organization of which the former organization or the State is a member.

Article 23
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.

Commentary

(1) With regard to States, *force majeure* had been defined in article 23 on the responsibility of States for internationally wrongful acts as "an irresistible force or [...] an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation".[206] This circumstance precluding wrongfulness does not apply when the situation is due to the conduct of the State invoking it or the State has assumed the risk of that situation occurring.

[206] *Ibid*., p. 76.

(2) There is nothing in the differences between States and international organizations that would justify the conclusion that *force majeure* is not equally relevant for international organizations or that other conditions should apply.

(3) One may find a few instances of practice concerning *force majeure*. Certain agreements concluded by international organizations provide examples to that effect. For instance, article XII, paragraph 6, of the Executing Agency Agreement of 1992 between the United Nations Development Programme (UNDP) and the World Health Organization stated that:

> "[i]n the event of *force majeure* or other similar conditions or events which prevent the successful execution of a Project by the Executing Agency, the Executing Agency shall promptly notify the UNDP of such occurrence and may, in consultation with the UNDP, withdraw from the execution of the Project. In case of such withdrawal, and unless the Parties agree otherwise, the Executing Agency shall be reimbursed the actual costs incurred up to the effective date of the withdrawal."[207]

Although this paragraph concerns withdrawal from the Agreement, it implicitly considers that non-compliance with an obligation under the Agreement because of *force majeure* does not constitute a breach of the Agreement.

(4) *Force majeure* has been invoked by international organizations in order to exclude wrongfulness of conduct in proceedings before international administrative tribunals.[208] In Judgment No. 24, *Torres et al. v. Secretary-General of the Organization of American States*, the Administrative Tribunal of the Organization of American States rejected the plea of *force majeure*, which had been made in order to justify termination of an official's contract:

> "The Tribunal considers that in the present case there is no *force majeure* that would have made it impossible for the General Secretariat to fulfil the fixed-term contract, since it is much-explored law that by *force majeure* is meant an irresistible happening of nature."[209]

Although the Tribunal rejected the plea, it clearly recognized the invocability of *force majeure*.

(5) A similar approach was taken by the Administrative Tribunal of the International Labour Organization (ILO) in its Judgment No. 664, in the *Barthl* case. The Tribunal found that *force majeure* was relevant to an employment contract and said:

> "*Force majeure* is an unforeseeable occurrence beyond the control and independent of the will of the parties, which unavoidably frustrates their common intent."[210]

It is immaterial that in the actual case *force majeure* had been invoked by the employee against the international organization instead of by the organization.

(6) The text of the present article differs from that of article 23 on the responsibility of States for internationally wrongful acts only because the term "State" has been replaced once with the term "international organization" and four times with the term "organization".

Article 24
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.

Commentary

(1) Article 24 on the responsibility of States for internationally wrongful acts includes distress among the circumstances precluding wrongfulness of an act and describes this circumstance as the case in which "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".[211] The commentary gives the example from practice of a British military ship entering Icelandic territorial waters to seek shelter during severe weather,[212] and notes that, "[a]lthough historically practice has focused on cases involving ships and aircraft, article 24 is not limited to such cases".[213]

(2) Similar situations could occur, though more rarely, with regard to an organ or agent of an international organization. Notwithstanding the absence of known cases of practice in which an international organization invoked distress, the same rule should apply both to States and to international organizations.

(3) As with regard to States, the borderline between cases of distress and those which may be considered as pertaining to necessity[214] is not always obvious. The commentary on article 24 notes that "general cases of emergencies [...] are more a matter of necessity than distress".[215]

(4) Article 24 on the responsibility of States for internationally wrongful acts only applies when the situation of distress is not due to the conduct of the State invoking distress

---

207 United Nations, *Treaty Series*, vol. 1691, p. 325 at p. 331.

208 These cases related to the application of the rules of the organization concerned. The question whether those rules pertain to international law has been discussed in the commentary on article 10.

209 Para. 3 of the judgment, issued on 16 November 1976. The text is available at http://www.oas.org/tribadm/decisiones_decisions/judgements. In a letter dated 8 January 2003 to the United Nations Legal Counsel, the Organization of American States (OAS) noted that:

> "The majority of claims presented to the OAS Administrative Tribunal allege violations of the OAS General Standards, other resolutions of the OAS General Assembly, violations of rules promulgated by the Secretary-General pursuant to his authority under the OAS Charter and violations of rules established by the Tribunal itself in its jurisprudence. Those standards and rules, having been adopted by duly constituted international authorities, all constitute international law. Thus, the complaints claiming violations of those norms and rules may be characterized as alleging violations of international law." (see A/CN.4/545, sect. II.I).

210 Para. 3 of the judgment, issued on 19 June 1985. The Registry's translation from the original French is available at http://www.ilo.org/public/english/tribunal.

211 *Yearbook ... 2001*, vol. II (Part Two), p. 78.

212 *Ibid*., p. 79, para. (3).

213 *Ibid*., para. (4).

214 Necessity is considered in the following article.

215 *Yearbook ... 2001*, vol. II (Part Two), p. 80, para. (7).

and the act in question is not likely to create a comparable or greater peril. These conditions appear to be equally applicable to international organizations.

(5) The present article is textually identical to the corresponding article on State responsibility, with the only changes due to the replacement of the term "State" once with the term "international organization" and twice with the term "organization".

Article 25
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 its member States or 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 international 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.

Commentary

(1) Conditions for the invocation of necessity by States have been listed in article 25 on the responsibility of States for internationally wrongful acts.[216] In brief, the relevant conditions are as follows: the State's conduct should be the only means to safeguard an essential interest against a grave and imminent peril; the conduct in question should not impair an essential interest of the State or the States towards which the obligation exists, or of the international community as a whole; the international obligation in question does not exclude the possibility of invoking necessity; the State invoking necessity has not contributed to the situation of necessity.

(2) With regard to international organizations, practice reflecting the invocation of necessity is scarce. One case in which necessity was held to be invocable is Judgment No. 2183 of the ILO Administrative Tribunal in the *T.O.R.N. v. CERN* case. This case concerned access to the electronic account of an employee who was on leave. The Tribunal said that:

> "[...] in the event that access to an e-mail account becomes necessary for reasons of urgency or because of the prolonged absence of the account holder, it must be possible for organizations to open the account using appropriate technical safeguards. That state of necessity, justifying access to data which may be confidential, must be assessed with the utmost care."[217]

[216] *Ibid.*, p. 80.

[217] Para. 9 of the judgment, issued on 3 February 2003. The Registry's translation from the original French is available at http://www.ilo.org/public/english/tribunal.

(3) Even if practice is scarce, as was noted by the International Criminal Police Organization:

> "[...] necessity does not pertain to those areas of international law that, by their very nature, are patently inapplicable to international organizations."[218]

The invocability of necessity by international organizations was also advocated in written statements by the Commission of the European Union,[219] the International Monetary Fund,[220] the World Intellectual Property Organization,[221] the World Bank[222] and the Secretariat of the United Nations.[223]

(4) While the conditions set by article 25 on the responsibility of States for internationally wrongful acts would be applicable also with regard to international organizations, the scarcity of practice and the considerable risk that invocability of necessity entails for compliance with international obligations suggest that, as a matter of policy, necessity should not be invocable by international organizations as widely as by States. This may be achieved by limiting the essential interests which may be protected by the invocation of necessity to those of the member States and of the international community as a whole, to the extent that the organization has, in accordance with international law, the function to protect them. Thus, when an international organization has been given powers over certain matters, it may, in the use of these powers, invoke the need to safeguard an essential interest of the international community or of its member States, provided that this is consistent with the principle of speciality. On the other hand, an international organization may invoke one of its own essential interests only if it coincides with an essential interest of the international community or of its member States. This solution may be regarded as an attempt to reach a compromise between two opposite positions with regard to necessity: the view of those who favour placing international organizations on the same level as States and the opinion of those who would totally rule out the invocability of necessity by international organizations.

(5) There is no contradiction between the reference in subparagraph (1) (a) to the protection of an essential interest of the international community and the condition in subparagraph (1) (b) that the conduct in question should not impair an essential interest of the international community. The latter interest could be different from the interest that is at the basis of the invocation of necessity.

(6) In view of the solution adopted for subparagraph (1) (a), which does not allow the invocation of necessity for the protection of the essential interests of an international organization unless they coincide with those of member States or of the international community, the essential interests of international organizations have not been added in subparagraph (1) (b) to those that should not be seriously impaired.

(7) Apart from the change in subparagraph (1) (a) the text reproduces article 25 on the responsibility of States for internationally wrongful acts, with the replacement of the term

[218] Letter dated 9 February 2005 from the General Counsel of the International Criminal Police Organization to the Secretary of the International Law Commission (see A/CN.4/556, sect. II.M).

[219] Letter dated 18 March 2005 from the European Commission to the Legal Counsel of the United Nations (see A/CN.4/556, sect. II.M).

[220] Letter dated 1 April 2005 from the International Monetary Fund to the Legal Counsel of the United Nations (see A/CN.4/556, sect. II.M).

[221] Letter dated 19 January 2005 from the Legal Counsel of the World Intellectual Property Organization to the Legal Counsel of the United Nations (see A/CN.4/556, sect. II.M).

[222] Letter dated 31 January 2006 from the Senior Vice-President and General Counsel of the World Bank to the Secretary of the International Law Commission (see A/CN.4/568, sect. II.E).

[223] A/CN.4/637/Add. 1, Sect. II.B.14, para. 4.

"State" with the terms "international organization" or "organization" in the chapeau of both paragraphs.

Article 26
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.

Commentary

(1) Chapter V of Part One of the articles on the responsibility of States for internationally wrongful acts contains a "without prejudice" provision which applies to all the circumstances precluding wrongfulness considered in that chapter. The purpose of this provision — article 26 — is to "make it clear that circumstances precluding wrongfulness in chapter V Part One do not authorise or excuse any derogation from a peremptory norm of general international law".[224]

(2) The commentary on article 26 on the responsibility of States for internationally wrongful acts states that "peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination".[225] In its judgment in the *Case concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, the International Court of Justice found that the prohibition of genocide "assuredly" was a peremptory norm.[226]

(3) It is clear that, like States, international organizations could not invoke a circumstance precluding wrongfulness in the case of non-compliance with an obligation arising under a peremptory norm. Thus, there is the need for a "without prejudice" provision matching the one applicable to States.

(4) The present article reproduces the text of article 26 on the responsibility of States for internationally wrongful acts with the replacement of the term "State" by "international organization".

Article 27
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.

Commentary

(1) Article 27 on the responsibility of States for internationally wrongful acts makes two points.[227] The first point is that a circumstance precludes wrongfulness only if and to the extent that the circumstance exists. While the wording appears to emphasize the element of time,[228] it is clear that a circumstance may preclude wrongfulness only insofar as it covers a particular situation. Beyond the reach of the circumstance, wrongfulness of the act is not affected.

(2) The second point is that the question whether compensation is due is left unprejudiced. It would be difficult to set a general rule concerning compensation for losses caused by an act that would be wrongful, but for the presence of a certain circumstance.

(3) Since the position of international organizations does not differ from that of States with regard to both matters covered by article 27 on the responsibility of States for internationally wrongful acts, and no change in the wording is required in the present context, the present article is identical to the corresponding article on the responsibility of States for internationally wrongful acts.

Part Three
Content of the international responsibility of an international organization

Commentary

(1) Part Three of the present draft articles 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 articles on responsibility of States for internationally wrongful acts.[229]

(2) Chapter I (arts. 28 to 33) lays down certain general principles and sets out the scope of Part Three. Chapter II (arts. 34 to 40) specifies the obligation of reparation in its various forms. Chapter III (arts. 41 and 42) 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 28
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 Two involves legal consequences as set out in this Part.

Commentary

This provision has an introductory character. It corresponds to article 28 on the responsibility of States for internationally wrongful acts,[230] 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 article.

Article 29
Continued duty of performance

---

224 *Yearbook ... 2001*, vol. II (Part Two), p. 85.
225 *Ibid.*, p. 85, para. (5).
226 *I.C.J. Reports 2006*, p. 32, para. 64.
227 *Yearbook ... 2001*, vol. II (Part Two), p. 85.
228 This temporal element may have been emphasized because the International Court of Justice had said in the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* case that "[a]s soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives". *I.C.J. Reports 1997*, p. 63, para. 101.
229 *Yearbook ... 2001*, vol. II (Part Two), pp. 86–116.
230 *Ibid.*, p. 87.

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 the rule in article 60 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.[231]

(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 on the responsibility of States for internationally wrongful acts,[232] the only difference being that the term "State" is replaced by the term "international organization".

Article 30
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 29, has the corollary that, if the wrongful act is continuing, the obligation still has 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 persistent breach of a certain obligation, guarantees of non-repetition would hardly be out of place.

(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, when the commission of the act 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 on the responsibility of States for internationally wrongful acts,[233] with the replacement of the word "State" with "international organization".

Article 31
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) Injury is defined as including "any damage, whether material or moral, caused by the internationally wrongful act". According to the judgment of the European Court of Justice in *Walz v. Clickair*, this wording, as it appears in paragraph 2 of article 31 on the responsibility of States for internationally wrongful acts expresses a concept which "is common to all the international law sub-systems" and expresses "the ordinary meaning to be given to the concept of damage in international law".[234]

(3) As in the case of 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

[231] A/CONF.129/15.
[232] *Yearbook ... 2001*, vol. II (Part Two), p. 88.
[233] *Ibid*.
[234] Judgment of 6 May 2010, Case C-63/09, *Walz v. Clickair SA*, paras. 27–28.

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.

(4) 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 available 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.

(5) 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.

(6) When an international organization intends to undertake an activity in a country where its international responsibility may be engaged, one option for the organization is to conclude with the territorial State an agreement limiting its responsibility for wrongful acts occurring in relation to that activity. An example may be offered by the United Nations practice concerning peacekeeping operations, to the extent that the agreements with States on whose territory peacekeeping missions are deployed also cover claims arising out of international responsibility.[235]

(7) 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 in connection with 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.[236]

(8) The present article reproduces article 31 on the responsibility of States for internationally wrongful acts,[237] with the replacement in both paragraphs of the term "State" with "international organization".

Article 32
Relevance 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 to the relations between the organization and 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 with its obligations under Part Two of the articles on the responsibility of States for internationally wrongful acts. The text of paragraph 1 replicates article 32 on State responsibility,[238] 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 on the Law of Treaties between States and International Organizations and between International Organizations,[239] which parallels the corresponding provision of the 1969 Vienna Convention on the Law of Treaties 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 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 Two 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 in that Part. On the contrary, in Part Three 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 will serve as a reminder of 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 Three 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 33
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 States, to one or more other organizations, 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.

---

235 The Secretariat of the United Nations referred in this context to that practice. See A/CN.4/637/Add. 1, sect. II.B.16, para. 6.

236 See article 14.

237 *Yearbook ... 2001*, vol. II (Part Two), p. 91.

238 *Ibid*., p. 94.

239 A/CONF.129/15.

Commentary

(1) In the articles on the responsibility of States for internationally wrongful acts, Part One concerns any breach of an obligation under international law that may be attributed to a State, irrespectively 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 to be because of 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 would incur international responsibility.

(2) Should one take a similar approach with regard to international organizations in the present draft articles, one would have to limit the scope of Part Three to obligations arising for international organizations towards other international organizations or towards the international community as a whole. However, it seems logical to include also obligations that organizations have towards States, given the existence of the articles on responsibility of States for internationally wrongful acts. As a result, Part Three of the present draft articles encompasses obligations that a responsible international organization may have towards one or more other organizations, one or more States, or the international community as a whole. This is meant to include the possibility that an international organization incurs international responsibility, and therefore acquires the obligations set out in Part Three, towards one State and one organization, two or more States and one organization, two or more States and two more organizations, or one State and two or more organizations.

(3) With the change in the reference to the responsible entity and with the addition explained above, paragraph 1 follows the wording of article 33, paragraph 1, on State responsibility.[240]

(4) While the scope of Part Three 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,[241] paragraph 2 provides that Part Three 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 the 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 international law concerning employment. Another area is that of breaches committed by peacekeeping forces and affecting individuals.[242] The consequences of these breaches with regard to individuals, as stated in paragraph (1), are not covered by the present draft articles.

Chapter II
Reparation for injury

Article 34
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.

Commentary

(1) The above provision is identical to article 34 on the responsibility of States for internationally wrongful acts.[243] 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 (IAEA) 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."[244]

Article 35
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

(1) Restitution is a form of reparation that involves the re-establishment as far as possible of the situation which existed before the internationally wrongful act was committed by the responsible international organization.

(2) The concept and forms of restitution and the related conditions, as defined in article 35 on the responsibility of States for internationally wrongful acts,[245] 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 on State responsibility, the only difference being that the term "State" is replaced by "international organization".

---

240 *Yearbook ... 2001*, vol. II (Part Two), p. 94.

241 *Ibid.*

242 See, for instance resolution 52/247 of the General Assembly, of 26 June 1998, on "Third-party liability: temporal and financial limitations".

243 *Yearbook ... 2001*, vol. II (Part Two), p. 95.

244 GOV/COM.22/27, para. 27 (contained in an annex to A/CN.4/545, which is on file with the Codification Division of the Office of Legal Affairs). It has to be noted that, according to the prevailing use, which is reflected in article 34 on the responsibility of States for internationally wrongful acts and the article above, reparation is considered to include satisfaction.

245 *Yearbook ... 2001*, vol. II (Part Two), p. 96.

Article 36
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.

Commentary

(1) Compensation is the form of reparation most frequently made by international organizations. The most well-known instance of practice concerns the settlement of claims arising from the United Nations operation in the Congo. Compensation to nationals of Belgium, Switzerland, Greece, Luxembourg and Italy 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".[246]

With regard to the same operation, further settlements were made with Zambia, the United States of America, the United Kingdom of Great Britain and Northern Ireland and France,[247] and also with the International Committee of the Red Cross.[248]

(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 Permanent Representative of the Soviet Union. 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 the civilian population during hostilities as well as by considerations of equity and humanity which the United Nations cannot ignore."[249]

(3) A reference to the obligation on the United Nations to pay compensation was also made by the International Court of Justice in its advisory opinion on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*.[250]

(4) There is no reason to depart from the text of article 36 on the responsibility of States for internationally wrongful acts,[251] apart from replacing the term "State" by "international organization".

Article 37
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."[252]

(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."[253]

(4) Shortly after the NATO bombing of the Chinese embassy in Belgrade, a NATO spokesman 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."[254]

---

246 United Nations, *Treaty Series*, vol. 535, p. 199; vol. 564, p. 193; vol. 565, p. 3; vol. 585, p. 147; and vol. 588, p. 197.

247 See K. Schmalenbach, *Die Haftung Internationaler Organisationen* (Frankfurt am Main: Peter Lang, 2004), pp. 314–321.

248 The text of this agreement was reproduced by K. Ginther, *Die völkerrechtliche Verantwortlichkeit Internationaler Organisationen gegenüber Drittstaaten* (Wien/New York: Springer, 1969), pp. 166–167.

249 *United Nations Juridical Yearbook* (1965), p. 41. 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.

250 *I.C.J. Reports 1999*, pp. 88–89, para. 66.

251 *Yearbook ... 2001*, vol. II (Part Two), p. 98.

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

253 www.un.org/News/ossg/sgsm_rwanda.htm.

254 http://www.ess.uwe.ac.uk/kosovo/Kosovo-Mistakes2.htm.

A further apology was addressed on 13 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.[255]

(5) As with regard to other forms of reparation, the rules of the responsible international organization will determine which organ or agent is competent to give satisfaction on behalf of the organization.

(6) 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 be asked to give it and would necessarily be affected.

(7) Thus, the paragraphs of article 37 on the responsibility of States for internationally wrongful acts[256] may be transposed, with the replacement of the term "State" with "international organization" in paragraphs 1 and 3.

Article 38
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 on the responsibility of States for internationally wrongful acts[257] 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 on State responsibility are here reproduced without change.

Article 39
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 on the responsibility of States for internationally wrongful acts.[258] 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 requires 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.[259]

(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 33 of the scope of the international obligations set out in Part Three. 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 40
Ensuring the fulfilment of the obligation to make reparation

1. The responsible international organization shall take all appropriate measures in accordance with its rules to ensure that its members provide it with the means for effectively fulfilling its obligations under this Chapter.

2. The members of a responsible international organization shall take all the appropriate measures that may be required by the rules of the organization in order to enable the organization to fulfil its obligations under this Chapter.

Commentary

(1) International organizations having a separate legal personality are in principle the only subjects that bear international responsibility for their international wrongful acts. When an international organization is responsible for an internationally wrongful act, States and other organizations incur responsibility because of their membership of a responsible organization only according to the conditions stated in articles 17, 61 and 62. 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,[260] 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.[261] The same opinion was expressed in

---

255 "Schroeder issues NATO apology to the Chinese", http://archives.tcm.ie/irishexaminer/1999/05/13/fhead.htm.

256 *Yearbook ... 2001*, vol. II (Part Two), p. 105.

257 *Ibid.*, p. 107.

258 *Ibid*., p. 109.

259 See P. Klein, footnote 107 above, p. 606.

260 *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 28.

261 The delegation of the Netherlands noted that there would be "no basis for such an obligation" (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) (A/C.6/61/SR.13, para. 32); Belgium

statements by the International Monetary Fund and the Organization for the Prohibition of Chemical Weapons.[262] This approach appears to conform to practice, which does not show any support for the existence of such an obligation under international law.

(3) Thus, the injured party would have to rely on the fulfilment by the responsible international organization of its obligations. It is clear that if no budget line is provided for the event that the organization incurs international responsibility, the effective fulfilment of the obligation to make reparation will be at risk. Thus paragraph 1 stresses the need for an international organization to take all appropriate measures so as to be in a position of complying with its obligations should it incur responsibility. This will generally imply that the members of the organization be requested to provide the necessary means.

(4) Paragraph 2 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.

(5) In both paragraphs, the reference to the rules of the organization is meant to define the basis of the requirements in question.[263] While the rules of the organization do not necessarily deal with the matter expressly, an obligation for members to finance the organization as part of the general duty to cooperate with the organization may be implied under the relevant rules. As was noted by Judge Sir Gerald Fitzmaurice in his separate opinion in the *Certain Expenses of the United Nations advisory opinion*:

> "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*, at p. 182)."[264]

(A/C.6/61/SR.14, paras. 41–42); Spain (*ibid*., paras. 52–53); France (*ibid.*, para. 63); Italy (*ibid.*, para. 66); United States of America (*ibid*., para. 83); Belarus (*ibid.*, para. 100); Switzerland (A/C.6/61/SR.15, para. 5); Cuba (A/C.6/61/SR.16, para. 13); Romania (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" (A/C.6/61/SR.14, para. 100). Although sharing the prevailing view, the delegation of Argentina (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". More recently, see the statement by Belarus (A/C.6/64/SR.15, para. 36), Hungary (A/C.6/64/SR.16, para. 40), Portugal (para. 46) and Greece (para. 62) and the written comments by Germany (A/CN.4/636, sect. II.B.19, para. 3) and the Republic of Korea (A/CN.4/636/Add.1). A similar position was taken by Austria, A/CN.4/636, sect. II.B.19, para. 4. The Islamic Republic of Iran (A/C.6/64/SR.16, para. 53), while sharing the same view, maintained that "the brunt of responsibility in such cases should be borne by those members which, on account of their decision-making role or overall position within the organization, had contributed to the injurious act".

262 A/CN.4/582, sect. II.U.1. Several international organizations suggested that the Commission state an obligation for members as "an exercise of progressive development". A/CN.4/637, sect. II.B.17.

263 See the statements by the delegations of Denmark, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (A/C.6/61/SR.13, para. 32); Belgium (A/C.6/61/SR.14, para. 42); Spain (*ibid*., para. 53); France (*ibid.*, para. 63); and Switzerland (A/C.6/61/SR.15, para. 5). Also the Institut de Droit International held that an obligation to put a responsible organization in funds only existed "pursuant to its Rules" (*Annuaire de l'Institut de Droit International*, vol. 66-II (1996), p. 451).

Chapter III
Serious breaches of obligations under peremptory norms of general international law

Article 41
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.

Commentary

(1) The scope of Chapter III corresponds to the scope defined in article 40 on the responsibility of States for internationally wrongful acts.[265] 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 of such a breach cannot be entirely ruled out. It is not inconceivable, for example, that an international organization commits an aggression or infringes an obligation under a peremptory norm of general international law relating to the protection of human rights. If a serious breach does occur, it calls for the same consequences as in the case of 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,[266] but for the replacement of the term "State" with "international organization".

Article 42
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 41.

2. No State or international organization shall recognize as lawful a situation created by a serious breach within the meaning of article 41, 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 on the responsibility of States for internationally wrongful acts.[267] Therefore, the same wording is used here as in that article, with the addition of the words "and

264 *I.C.J. Reports 1962*, p. 208.

265 *Yearbook ... 2001*, vol. II (Part Two), p. 112.

266 *Ibid*.

267 *Ibid*., pp. 113–114.

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,[268] 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.[269] Moreover, several States maintained that international organizations would also be under an obligation to cooperate to bring the breach to an end.[270]

(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."[271]

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".[272]

(4) Paragraph 1 of the present article is not designed to vest international organizations with functions that are outside 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.

(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 International Court of Justice first stated the obligation incumbent upon Israel to cease forthwith 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".[273] 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 regime, taking due account of the present Advisory Opinion."[274]

(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, Security Council resolution 662 (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".[275] Another example is provided by the Declaration that the European Community and its member States made in 1991 on the "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union". This text included the following sentence: "The Community and its member States will not recognize entities which are the result of aggression."[276]

(8) The present article concerns the obligations of States and international organizations in the event 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.

Part Four
The implementation of the international responsibility of an international organization

Commentary

(1) Part Four of the present articles concerns the implementation of the international responsibility of international organizations. This Part is subdivided into two chapters, according to the general pattern of the articles on the responsibility of States for internationally wrongful acts.[277] Chapter I deals with the invocation of international responsibility and with certain associated issues. These do not include questions relating to remedies that may be available for implementing international responsibility. Chapter II considers countermeasures taken in order to induce the responsible international organization to cease the unlawful conduct and to provide reparation.

(2) Issues relating to the implementation of international responsibility are here considered insofar as they concern the invocation of the responsibility of an international organization. Thus, while the present draft articles consider the invocation of responsibility by a State or an international organization, they do not address questions relating to the invocation of responsibility of States.[278] However, one provision (art. 48) refers to the case

---

[268] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), par

[269] See the interventions by Denmark, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (A/C.6/61/SR.13, para. 33); Argentina (*ibid*., para. 50); the Netherlands (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 (A/C.6/61/SR.15, para. 8); Jordan (A/C.6/61/SR.16, para. 5); the Russian Federation (A/C.6/61/SR.18, para. 68); and Romania (A/C.6/61/SR.19, para. 60).

[270] Thus the interventions by Denmark, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (A/C.6/61/SR.13, para. 33); Argentina (*ibid*., para. 50); the Netherlands (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 (A/C.6/61/SR.15, para. 8); and the Russian Federation (A/C.6/61/SR.18, para. 68).

[271] A/CN.4/582, sect. II.U.2.

[272] *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*.).

[273] See para. 159 and operative para. (3) B and D, *I.C.J. Reports 2004*, pp. 200–202.

[274] Operative para. (3) E, *I.C.J. Reports 2004*, p. 202. The same wording appears in para. 160 of the advisory opinion, *ibid*., p. 200.

[275] Security Council resolution 662 (1990) of 9 August 1990, para. 2.

[276] European Community, Declaration on Yugoslavia and on the Guidelines on the Recognition of New States, 16 December 1991, reproduced in *International Legal Materials*, vol. 31 (1992), p. 1485 at p. 1487.

[277] *Yearbook ... 2001*, vol. II (Part Two), pp. 116–139.

[278] See article 1 and in particular para. (10) of the related commentary.

in which the responsibility of one or more States is concurrent with that of one or more international organizations for the same wrongful act.

Chapter I
Invocation of the responsibility of an international organization

Article 43
Invocation of responsibility by an injured State or international organization

A State or an international organization is entitled as an injured State or an injured international organization to invoke the responsibility of another international organization if the obligation breached is owed to:

(a) that State or the former international organization individually;

(b) a group of States or international organizations including that State or the former international organization, or the international community as a whole, and the breach of the obligation:

(i) specially affects that State or that international organization; or

(ii) is of such a character as radically to change the position of all the other States and international organizations to which the obligation is owed with respect to the further performance of the obligation.

Commentary

(1) The present article defines when a State or an international organization is entitled to invoke responsibility as an injured State or international organization. This implies the entitlement to claim from the responsible international organization compliance with the obligations that are set out in Part Three.

(2) Subparagraph (a) addresses the more frequent case of responsibility arising for an international organization: that of a breach of an obligation owed to a State or another international organization individually. This subparagraph corresponds to article 42 (a) on the responsibility of States for internationally wrongful acts.[279] It seems clear that the conditions for a State to invoke responsibility as an injured State cannot vary according to the fact that the responsible entity is another State or an international organization. Similarly, when an international organization owes an obligation to another international organization individually, the latter organization has to be regarded as entitled to invoke responsibility as an injured organization in case of breach.

(3) Practice concerning the entitlement of an international organization to invoke international responsibility because of the breach of an obligation owed to that organization individually mainly concerns breaches of obligations that are committed by States. Since the present draft articles do not address questions relating to the invocation of responsibility of States, this practice is here relevant only indirectly. The obligations breached to which practice refers were imposed either by a treaty or by general international law. It was in the latter context that in its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations* the International Court of Justice stated that it was "established that the Organization has capacity to bring claims on the international plane".[280] Also in the context of breaches of obligations under general international law that were committed by a State the Governing Council of the United Nations Compensation Commission envisaged compensation "with respect to any direct loss, damage, or injury to Governments or international organizations as a result of Iraq's unlawful invasion and occupation of Kuwait".[281] On this basis, several entities that were expressly defined as international organizations were, as a result of their claims, awarded compensation by the panel of commissioners: the Arab Planning Institute, the Inter-Arab Investment Guarantee Corporation, the Gulf Arab States Educational Research Center, the Arab Fund for Economic and Social Development, the Joint Program Production Institution for the Arab Gulf Countries and the Arab Towns Organization.[282]

(4) According to article 42 (b) on the responsibility of States for internationally wrongful acts, a State may invoke responsibility as an injured State also when the obligation breached is owed to a group of States or to the international community as a whole, and the breach of the obligation (i) specially affects that State, or (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with regard to the further performance of the obligation.[283] The related commentary gives as an example for the first category a coastal State that is particularly affected by the breach of an obligation concerning pollution of the high seas;[284] for the second category, the party to a disarmament treaty or "any other treaty where each party's performance is effectively conditioned upon and requires the performance of each of the others".[285]

(5) Breaches of this type, which rarely affect States, are even less likely to be relevant for international organizations. However, one cannot rule out that an international organization may commit a breach that falls into one or the other category and that a State or an international organization may then be entitled to invoke responsibility as an injured State or international organization. It is therefore preferable to include in the present article the possibility that a State or an international organization may invoke responsibility of an international organization as an injured State or international organization under similar circumstances. This is provided in subparagraph (b) (i) and (ii).

(6) While the chapeau of the present article refers to "the responsibility of another international organization", this is due to the fact that the text cumulatively considers invocation of responsibility by a State or an international organization. The reference to "another" international organization is not intended to exclude the case that a State is injured and only one international organization — the responsible organization — is involved. Nor does the reference to "a State" and to "an international organization" in the same chapeau imply that more than one State or international organization may not be injured by the same internationally wrongful act.

(7) Similarly, the reference in subparagraph (b) to "a group of States or international organizations" does not necessarily imply that the group should comprise both States and international organizations or that there should be a plurality of States or international organizations. Thus, the text is intended to include the following cases: that the obligation breached is owed by the responsible international organization to a group of States; that it is owed to a group of other organizations; that it is owed to a group comprising both States and organizations, but not necessarily a plurality of either.

Article 44
Notice of claim by an injured State or international organization

[279] *Yearbook ... 2001*, vol. II (Part Two), p. 117.
[280] *I.C.J. Reports 1949*, pp. 184–185.
[281] S/AC.26/1991/7/Rev.1, para. 34.
[282] "Report and Recommendations made by the Panel of Commissioners concerning the Sixth Instalment of 'F1' Claims", S/AC.26/2002/6, paras. 213–371.
[283] *Yearbook ... 2001*, vol. II (Part Two), p. 117.
[284] *Ibid*., p. 119, para. (12).
[285] *Ibid*., p. 119, para. (13).

1. An injured State or international organization which invokes the responsibility of another international organization shall give notice of its claim to that organization.

2. The injured State or international organization may specify in particular:

(a) the conduct that the responsible international organization should take in order to cease the wrongful act, if it is continuing;

(b) what form reparation should take in accordance with the provisions of Part Three.

Commentary

(1) This article corresponds to article 43 on the responsibility of States for internationally wrongful acts.[286] With regard to notice of claim for invoking international responsibility of an international organization, there would be little reason for envisaging different modalities from those that are applicable when an injured State invokes the responsibility of another State. Moreover, the same rule should apply whether the entity invoking responsibility is a State or an international organization.

(2) Paragraph 1 does not specify what form the invocation of responsibility should take. The fact that, according to paragraph 2, the State or international organization invoking responsibility may specify some elements, and in particular "what form reparation should take", does not imply that the responsible international organization is bound to conform to those specifications.

(3) While paragraph 1 refers to the responsible international organization as "another international organization", this does not mean that, when the entity invoking responsibility is a State, more than one international organization needs to be involved.

(4) Although the present article refers to "an injured State or international organization", according to article 49, paragraph 5, the same rule applies to notice of claim when a State or an international organization is entitled to invoke responsibility without being an injured State or international organization within the definition of article 43.

Article 45
Admissibility of claims

1. An injured State may not invoke the responsibility of an international organization if the claim is not brought in accordance with any applicable rule relating to nationality of claims.

2. When the rule of exhaustion of local remedies applies to a claim, an injured State or international organization may not invoke the responsibility of another international organization if any available and effective remedy has not been exhausted.

Commentary

(1) This article corresponds to article 44 on the responsibility of States for internationally wrongful acts.[287] It concerns the admissibility of certain claims that States or international organizations may make when invoking the international responsibility of an international organization. Paragraph 1 deals with those claims that are subject to the rule on nationality of claims, while paragraph 2 relates to the claims to which the local remedies rule applies.

(2) Nationality of claims is a requirement applying to States exercising diplomatic protection. Although article 1 of the articles on diplomatic protection defines that institution with regard to the invocation by a State 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", this definition is made "for the purposes of the […] draft articles".[288] The reference only to the relations between States is understandable in view of the fact that generally diplomatic protection is relevant in that context.[289] However, diplomatic protection could be exercised by a State also towards an international organization, for instance when an organization deploys forces on the territory of a State and the conduct of those forces leads to a breach of an obligation under international law concerning the treatment of individuals.

(3) The requirement that a person be a national for diplomatic protection to be admissible is already implied in the definition quoted in the previous paragraph. It is expressed in article 3, paragraph 1, on diplomatic protection in the following terms: "The State entitled to exercise diplomatic protection is the State of nationality."[290]

(4) Paragraph 1 of the present article only concerns the exercise of diplomatic protection by a State. When an international organization prefers a claim against another international organization no requirement concerning nationality applies. With regard to the invocation of the responsibility of a State by an international organization, the International Court of Justice stated in its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations* that "the question of nationality is not pertinent to the admissibility of the claim".[291]

(5) Paragraph 2 relates to the local remedies rule. Under international law, this rule does not apply only to claims concerning diplomatic protection, but also to claims relating to respect for human rights.[292] The local remedies rule does not apply in the case of functional protection,[293] when an international organization acts in order to protect one of its officials or agents in relation to the performance of his or her mission, although an organization may include in its claim also "the damage suffered by the victim or by persons entitled through him", as the International Court of Justice said in its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations.*[294]

---

286 *Ibid.*, p. 119.
287 *Ibid.*, p. 120.
288 *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), p. 16.
289 It was also in the context of a dispute between two States that the International Court of Justice found in its judgment on the preliminary objections in the *Ahmadou Sadio Diallo* case that the definition provided in article 1 on diplomatic protection reflected "customary international law"; *I.C.J. Reports 2007*, para. 39 (available at http://www.icj-cij.org/docket/files/103/13856.pdf).
290 *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), p. 17.
291 *I.C.J. Reports 1949*, p. 186.
292 See especially A.A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law* (Cambridge: Cambridge University Press, 1983), pp. 46–56; C.F. Amerasinghe, *Local Remedies in International Law*, 2nd ed. (Cambridge: Cambridge University Press, 2004), pp. 64–75; R. Pisillo Mazzeschi, *Esaurimento dei ricorsi interni e diritti umani* (Torino: Giappichelli, 2004). These authors focus on the exhaustion of local remedies with regard to claims based on human rights treaties.
293 This point was stressed by C.F. Amerasinghe, footnote 107 above, p. 484, and J. Verhoeven, "Protection diplomatique, épuisement des voies de recours et juridictions européennes", *Droit du pouvoir, pouvoir du droit – Mélanges offerts à Jean Salmon* (Bruxelles: Bruylant, 2007), p. 1511 at p. 1517.
294 *I.C.J. Reports 1949*, p. 184.

(6) With regard to a responsible international organization, the need to exhaust local remedies depends on the circumstances of the claim. Provided that the requirement applies in certain cases, there is no need to define here more precisely when the local remedies rule would be applicable. One clear case appears to be that of a claim in respect of the treatment of an individual by an international organization while administering a territory. The local remedies rule has also been invoked with regard to remedies existing within the European Union. One instance of practice is provided by a statement made on behalf of all the member States of the European Union by the Director-General of the Legal Service of the European Commission before the Council of the International Civil Aviation Organization in relation to a dispute between those States and the United States concerning measures taken for abating noise originating from aircraft. The member States of the European Union contended that the claim of the United States was inadmissible because remedies relating to the controversial EC regulation had not been exhausted, since the measure was at the time "subject to challenge before the national courts of EU Member States and the European Court of Justice".[295] This practice suggests that, whether a claim is addressed to the EU member States or the responsibility of the European Union is invoked, exhaustion of remedies existing within the European Union would be required.

(7) The need to exhaust local remedies with regard to claims against an international organization has been accepted, at least in principle, by the majority of writers.[296] Although the term "local remedies" may seem inappropriate in this context, because it seems to refer to remedies available in the territory of the responsible entity, it has generally been used in English texts as a term of art and as such has been included also in paragraph 2.

[295] "Oral statement and comments on the US response", 15 November 2000, A/CN.4/545, attachment No. 18.

[296] The applicability of the local remedies rule to claims addressed by States to international organizations was maintained by several authors: J.-P. Ritter, footnote 107 above, p. 427 at pp. 454–455; P. De Visscher, "Observations sur le fondement et la mise en œuvre du principe de la responsabilité de l'Organisation des Nations Unies", *Revue de Droit International et de Droit Comparé*, vol. 40 (1963), p. 165 at p. 174; R. Simmonds, footnote 107 above, p. 238; B. Amrallah, footnote 107 above, p. 57 at p. 67; L. Gramlich, "Diplomatic Protection Against Acts of Intergovernmental Organs", *German Yearbook of International Law*, vol. 27 (1984), p. 386 at p. 398 (more tentatively); H.G. Schermers & N.M. Blokker, *International Institutional Law*, 3rd ed. (The Hague: Nijhoff, 1995), pp. 1167–1168; P. Klein, footnote 107 above, p. 534 ff.; C. Pitschas, footnote 107 above, p. 250; K. Wellens, *Remedies against International Organizations* (Cambridge: Cambridge University Press, 2002), pp. 66–67; G. Thallinger, "The Rule of Exhaustion of Local Remedies in the Context of the Responsibility of International Organizations", *Nordic Journal of International Law*, vol. 77 (2008), p. 401 ff. The same opinion was expressed by the Committee on Accountability of International Organisations of the ILA *Report of the Seventy-First Conference* (2004), p. 213. C. Eagleton, "International Organizations and the Law of Responsibility", *Recueil des Cours ...*, vol. 76 (1950-I), p. 323 at p. 395 considered that the local remedies rule would not be applicable to a claim against the United Nations, but only because "the United Nations does not have a judicial system or other means of 'local redress' such as are regularly maintained by states". A.A. Cançado Trindade, "Exhaustion of Local Remedies and the Law of International Organizations", *Revue de Droit International et de Sciences Diplomatiques*, vol. 57 (1979), p. 81 at p. 108 noted that "when a claim for damages is lodged against an international organization, application of the rule is not excluded, but the law may still develop in different directions". The view that the local remedies rule should be applied in a flexible manner was expressed by M. Pérez González, footnote 107 above, p. 63 at p. 71. C.F. Amerasinghe, footnote 107 above, p. 486, considered that, since international organizations "do not have jurisdictional powers over individuals in general", it is "questionable whether they provide suitable internal remedies. Thus, it is difficult to see how the rule of local remedies would be applicable"; this view, which had already been expressed in the first edition of the same book, was shared by F. Vacas Fernández, *La responsabilidad internacional de Naciones Unidas* (Madrid: Dykinson, 2002), pp. 139–140.

(8) As in article 44 on the responsibility of States for internationally wrongful acts, the requirement for local remedies to be exhausted is conditional on the existence of "any available and effective remedy". This requirement has been elaborated in greater detail by the Commission in articles 14 and 15 on diplomatic protection,[297] but for the purpose of the present draft articles the more concise description may prove adequate.

(9) While available and effective remedies within an international organization may exist only in the case of a limited number of organizations, paragraph 2, by referring to remedies "provided by that organization", intends to include also remedies that are available before arbitral tribunals, national courts or administrative bodies when the international organization has accepted their competence to examine claims. The location of the remedies may affect their effectiveness in relation to the individual concerned.

(10) As in other provisions, the reference to "another" international organization in paragraph 2 is not intended to exclude that responsibility may be invoked against an international organization even when no other international organization is involved.

(11) Paragraph 2 is also relevant when, according to article 48, responsibility is invoked by a State or an international organization other than an injured State or international organization. A reference to article 44, paragraph 2, is made in article 48, paragraph 5, to this effect.

Article 46
Loss of the right to invoke responsibility

The responsibility of an international organization may not be invoked if:

(a) the injured State or international organization has validly waived the claim;

(b) the injured State or international organization is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

Commentary

(1) The present article closely follows the text of article 45 on the responsibility of States for internationally wrongful acts,[298] with the replacement of "a State" by "an international organization" in the chapeau and the addition of "or international organization" in subparagraphs (a) and (b).

(2) It is clear that, for an injured State, the loss of the right to invoke responsibility can hardly depend on whether the responsible entity is a State or an international organization. In principle also an international organization should be considered to be in the position of waiving a claim or acquiescing in the lapse of the claim. However, it is to be noted that the special features of international organizations make it generally difficult to identify which organ is competent to waive a claim on behalf of the organization and to assess whether acquiescence on the part of the organization has taken place. Moreover, acquiescence on the part of an international organization may involve a longer period than the one normally sufficient for States.

(3) Subparagraphs (a) and (b) specify that a waiver or acquiescence entails the loss of the right to invoke responsibility only if it is "validly" made. As was stated in the commentary on article 20 of the present draft articles, this term "refers to matters 'addressed by international law rules outside the framework of State responsibility' or of

[297] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), p. 20.

[298] *Yearbook ... 2001*, vol. II (Part Two), p. 121.

the responsibility of an international organization, such as whether the organ or agent who gave the consent was authorized to do so on behalf of the relevant State or international organization, or whether the consent was vitiated by coercion or some other factor".[299] In the case of an international organization validity generally implies that the rules of the organization have to be respected. However, this requirement may encounter limits such as those stated in article 46, paragraphs 2 and 3, of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations[300] with regard to the relevance of respecting the rules of the organization relating to competence to conclude treaties in relation to the invalidity of the treaty for infringement of those rules.

(4) When there is a plurality of injured States or injured international organizations, the waiver by one or more State or international organization does not affect the entitlement of the other injured States or organizations to invoke responsibility.

(5) Although subparagraphs (a) and (b) refer to "the injured State or international organization", a loss of the right to invoke responsibility because of a waiver or acquiescence may occur also for a State or an international organization that is entitled, in accordance with article 49, to invoke responsibility not as an injured State or international organization. This is made clear by the reference to article 46 contained in article 49, paragraph 5.

Article 47
Plurality of injured States or international organizations

Where several States or international organizations are injured by the same internationally wrongful act of an international organization, each injured State or international organization may separately invoke the responsibility of the international organization for the internationally wrongful act.

Commentary

(1) This provision corresponds to article 46 on the responsibility of States for internationally wrongful acts.[301] The following cases, all relating to responsibility for a single wrongful act, are here considered: that there is a plurality of injured States; that there exists a plurality of injured international organizations; that there are one or more injured States and one or more injured international organizations.

(2) Any injured State or international organization is entitled to invoke responsibility independently from any other injured State or international organization. This does not preclude some or all of the injured entities invoking responsibility jointly, if they so wish. Coordination of claims would contribute to avoid the risk of a double recovery.

(3) An instance of claims that may be concurrently preferred by an injured State and an injured international organization was envisaged by the International Court of Justice in its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*. The Court found that both the United Nations and the national State of the victim could claim "in respect of the damage caused […] to the victim or to persons entitled through him" and noted that there was "no rule of law which assigns priority to the one or to the other, or which compels either the State or the Organization to refrain from bringing an international claim. The Court sees no reason why the parties concerned should not find solutions inspired by goodwill and common sense […]".[302]

(4) An injured State or international organization could undertake to refrain from invoking responsibility, leaving other injured States or international organizations to do so. If this undertaking is not only an internal matter between the injured entities, it could lead to the loss for the former State or international organization of the right to invoke responsibility according to article 46.

(5) When an international organization and one or more of its members are both injured as the result of the same wrongful act, the rules of the organization could similarly attribute to the organization or to its members the exclusive function of invoking responsibility.

Article 48
Responsibility of an international organization and one or more States or international organizations

1. Where an international organization and one or more States or other international organizations are responsible for the same internationally wrongful act, the responsibility of each State or organization may be invoked in relation to that act.

2. Subsidiary responsibility may be invoked insofar as the invocation of the primary responsibility has not led to reparation.

3. Paragraphs 1 and 2:

(a) do not permit any injured State or international organization to recover, by way of compensation, more than the damage it has suffered;

(b) are without prejudice to any right of recourse that the State or international organization providing reparation may have against the other responsible States or international organizations.

Commentary

(1) The present article addresses the case where an international organization is responsible for a given wrongful act together with one or more other entities, either international organizations or States. The joint responsibility of an international organization with one or more States is envisaged in articles 14 to 18, which concern the responsibility of an international organization in connection with the act of a State, and in articles 58 to 62, which deal with the responsibility of a State in connection with the internationally wrongful act of an international organization. Another example is provided by so-called mixed agreements that are concluded by the European Union together with its member States, when such agreements do not provide for the apportionment of the responsibility between the Union and its member States. As was stated by the European Court of Justice in a case *Parliament v. Council* relating to a mixed cooperation agreement: "In those circumstances, in the absence of derogations expressly laid down in the Convention, the Community and its member States as partners of the ACP States are jointly liable to those latter States for the fulfilment of every obligation arising from the commitments undertaken, including those relating to financial assistance."[303]

[299] Para. (5) of the commentary on article 20.
[300] A/CONF.129/15.
[301] *Yearbook ... 2001*, vol. II (Part Two), p. 123.
[302] *I.C.J. Reports 1949*, pp. 184–186.
[303] Judgment of 2 March 1994, case C-316/91, *European Court of Justice Reports*, 1994, p. I-623 at pp. I-660–661, recital 29.

(2) Like article 47 on the responsibility of States for internationally wrongful acts,[304] paragraph 1 provides that the responsibility of each responsible entity may be invoked by the injured State or international organization. However, there may be cases in which a State or an international organization bears only subsidiary responsibility, to the effect that it would have an obligation to provide reparation only if, and to the extent that, the primarily responsible State or international organization fails to do so. Article 62 gives an example of subsidiary responsibility, by providing that, when the responsibility of a member State arises for the wrongful act of an international organization, responsibility is "presumed to be subsidiary".

(3) An injured State or international organization may address a claim to a subsidiarily responsible entity before the primarily responsible organization fails to provide reparation only if the claim is subject to the condition that the entity whose responsibility is primary fails to provide reparation.

(4) Paragraph 3 corresponds to article 47, paragraph 2, on the responsibility of States for internationally wrongful acts, with the addition of the words "or international organization" in subparagraphs (a) and (b). A slight change in the wording of subparagraph (b) is intended to make it clearer that the right of recourse accrues to the State or international organization "providing reparation".

Article 49
Invocation of responsibility by a State or an international organization other than an injured State or international organization

1. A State or an international organization other than an injured State or international organization is entitled to invoke the responsibility of another international organization in accordance with paragraph 4 if the obligation breached is owed to a group of States or international organizations, including the State or organization that invokes responsibility, and is established for the protection of a collective interest of the group.

2. A State other than an injured State is entitled to invoke the responsibility of an international organization in accordance with paragraph 4 if the obligation breached is owed to the international community as a whole.

3. An international organization other than an injured international organization is entitled to invoke the responsibility of another international organization in accordance with paragraph 4 if the obligation breached is owed to the international community as a whole and safeguarding the interest of the international community as a whole underlying the obligation breached is within the functions of the international organization invoking responsibility.

4. A State or an international organization entitled to invoke responsibility under paragraphs 1 to 3 may claim from the responsible international organization:

(a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and

(b) performance of the obligation of reparation in accordance with Part Three, in the interest of the injured State or international organization or of the beneficiaries of the obligation breached.

5. The requirements for the invocation of responsibility by an injured State or international organization under articles 44, 45, paragraph 2, and 46 apply to an invocation of responsibility by a State or international organization entitled to do so under paragraphs 1 to 4.

Commentary

(1) The present article corresponds to article 48 on the responsibility of States for internationally wrongful acts.[305] It concerns the invocation of responsibility of an international organization by a State or another international organization which, although it is owed the obligation breached, cannot be regarded as injured within the meaning of article 43 of the present draft articles. According to paragraph 4, when that State or the latter international organization is entitled to invoke responsibility, it may claim cessation of the internationally wrongful act, assurances and guarantees of non-repetition and the performance of the obligation of reparation "in the interest of the injured State or international organization or of the beneficiaries of the obligation breached".

(2) Paragraph 1 concerns the first category of cases in which this limited entitlement arises. The category comprises cases when the "obligation breached is owed to a group of States or international organizations, including the State or organization that invokes responsibility, and is established for the protection of a collective interest of the group". Apart from the addition of the words "or international organizations" and "or organization", this text reproduces subparagraph (a) of article 48, paragraph 1, on the responsibility of States for internationally wrongful acts.

(3) The reference in paragraph 1 to the "collective interest of the group" is intended to specify that the obligation breached is not only owed, under the specific circumstances in which the breach occurs, to one or more members of the group individually. For instance, should an international organization breach an obligation under a multilateral treaty for the protection of the common environment, the other parties to the treaty may invoke responsibility because they are affected by the breach, even if they are not "specially affected" within the meaning of article 43, subparagraph (b), (i). Each member of the group would then be entitled to request compliance as a guardian of the collective interest of the group.

(4) Obligations that an international organization may have towards its members under its rules do not necessarily fall within this category. Moreover, the rules of the organization may restrict the entitlement of a member to invoke responsibility of that organization.

(5) The wording of paragraph 1 does not imply that the obligation breached should necessarily be owed to a group comprising States and international organizations. That obligation may also be owed to either a group of States or a group of international organizations. As in other provisions, the reference to "another international organization" in the same paragraph does not imply that more than one international organization needs to be involved.

(6) Paragraphs 2 and 3 consider the other category of cases when a State or an international organization that is not injured within the meaning of article 43 may nevertheless invoke responsibility, although to the limited extent provided in paragraph 4. Paragraph 2, which refers to the invocation of responsibility by a State, is identical to article 48, paragraph 1, subparagraph (b) on the responsibility of States for internationally wrongful acts. It seems clear that, should a State be regarded as entitled to invoke the responsibility of another State which has breached an obligation towards the international community as a whole, the same applies with regard to the responsibility of an international organization that has committed a similar breach. As was observed by the Organization for

[304] *Yearbook ... 2001*, vol. II (Part Two), p. 124.

[305] *Ibid*., p. 126.

the Prohibition of Chemical Weapons, "there does not appear to be any reason why States — as distinct from other international organizations — may not also be able to invoke the responsibility of an international organization".[306]

(7) An international organization, when invoking the responsibility of another international organization in the case of breach of an international obligation towards the international community as a whole, would act only in the exercise of functions that have been attributed to it by its member States, which would be entitled to invoke responsibility individually or jointly in relation to a breach.

(8) Legal writings concerning the entitlement of international organizations to invoke responsibility in case of a breach of an obligation owed to the international community as a whole mainly focus on the European Union. The views are divided among authors, but a clear majority favours an affirmative solution.[307] Although authors generally consider only the invocation by an international organization of the international responsibility of a State, a similar solution would seem to apply to the case of a breach by another international organization.

(9) Practice in this regard is not very indicative. This is not just because practice relates to action taken by international organizations in respect of States. When international organizations respond to breaches committed by their members they often act only on the basis of their respective rules. It would be difficult to infer from this practice the existence of a general entitlement of international organizations to invoke responsibility. The most significant practice appears to be that of the European Union, which has often stated that non-members committed breaches of obligations which appear to be owed to the international community as a whole. For instance, a common position of the Council of the European Union of 26 April 2000 referred to "severe and systematic violations of human rights in Burma".[308] A more recent example are the measures taken by the Council of the European Union with regard to the situation in Libya; the EU "strongly condemned the violence and use of force against civilians and deplored the repression against peaceful demonstrators".[309] It is not altogether clear whether responsibility was jointly invoked by the member States of the European Union or by the European Union as a distinct organization. In most cases this type of statement by the European Union led to the adoption of economic measures against the allegedly responsible State. Those measures will be discussed in the next chapter.

(10) Paragraph 3 restricts the entitlement of an international organization to invoke responsibility in case of a breach of an international obligation owed to the international community as a whole. It is required that "safeguarding the interest of the international community underlying the obligation breached be included among the functions of the international organization invoking responsibility". Those functions reflect the character and purposes of the organization. The rules of the organization would determine which are the functions of the international organization. There is no requirement of a specific mandate of safeguarding the interest of the international community under those rules.

(11) The solution adopted in paragraph 3 corresponds to the view expressed by several States[310] in the Sixth Committee of the General Assembly, in response to a question raised by the Commission in its 2007 report to the General Assembly.[311] A similar view was shared by some international organizations that contributed comments on this question.[312]

(12) It is noteworthy that in its advisory opinion on *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area* the Seabed Chamber of the International Tribunal on the Law of the Sea considered that the entitlement of the Seabed Authority to claim compensation for breaches of obligations in the Area "is implicit in article 137, paragraph 2, of the [United Nations] Convention [on the Law of the Sea], which states that the Authority shall act 'on behalf' of mankind".[313] Although this conclusion was based on a specific provision of the Convention, it essentially rested — as article 49, paragraph 2 — on the functions entrusted to the relevant international organization.

(13) Paragraph 5 is based on article 48, paragraph 3, on the responsibility of States for internationally wrongful acts. It is designed to indicate that the provisions concerning notice of claim, admissibility of claims and loss of the right to invoke responsibility apply also with regard to States and international organizations that invoke responsibility according to the present article. While article 48, paragraph 3, on the responsibility of States for internationally wrongful acts makes a general reference to the corresponding provisions

---

306 A/CN.4/593, sect. II.F.1.

307 The opinion that at least certain international organizations could invoke responsibility in case of a breach of an obligation *erga omnes* was expressed by C.-D. Ehlermann, "Communautés européennes et sanctions internationales – une réponse à J. Verhoeven", *Revue Belge de Droit International*, vol. 18 (1984–5), p. 96 at pp. 104–105; E. Klein, "Sanctions by International Organizations and Economic Communities", *Archiv des Völkerrechts*, vol. 30 (1992), p. 101 at p. 110; A. Davì, *Comunità europee e sanzioni economiche internazionali* (Napoli: Jovene, 1993), p. 496 ff.; C. Tomuschat, "Artikel 210", in: H. van der Groeben, J. Thiesing, C.-D. Ehlermann (eds.), *Kommentar zum EU-/EG-Vertrag*, 5th ed. (Baden-Baden: Nomos, 1997), vol. 5, pp. 28–29; P. Klein, footnote 107 above, p. 401 ff.; A. Rey Aneiros, *Una aproximación a la responsabilidad internacional de las organizaciones internacionales* (Valencia: Tirant, 2006), p. 166. The opposite view was maintained by J. Verhoeven, "Communautés européennes et sanctions internationales", *Revue Belge de Droit International*, vol. 18 (1984–5), p. 79 at pp. 89–90, and P. Sturma, "La participation de la Communauté internationale à des 'sanctions' internationales", *Revue du Marché Commun et de l'Union européenne*, No. 366 (1993), p. 250 at p. 258. According to P. Palchetti, "Reactions by the European Union to Breaches of Erga Omnes Obligations", in: E. Cannizzaro (ed.), *The European Union as an Actor in International Relations* (The Hague: Kluwer Law International, 2002), p. 219 at p. 226, "the role of the Community appears to be only that of implementing rights that are owed to its Member States".

308 *Official Journal of the European Communities*, 14 May 2000, *L* 122, p. 1.

309 Council Decision 2011/137/CFSP of 28 February 2011, *Official Journal of the European Union*, 3 March 2011, *L* 58, p. 53.

310 Thus the interventions of Argentina (A/C.6/62/SR.18, para. 64), Denmark, on behalf of the five Nordic countries (A/C.6/62/SR.18, para. 100), Italy (A/C.6/62/SR.19, para. 40), Japan (A/C.6/62/SR.19, para. 100), the Netherlands (A/C.6/62/SR.20, para. 39), the Russian Federation (A/C.6/62/SR.21, para. 70) and Switzerland (A/C.6/62/SR.21, para. 85). See also the intervention of the Czech Republic (A/C.6/64/SR.15, para. 58) and the written comment of Germany (A/CN.4/636, sect. II.B.23). Other States appear to favour a more general entitlement for international organizations. See the interventions of Belarus (A/C.6/62/SR.21, para. 97), Belgium (A/C.6/62/SR.21, para. 90), Cyprus (A/C.6/62/SR.21, para. 38), Hungary (A/C.6/62/SR.21, para. 16) and Malaysia (A/C.6/62/SR.19, para. 75).

311 *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), chap. III, sect. D, para. 30. The question ran as follows: "Article 48 on responsibility of States for internationally wrongful acts provides that, in case of a breach by a State of an obligation owed to the international community as a whole, States are entitled to claim from the responsible State cessation of the internationally wrongful act and performance of the obligation of reparation in the interest of the injured State or of the beneficiaries of the obligation breached. Should a breach of an obligation owed to the international community as a whole be committed by an international organization, would the other organizations or some of them be entitled to make a similar claim?"

312 See the views expressed by the Organization for the Prohibition of Chemical Weapons (A/CN.4/593, sect. II.F.1), the Commission of the European Union (*ibid.*), the World Health Organization (*ibid.*) and the International Organization for Migration (A/CN.4/593/Add.1, sect. II.B). See also the reply of the World Trade Organization (A/CN.4/593, sect. II.F.1).

313 Advisory opinion of 1 February 2011, para. 180, available at: www.itlos.org.

(arts. 43 to 45), it is not intended to extend the applicability of "any applicable rule relating to the nationality of claims", which is stated in article 44, subparagraph (a), because that requirement is clearly not relevant to the obligations dealt with in article 48. Although this may be taken as implied, the reference in paragraph 5 of the present article has been expressly limited to the paragraph on admissibility of claims that relates to the exhaustion of local remedies.

Article 50
Scope of this Chapter

This Chapter is without prejudice to the entitlement that a person or entity other than a State or an international organization may have to invoke the international responsibility of an international organization.

Commentary

(1) Articles 43 to 49 above address the implementation of the responsibility of an international organization only to the extent that responsibility is invoked by a State or another international organization. This accords with article 33, which defines the scope of the international obligations set out in Part Three by stating that these only relate to the breach of an obligation under international law that an international organization owes to a State, another international organization or the international community as a whole. The same article further specifies that this 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". Thus, by referring only to the invocation of responsibility by a State or an international organization the scope of the present Chapter reflects that of Part Three. Invocation of responsibility is considered only insofar as it concerns the obligations set out in Part Three.

(2) While it could be taken as implied that the articles concerning invocation of responsibility are without prejudice to the entitlement that a person or entity other than a State or an international organization may have to invoke responsibility of an international organization, an express statement to this effect serves the purpose of conveying more clearly that the present Chapter is not intended to exclude any such entitlement.

Chapter II
Countermeasures

Article 51
Object and limits of countermeasures

1. An injured State or an injured international organization may only take countermeasures against an international organization which is responsible for an internationally wrongful act in order to induce that organization to comply with its obligations under Part Three.

2. Countermeasures are limited to the non-performance for the time being of international obligations of the State or international organization taking the measures towards the responsible international organization.

3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

4. Countermeasures shall, as far as possible, be taken in such a way as to limit their effects on the exercise by the responsible international organization of its functions.

Commentary

(1) As set forth in article 22, when an international organization incurs international responsibility, it could become the object of countermeasures. An injured State or international organization could then take countermeasures, since there is no convincing reason for categorically exempting responsible international organizations from being possible targets of countermeasures. In principle, the legal situation of a responsible international organization in this regard appears to be similar to that of a responsible State.

(2) This point was made also in the comments of certain international organizations. The World Health Organization agreed that "there is no cogent reason why an international organization that breaches an international obligation should be exempted from countermeasures taken by an injured State or international organization to bring about compliance by the former organization with its obligations".[314] Also UNESCO stated that it "[did] not have any objection to the inclusion of draft articles on countermeasures" in a text on the responsibility of international organizations.[315] The OSCE accepted "the possibility of countermeasures by and against international organizations".[316]

(3) In response to a question raised by the Commission, several States expressed the view that rules generally similar to those that were devised for countermeasures taken against States in articles 49 to 53 of the articles on the responsibility of States for internationally wrongful acts should be applied to countermeasures directed against international organizations.[317]

(4) Practice concerning countermeasures taken against international organizations is undoubtedly scarce. However, one may find some examples of measures that were defined as countermeasures. For instance, in *United States – Import Measures on Certain Products from the European Communities*, a WTO panel considered that the suspension of concessions or other obligations which had been authorized by the Dispute Settlement Body against the European Communities was "essentially retaliatory in nature". The panel observed:

> "Under general international law, retaliation (also referred to as reprisals or countermeasures) has undergone major changes in the course of the twentieth century, specially, as a result of the prohibition of the use of force (*jus ad bellum*). Under international law, these types of countermeasures are now subject to requirements, such as those identified by the International Law Commission in its work on State responsibility (proportionality, etc. ... see article 43 of the draft). However, in WTO, countermeasures, retaliations and reprisals are strictly regulated and can take place only within the framework of the WTO/DSU."[318]

---

[314] A/CN.4/609, sect. II.I.

[315] A/CN.4/609, sect. II.I.

[316] A/CN.4/637, sect. II.B.21.

[317] See the interventions by Denmark, on behalf of the five Nordic countries (A/C.6/62/SR.18, para. 101), Malaysia (A/C.6/62/SR.19, para. 75, also envisaging some "additional restrictions"), Japan (A/C.6/62/SR.19, para. 100), the Netherlands (A/C.6/62/SR.20, para. 40), Switzerland (A/C.6/62/SR.21, para. 86) and Belgium (A/C.6/62/SR.21, para. 91). These interventions were made in response to a request for comments made by the Commission, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), chap. III, sect. D, para. 30 (b).

[318] WT/DS165/R, 17 July 2000, para. 6.23, note 100. The reference made by the panel to the work of the Commission concerns the first-reading articles on State responsibility. The question whether measures taken within the WTO system may be qualified as countermeasures is controversial. For the affirmative view see H. Lesaffre, *Le règlement des différends au sein de l'OMC et le droit de la responsabilité internationale* (Paris: L.E.D.J., 2007), pp. 454–461.

(5) Paragraphs 1 to 3 define the object and limits of countermeasures in the same way as has been done in the corresponding paragraphs of article 49 on the responsibility of States for internationally wrongful acts.[319] There is no apparent justification for a distinction in this regard between countermeasures taken against international organizations and countermeasures directed against States.

(6) One matter of concern that arises with regard to countermeasures affecting international organizations is the fact that countermeasures may hamper the functioning of the responsible international organization and therefore endanger the attainment of the objectives for which that organization was established. While this concern could not justify the total exclusion of countermeasures against international organizations, it may lead to asserting some restrictions. Paragraph 4 addresses the question in general terms. Further restrictions, that specifically pertain to the relations between an international organization and its members, are considered in the following article.

(7) The exercise of certain functions by an international organization may be of vital interest to its member States and in certain cases to the international community. However, it would be difficult to define restrictions to countermeasures on the basis of this criterion, because the distinction would not always be easy to make and moreover the fact of impairing a certain function may have an impact on the exercise of other functions. Thus, paragraph 4 requires an injured State or international organization to select countermeasures that would affect, in as limited a manner as possible, the exercise by the targeted international organization of any of its functions. A qualitative assessment of the functions that would be likely to be affected may nevertheless be taken as implied.

Article 52
Conditions for taking countermeasures by members of an international organization

1. Subject to paragraph 2, an injured State or international organization which is a member of a responsible international organization may not take countermeasures against that organization unless:

(a) the conditions referred to in article 51 are met;

(b) the countermeasures are not inconsistent with the rules of the organization; and

(c) no appropriate means are available for otherwise inducing compliance with the obligations of the responsible international organization concerning cessation of the breach and reparation.

2. Countermeasures may not be taken by an injured State or international organization which is a member of a responsible international organization against that organization in response to a breach of an international obligation under the rules of the organization unless such countermeasures are provided for by those rules.

Commentary

(1) The adoption of countermeasures against an international organization by its members may be precluded by the rules of the organization. The same rules may on the contrary allow countermeasures, but only on certain conditions that may differ from those applying under general international law. Those conditions are likely to be more restrictive. As was noted by the World Health Organization, "for international organizations of quasi-universal membership such as those of the United Nations system, the possibility for their respective Member States to take countermeasures against them would either be severely limited by the operation of the rules of those organizations, rendering it largely virtual, or would be subject to a *lex specialis* — thus outside the scope of the draft articles — to the extent that the rules of the organization concerned do not prevent the adoption of countermeasures by its Member States".[320]

(2) In one of its comments UNESCO, "considering that often countermeasures are not specifically provided for by the rules of international organizations, [supported] the possibility for an injured member of an international organization to resort to countermeasures which are not explicitly allowed by the rules of the organization".[321] However, as UNESCO also noted, some specific restrictions are called for.[322] These restrictions would be consonant with the principle of cooperation underlying the relations between an international organization and its members.[323]

(3) The restrictions in question are meant to be additional to those that are generally applicable to countermeasures that are taken against an international organization. It is probably not necessary to state expressly that the restrictions set forth in the present article are additional to those that appear in the other articles included in the Chapter.

(4) The present article makes a distinction between countermeasures by injured member States or international organizations against the organization of which they are members in general, and those that are taken in response to a breach by that organization of an international obligation arising under the rules of the organization. Paragraph 1 sets forth the residual rule while paragraph 2 addresses the latter case.

(5) Paragraph 2 requires countermeasures not to be inconsistent with the rules of the organization. This implies that the taking of countermeasures need not be based on the rules of the organization, but should not run counter any restriction provided for in these rules.

(6) Paragraph 2 further provides that countermeasures may not be resorted to when some "appropriate means" for inducing compliance are available. The term "appropriate means" refers to those lawful means that are proportionate and offer a reasonable prospect for inducing compliance when the member intends to take countermeasures. However, failure on the part of the member to make timely use of remedies that were available could result in countermeasures becoming precluded.

(7) An example of the relevance of appropriate means existing in accordance with the rules of the organization is offered by a judgment of the Court of Justice of the European Communities. Two member States had argued that, although they had breached an obligation under the constituent instrument, their infringement was excused by the fact that

[319] *Yearbook ... 2001*, vol. II (Part Two), p. 129.

[320] A/CN.4/609, sect. II.I.

[321] A/CN.4/609, sect. II.I.

[322] *Ibid*. UNESCO expressed its agreement with the terms "only if this is not inconsistent with the rules of the injured organization" which had been proposed by the special rapporteur in his sixth report (A/CN.4/597, para. 48).

[323] This principle was expressed by the International Court of Justice in its advisory opinion on the Interpretation of the Agreement as follows:

> "The very fact of Egypt's membership of the Organization entails certain mutual obligations of co-operation and good faith incumbent upon Egypt and upon the Organization."
>
> *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, I.C.J. Reports 1980*, p. 93, para. 43.

the Council of the European Economic Community (EEC) had previously failed to comply with one of its obligations. The Court of Justice said:

> "[...] except where otherwise expressly provided, the basic concept of the [EEC] Treaty requires that the member States shall not take the law into their own hands. Therefore the fact that the Council failed to carry out its obligations cannot relieve the defendants from carrying out theirs."[324]

The existence of judicial remedies within the European Communities appears to be the basic reason for this statement.

(8) Paragraph 2 considers the taking of countermeasures by injured States or international organizations against the organization of which they are members when the latter has breached an international obligation arising under the rules of the organization. In this case, in view of the special ties existing between an international organization and its members,[325] countermeasures are allowed only if they are provided for by these rules.

(9) As has been stated in article 22, paragraphs 2 and 3, restrictions similar to the ones here envisaged apply in the reverse case of an international organization intending to take countermeasures against one of its members.

Article 53
Obligations not affected by countermeasures

1. Countermeasures shall not affect:

(a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;

(b) obligations for the protection of human rights;

(c) obligations of a humanitarian character prohibiting reprisals;

(d) other obligations under peremptory norms of general international law.

2. An injured State or international organization taking countermeasures is not relieved from fulfilling its obligations:

(a) under any dispute settlement procedure applicable between it and the responsible international organization;

(b) to respect any inviolability of organs or agents of the responsible international organization and of the premises, archives and documents of that organization.

Commentary

(1) With the exception of the last subparagraph, the present article reproduces the list of obligations not affected by countermeasures that is contained in article 50 on the responsibility of States for internationally wrongful acts.[326] Most of these obligations are obligations that the injured State or international organization has towards the international community. With regard to countermeasures taken against an international organization, the breaches of these obligations are relevant only insofar as the obligation in question is also owed to the international organization concerned, since the existence of an obligation towards the targeted entity is a condition for a measure to be defined a countermeasure. Thus, the use of force could be considered a countermeasure taken against an international organization only if the prohibition to use force is owed to that organization. This occurs if the organization is considered to be a component of the international community to which the obligation is owed or if the obligation breached is owed to the organization because of special circumstances, for instance because force is used in relation to a territory that the organization administers.

(2) Article 50, paragraph 2 (b) on the responsibility of States for internationally wrongful acts provides that obligations concerning the "inviolability of diplomatic or consular agents, premises, archives and documents" are not affected by countermeasures. Since those obligations cannot be owed to an international organization, this case is clearly inapplicable to international organizations and has not been included in the present article. However, the rationale underlying that restriction, namely the need to protect certain persons and property that could otherwise become an easy target of countermeasures,[327] also applies to international organizations and their agents. Thus a restriction concerning obligations that protect international organizations and their agents has been set forth in paragraph 2 (b). The content of obligations concerning the inviolability of the agents and of the premises, archives and documents of international organizations may vary considerably according to the applicable rules. Therefore the subparagraph refers to "any" inviolability. The term "agent" is wide enough to include any mission that an international organization would send, permanently or temporarily, to a State or another international organization.

(3) While article 50, paragraph 1(b) on the responsibility of States for internationally wrongful acts refers to "fundamental human rights", the corresponding text of the present article does not quality the term "human rights". This omission conforms to the tendency not to make a distinction among human rights according to their relative importance.

Article 54
Proportionality of countermeasures

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

Commentary

(1) The text of the present article is identical to article 51 on the responsibility of States for internationally wrongful acts.[328] It reproduces, with a few additional words, the requirement stated by the International Court of Justice in the *Gabčíkovo-Nagymaros Project* case, that "the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question".[329]

(2) As was stated by the Commission in its commentary on article 51, proportionality "is concerned with the relationship between the internationally wrongful act and the countermeasure"; "a countermeasure must be commensurate with the injury suffered, including the importance of the issue of principle involved and this has a function partly independent of the question whether the countermeasure was necessary to achieve the result of ensuring compliance".[330] The commentary further explained that "the reference to 'the

---

[324] Judgment of 13 November 1964, *Commission of the European Economic Community v. Grand Duchy of Luxembourg and Kingdom of Belgium*, joined cases 90/63 and 91/63, *European Court of Justice Reports*, 1964, p. 1201 (French edition).

[325] The same reason is given in para. (6) of the commentary on article 22.

[326] *Yearbook ... 2001*, vol. II (Part Two), p. 131.

[327] *Ibid*., p. 134, para. (15).

[328] *Ibid*., p. 134.

[329] *I.C.J. Reports 1997*, p. 56, para. 85.

[330] *Yearbook ... 2001*, vol. II (Part Two), p. 135, para. (7).

rights in question' has a broad meaning, and includes not only the effect of a wrongful act on the injured State but also on the rights of the responsible State".[331] In the present context this reference would apply to the effects on the injured State or international organization and to the rights of the responsible international organization.

(3) One aspect that is relevant when assessing proportionality of a countermeasure is the impact that it may have on the targeted entity. One and the same countermeasure may affect a State or an international organization in a different way according to the circumstances. For instance, an economic measure that might hardly affect a large international organization may severely hamper the functioning of a smaller organization and for that reason not meet the test of proportionality.

(4) When an international organization is injured, it is only the organization and not its members that is entitled to take countermeasures. Should the international organization and its members both be injured, as in other cases of a plurality of injured entities, both would be entitled to resort to countermeasures. In this case, however, there would be the risk of a reaction that is excessive in terms of proportionality.[332]

Article 55
Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State or international organization shall:

(a) call upon the responsible international organization, in accordance with article 44, to fulfil its obligations under Part Three;

(b) notify the responsible international organization of any decision to take countermeasures and offer to negotiate with that organization.

2. Notwithstanding paragraph 1 (b), the injured State or international organization may take such urgent countermeasures as are necessary to preserve its rights.

3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:

(a) the internationally wrongful act has ceased; and

(b) the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.

4. Paragraph 3 does not apply if the responsible international organization fails to implement the dispute settlement procedures in good faith.

Commentary

(1) Procedural conditions relating to countermeasures have been developed mainly in relations between States. Those conditions are not however related to the nature of the targeted entity. Thus the rules that are set forth in article 52 on the responsibility of States for internationally wrongful acts[333] appear to be equally applicable when the responsible entity is an international organization. The conditions stated in article 52 have been reproduced in the present article with minor adaptations.

(2) Paragraph 1 sets forth the requirement that the injured State or international organization call on the responsible international organization to fulfil its obligations of cessation and reparation, and notify the intention to take countermeasures, while offering to engage in negotiations. The responsible international organization is thus given an opportunity to appraise the claim made by the injured State or international organization and become aware of the risk of being the target of countermeasures. By allowing urgent countermeasures, paragraph 2 makes it however possible for the injured State or international organization to apply immediately those measures that are necessary to preserve its rights, in particular those that would lose their potential impact if delayed.

(3) Paragraphs 3 and 4 concern the relations between countermeasures and the applicable procedures for the settlement of disputes. The idea underlying these two paragraphs is that, when the parties to a dispute concerning international responsibility have agreed to entrust the settlement of the dispute to a body which has the authority to make binding decisions, the task of inducing the responsible international organization to comply with its obligations under Part Three will rest with that body. These paragraphs are likely to be of limited importance in practice in relations with a responsible international organization, in view of the reluctance of most international organizations to accept methods for the compulsory settlement of disputes.[334]

Article 56
Termination of countermeasures

Countermeasures shall be terminated as soon as the responsible international organization has complied with its obligations under Part Three in relation to the internationally wrongful act.

Commentary

(1) The content of this article follows from the definition of the object of countermeasures in article 51. Since the object of countermeasures is to induce an international organization to comply with its obligations under Part Three with regard to an internationally wrongful act for which that organization is responsible, countermeasures are no longer justified and have to be terminated once the responsible organization has complied with those obligations.

(2) The wording of this article closely follows that of article 53 on the responsibility of States for internationally wrongful acts.[335]

Article 57
Measures taken by States or international organizations other than an injured State or international organization

This chapter does not prejudice the right of any State or international organization, entitled under article 49, paragraphs 1 to 3, to invoke the responsibility of an international organization, to take lawful measures against that organization to ensure cessation of the breach and reparation in the interest of the injured State or organization or of the beneficiaries of the obligation breached.

---

331 *Ibid.*, para. (6).

332 Belgium (A/C.6/62/SR.21, para. 92) referred to the need of preventing "countermeasures adopted by an international organization from exerting an excessively destructive impact".

333 *Yearbook ... 2001*, vol. II (Part Two), p. 135.

334 Even if mechanisms for the compulsory settlement of disputes are considered to include those involving the request for an advisory opinion of the International Court of Justice which the parties agree to be "decisive", as in the Convention on the Privileges and Immunities of the United Nations (sect. 22 of article VI).

335 *Yearbook ... 2001*, vol. II (Part Two), p. 137.

Commentary

(1) Countermeasures taken by States or international organizations which are not injured within the meaning of article 43, but are entitled to invoke responsibility of an international organization according to article 49 of the present draft articles, could have as an object only cessation of the breach and reparation in the interest of the injured State or international organization or of the beneficiaries of the obligation breached. Restrictions provided for in articles 51 to 56 would in any event apply, but the question may be asked whether States or international organizations which are not injured within the meaning of article 43 may resort to countermeasures at all.

(2) Article 54 on the responsibility of States for internationally wrongful acts[336] leaves "without prejudice" the question whether a non-injured State that is entitled to invoke responsibility of another State would have the right to resort to countermeasures. The basic argument given by the Commission in its commentary on article 54 was that State practice relating to countermeasures taken in the collective or general interest was "sparse" and involved "a limited number of States".[337] No doubt, this argument would be even stronger when considering the question whether a non-injured State or international organization may take countermeasures against a responsible international organization. In fact, practice does not offer examples of countermeasures taken by non-injured States or international organizations against a responsible international organization. On the other hand, in the context of the rarity of cases in which countermeasures against an international organization could have been taken by a non-injured State or international organization, the absence of practice relating to countermeasures cannot lead to the conclusion that countermeasures by non-injured States or international organizations would be inadmissible.[338] It seems therefore preferable to leave equally "without prejudice" the question whether countermeasures by a non-injured State or international organization are allowed against a responsible international organization.

Part Five
Responsibility of a State in connection with the conduct of an international organization

Commentary

(1) In accordance with article 1, paragraph 2, the present draft articles are intended to fill a gap that was deliberately left in the articles on the responsibility of States for internationally wrongful acts. As stated in article 57 on the responsibility of States for internationally wrongful acts, those articles are "without prejudice to any question of the responsibility [...] of any State for the conduct of an international organization".[339]

(2) Not all the questions that may affect the responsibility of a State in connection with the act of an international organization are examined in the present draft articles. For instance, questions relating to attribution of conduct to a State are covered only in the articles on the responsibility of States for internationally wrongful acts. Thus, if an issue arises as to whether certain conduct is to be attributed to a State or to an international organization or to both, the present articles will provide criteria for ascertaining whether conduct is to be attributed to the international organization, while the articles on the responsibility of States for internationally wrongful acts will regulate attribution of conduct to the State.

(3) The present Part assumes that there exists conduct attributable to an international organization. In most cases, that conduct will also be internationally wrongful. However, exceptions are provided for the cases envisaged in articles 60 and 61, which deal respectively with coercion of an international organization by a State and with international responsibility in case of a member State circumventing one of its international obligations by taking advantage of the competence of an international organization.

(4) According to articles 61 and 62, the State that incurs responsibility in connection with the act of an international organization is necessarily a member of that organization. In the cases envisaged in articles 58, 59 and 60, the responsible State may or may not be a member.

(5) The present Part does not address the question of responsibility that may arise for entities other than States that are also members of an international organization. Chapter IV of Part Two of the present draft articles already considers the responsibility that an international organization may incur when it aids or assists or directs and controls in the commission of an internationally wrongful act of another international organization of which the former organization is a member. The same chapter also deals with coercion by an international organization that is a member of the coerced organization. Article 18 considers further cases of responsibility of international organizations as members of another international organization. Questions relating to the responsibility of entities, other than States or international organizations, that are also members of international organizations fall outside the scope of the present draft articles.

Article 58
Aid or assistance by a State in the commission of an internationally wrongful act by an international organization

1. 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) the 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.

2. An act by a State member of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of that State under the terms of this article.

Commentary

(1) The present article addresses a situation parallel to the one covered in article 14, which concerns aid or assistance by an international organization in the commission of an internationally wrongful act by another international organization. Both articles closely follow the text of article 16 on the responsibility of States for internationally wrongful acts.[340]

---

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

[337] *Ibid.*, p. 139, para. 6.

[338] It is to be noted that practice includes examples of a non-injured international organization taking countermeasures against an allegedly responsible State. See, for instance, the measures taken by the Council of the European Union against Burma/Myanmar in view of "severe and systematic violations of human rights in Burma". *Official Journal of the European Communities*, 14 May 2000, *L* 122, pp. 1 and 29.

[339] *Yearbook ... 2001*, vol. II (Part Two), p. 141.

[340] *Ibid.*, p. 65.

(2) Aid or assistance by a State could constitute a breach of an obligation that the State has acquired under a primary norm. For example, a nuclear-weapon State Party to the Treaty on the Non-Proliferation of Nuclear Weapons[341] would have to refrain from assisting a non-nuclear-weapon State in the acquisition of nuclear weapons, and the same would seem to apply to assistance given to an international organization of which some non-nuclear-weapon States are members.

(3) The present article uses the same wording as article 16 on the responsibility of States for internationally wrongful acts, because it would be hard to find reasons for applying a different rule when the aided or assisted entity is an international organization rather than a State. Paragraph 1 sets under (a) and (b) the conditions for international responsibility to arise for the aiding or assisting State. It is to be noted that no distinction is made with regard to the temporal relation between the conduct of the State and the internationally wrongful act of the international organization.

(4) A State aiding or assisting an international organization in the commission of an internationally wrongful act may or may not be a member of that organization. Should the State be a member, the possibility that aid or assistance could result from conduct taken by the State within the framework of the organization cannot be totally excluded. However, as specified in paragraph 2, an act by a member State which is done in accordance with the rules of the organization does not as such engage the international responsibility of that State for aid or assistance. These criteria could entail some difficulties in ascertaining whether aid or assistance has taken place in borderline cases. The factual context such as the size of membership and the nature of the involvement will probably be decisive.

(5) The fact that a State does not *per se* incur international responsibility for aiding or assisting an international organization of which it is a member when it acts in accordance with the rules of the organization does not imply that the State would then be free to ignore its international obligations. These obligations may well encompass the conduct of a State when it acts within an international organization. Should a breach of an international obligation be committed by a State in this capacity, the State would not incur international responsibility under the present article, but rather under the articles on the responsibility of States for internationally wrongful acts.

(6) The heading of article 16 on the responsibility of States for internationally wrongful acts has been slightly adapted, by adding "by a State" to the words "aid or assistance", in order to distinguish the heading of the present article from that of article 14 of the present draft articles.

Article 59
Direction and control exercised by a State over the commission of an internationally wrongful act by an international organization

1. 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) the 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.

2. An act by a State member of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of that State under the terms of this article.

Commentary

(1) While article 15 relates to direction and control exercised by an international organization in the commission of an internationally wrongful act by another international organization, the present article considers the case in which direction and control are exercised by a State. Both articles closely follow the text of article 17 on the responsibility of States for internationally wrongful acts.[342]

(2) The State directing and controlling an international organization in the commission of an internationally wrongful act may or may not be a member of that organization. As in the case of aid or assistance, which is considered in article 58 and the related commentary, a distinction has to be made between participation by a member State in the decision-making process of the organization according to its pertinent rules, and direction and control which would trigger the application of the present article. Since the latter conduct could take place within the framework of the organization, in borderline cases one would face the same problems that have been referred to in the commentary on the previous article.

(3) Paragraph 1 sets under (a) and (b) the conditions for the responsibility of the State to arise with the same wording that is used in article 17 on the responsibility of States for internationally wrongful acts. There are no reasons for making a distinction between the case in which a State directs and controls another State in the commission of an internationally wrongful act and the case in which the State similarly directs and controls an international organization.

(4) As in article 58, paragraph 2 specifies that an act of a member State done in accordance with the rules of the organization does not as such cause the responsibility of that State for direction and control in the commission of an internationally wrongful act.

(5) The heading of the present article has been slightly adapted from article 17 on the responsibility of States for internationally wrongful acts by adding the words "by a State", in order to distinguish it from the heading of article 15 of the present articles.

Article 60
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 the coerced international organization; and

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

Commentary

(1) Article 16 deals with coercion by an international organization in the commission of what would be, but for the coercion, a wrongful act of another international organization. The present article concerns coercion by a State in a similar situation. Both articles closely

[341] United Nations, *Treaty Series*, vol. 729, p. 161.

[342] *Yearbook ... 2001*, vol. II (Part Two), pp. 67–68.

follow article 18 on the responsibility of States for internationally wrongful acts.[343] The existence of a direct link between the act of coercion and the act of the coerced State or international organization is in any event assumed.

(2) The conditions that the present article sets forth for international responsibility to arise are identical to those that are listed in article 18 on the responsibility of States for internationally wrongful acts. Also with regard to coercion, there is no reason to provide a different rule from that which applies in the relations between States.

(3) The State coercing an international organization may be a member of that organization. The present article does not contain a paragraph similar to paragraph 2 of articles 58 and 59 because it seems highly unlikely that an act of coercion could be taken by a State member of an international organization in accordance with the rules of the organization. However, one cannot assume that the act of coercion will necessarily be unlawful.

(4) The heading of the present article slightly adapts that of article 18 on the responsibility of States for internationally wrongful acts by introducing the words "by a State": this in order to distinguish it from the heading of article 16 of the present draft.

Article 61
Circumvention of international obligations of a State member of an international organization

1. A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.

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

Commentary

(1) The present article concerns a situation which is to a certain extent analogous to those considered in article 17. According to that article, an international organization incurs international responsibility when it circumvents one of its international obligations by adopting a decision binding a member State or international organization to commit an act that would be internationally wrongful if committed by the former organization. Article 17 also covers circumvention through authorizations given to member States or international organizations. The present article concerns circumvention by a State of one of its international obligations when it avails itself of the separate legal personality of an international organization of which it is a member.

(2) As the commentary on article 17 explains, the existence of an intention to avoid compliance is implied in the use of the term "circumvention".[344] International responsibility will not arise when the act of the international organization, which would constitute a breach of an international obligation if done by the State, has to be regarded as the unintended result of the member State's conduct. On the other hand, the present article does not refer only to cases in which the member State may be said to be abusing its rights.[345]

(3) The jurisprudence of the European Court of Human Rights provides a few examples of *dicta* affirming the possibility of States being held responsible when they fail to ensure compliance with their obligations under the European Convention of Human Rights in a field where they have attributed competence to an international organization. In *Waite and Kennedy v. Germany* the Court examined the question whether the right of access to justice had been unduly impaired by a State that granted immunity to the European Space Agency, of which it was a member, in relation to claims concerning employment. The Court said that:

> "Where States establish international organizations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organizations certain competences and accord them immunities, there may be implications as to protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution."[346]

(4) In *Bosphorus Hava Yollary Turizm ve Ticaret Anonim Sirketi v. Ireland* the Court took a similar approach with regard to a State measure implementing a regulation of the European Community. The Court said that a State could not free itself from its obligations under the European Convention of Human Rights by transferring functions to an international organization, because:

> "absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention; the guarantees of the Convention could be limited or excluded at will, thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards [...]. The State is considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention [...]."[347]

---

[343] *Ibid.*, p. 69.

[344] Para. (4) of the commentary on article 17 above.

[345] In article 5 (b) of a resolution adopted in 1995 at Lisbon on the "Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations towards Third Parties", the Institute of International Law stated: "In particular circumstances, members of an international organization may be liable for its obligations in accordance with a relevant general principle of law, such as […] the abuse of rights." *Annuaire de l'Institut de Droit International*, vol. 66-II (1996), p. 445.

[346] Judgment of 18 February 1999, *ECHR Reports*, 1999-I, p. 410, para. 67. The Court concluded that the "essence of the applicant's 'right to a court'" under the Convention had not been impaired (p. 412, para. 73). After examining the dictum in *Waite and Kennedy v. Germany* reproduced above, I. Brownlie, "The Responsibility of States for the Acts of International Organizations", in: M. Ragazzi (ed.), *International Responsibility Today. Essays in memory of Oscar Schachter* (Leiden/Boston: Nijhoff, 2005), p. 355 at p. 361, noted that, "whilst the context is that of human rights, the principle invoked would seem to be general in its application". Views similar to those of the European Court of Human Rights were expressed by A. Di Blase, "Sulla responsabilità internazionale per attività dell'ONU", *Rivista di Diritto Internazionale*, vol. 57 (1974), p. 270 at pp. 275–276; M. Hirsch, footnote 107 above, p. 179; K. Zemanek, in *Annuaire de l'Institut de Droit International*, vol. 66-I (1995), p. 329; P. Sands, in: P. Sands and P. Klein (eds.), *Bowett's Law of International Institutions* (London: Sweet & Maxwell, 2001), p. 524; D. Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (Oxford: Oxford University Press, 2005), p. 64; O. De Schutter, "Human Rights and the Rise of International Organisations: The Logic of Sliding Scales in the Law of International Responsibility", in: J. Wouters, E. Brems, S. Smis and P. Schmitt (eds.), *Accountability for Human Rights Violations by International Organisations* (Antwerp/Oxford/Portland: Intersentia, 2010), p. 51.

[347] Judgment of 30 June 2005, *ECHR Reports*, 2005-VI, pp. 157–158, para. 154. The Court found that the defendant State had not incurred responsibility because the relevant fundamental rights were

(5) In a more recent case before the European Court of Human Rights, *Gasparini v. Italy and Belgium*, an application had been made against these two States by two employees of NATO alleging the inadequacy of the settlement procedure concerning employment disputes with NATO. The Court said that States, when they transfer part of their sovereign powers to an organization of which they are members, are under an obligation to see that the rights guaranteed by the Convention receive within the organization an "equivalent protection" to that ensured by the Convention mechanism. As in the two previous decisions referred to in the preceding paragraphs, the Court found that this obligation had not been breached, in this case because the procedure within NATO was not tainted with "manifest insufficiency".[348]

(6) According to the present article, three conditions are required for international responsibility to arise for a member State circumventing one of its international obligations. The first one is that the international organization has competence in relation to the subject matter of an international obligation of a State. This could occur through the transfer of State functions to an organization of integration. However, the cases covered are not so limited. Moreover, an international organization could be established in order to exercise functions that States may not have. What is relevant for international responsibility to arise under the present article, is that the international obligation covers the area in which the international organization is provided with competence. The obligation may specifically relate to that area or be more general, as in the case of obligations under treaties for the protection of human rights.

(7) A second condition for international responsibility to arise according to the present article is that there be a significant link between the conduct of the circumventing member State and that of the international organization. The act of the international organization has to be caused by the member State.

(8) The third condition for international responsibility to arise is that the international organization commits an act that, if committed by the State, would have constituted a breach of the obligation. An act that would constitute a breach of the obligation has to be committed.

(9) Paragraph 2 explains that the present article does not require the act to be internationally wrongful for the international organization concerned. Circumvention is more likely to occur when the international organization is not bound by the international obligation. However, the mere existence of an international obligation for the organization does not necessarily exempt the State from international responsibility.

(10) Should the act of the international organization be wrongful and be caused by the member State, there could be an overlap between the cases covered in article 61 and those considered in articles 58, 59 and 60. This would occur when the conditions set by one of these articles are fulfilled. However, such an overlap would not be problematic, because it would only imply the existence of a plurality of bases for holding the State responsible.

Article 62
Responsibility of a State member of an international organization for an internationally wrongful act of that organization

1. 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 towards the injured party; or

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

2. Any international responsibility of a State under paragraph 1 is presumed to be subsidiary.

Commentary

(1) A State member of an international organization may be held responsible in accordance with articles 58 to 61. The present article envisages two additional cases in which member States incur responsibility. Member States may furthermore be responsible according to the articles on the responsibility of States for internationally wrongful acts,[349] but this lies beyond the scope of the present draft articles.

(2) Consistently with the approach generally taken by the present draft articles as well as by the articles on the responsibility of States for internationally wrongful acts, article 62 positively identifies those cases in which a State incurs responsibility and does not say when responsibility is not deemed to arise. While it would be thus inappropriate to include in the draft a provision stating a residual, and negative, rule for those cases in which responsibility is not considered to arise for a State in connection with the act of an international organization, such a rule is clearly implied. Therefore, membership does not as such entail for member States international responsibility when the organization commits an internationally wrongful act.

(3) The view that member States cannot generally be regarded as internationally responsible for the internationally wrongful acts of the organization has been defended by several States in contentious cases. The German Government recalled in a written comment that it had:

> "advocated the principle of separate responsibility before the European Commission of Human Rights (*M. & Co.*), the European Court of Human Rights (*Senator Lines*) and the International Court of Justice (*Legality of Use of Force*) and [had] rejected responsibility for reason of membership for measures taken by the European Community, NATO and the United Nations".[350]

(4) A similar view was taken by the majority opinions in the British courts in the litigation concerning the International Tin Council (ITC), albeit incidentally in disputes concerning private contracts. The clearest expressions were given by Lord Kerr in the Court of Appeal and by Lord Templeman in the House of Lords. Lord Kerr said that he could not:

> "find any basis for concluding that it has been shown that there is any rule of international law, binding upon the member States of the ITC, whereby they can be held liable — let alone jointly and severally — in any national court to the creditors of the ITC for the debts of the ITC resulting from contracts concluded by the ITC in its own name."[351]

protected within the European Community "in a manner which can be considered at least equivalent to that for which the Convention provides", p. 158, para. 155.

348 European Court of Human Rights, application No. 10750/03, decision of 12 May 2009. Issued in French; text available at www.rtdh.eu/pdf/20090512_gasparini_c_italie.pdf.

349 This would apply to the case envisaged by the Institute of International Law in article 5 (c) (ii) of its resolution on the "Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations towards Third Parties": the case that "the international organization has acted as the agent of the State, in law or in fact". *Annuaire de l'Institut de Droit International*, vol. 66-II (1996), p. 445.

350 A/CN.4/556, sect. O.

351 Judgment of 27 April 1988, *Maclaine Watson & Co. Ltd. v. Department of Trade and Industry*; *J.H. Rayner* (*Mincing Lane*) *Ltd. v. Department of Trade and Industry and Others*, ILR, vol. 80, p. 109.

With regard to an alleged rule of international law imposing on "States members of an international organization, joint and several liability for the default of the organization in the payment of its debts unless the treaty which establishes the international organization clearly disclaims any liability on the part of the members", Lord Templeman found that:

> "No plausible evidence was produced of the existence of such a rule of international law before or at the time of ITA6 [the Sixth International Tin Agreement] in 1982 or afterwards."[352]

(5) Although writers are divided on the question of responsibility of States when an international organization of which they are members commits an internationally wrongful act, it is noteworthy that the Institute of International Law adopted in 1995 a resolution in which it took the position that:

> "Save as specified in article 5, there is no general rule of international law whereby States members are, due solely to their membership, liable, concurrently or subsidiarily, for the obligations of an international organization of which they are members."[353]

(6) The view that member States are not in general responsible does not rule out that there are certain cases, other than those considered in the previous articles, in which a State would be responsible for the internationally wrongful act of the organization. The least controversial case is that of acceptance of international responsibility by the States concerned. This case is stated in subparagraph (a). No qualification is given to acceptance. This is intended to mean that acceptance may be expressly stated or implied and may occur either before or after the time when responsibility arises for the organization.

(7) In his judgment in the Court of Appeal concerning the International Tin Council, Lord Ralph Gibson referred to acceptance of responsibility in the "constituent document".[354] One can certainly envisage that acceptance results from the constituent instrument of the international organization or from other rules of the organization. However, member States would then incur international responsibility towards a third party only if their acceptance produced legal effects in their relations to the third party.[355] It could well be that member States only bind themselves towards the organization or agree to provide the necessary financial resources as an internal matter.[356] Thus, paragraph 1 (a) specifies that acceptance of responsibility only operates if it is made "towards the injured party".

(8) Paragraph 1 (b) envisages a second case of responsibility of member States: when the conduct of member States has led the third party to rely on the responsibility of member States. This occurs, for instance, when the members lead a third party reasonably to assume that they would stand in if the responsible organization did not have the necessary funds for making reparation.[357]

(9) An example of responsibility of member States based on reliance engendered by the conduct of member States was provided by the second arbitral award in the dispute concerning Westland Helicopters. The panel found that the special circumstances of the case invited:

> "the trust of third parties contracting with the organization as to its ability to cope with its commitments because of the constant support of the member States".[358]

(10) Reliance is not necessarily based on an implied acceptance. It may also reasonably arise from circumstances which cannot be taken as an expression of an intention of the member States to bind themselves. Among the factors that have been suggested as relevant is the small size of membership,[359] although this factor would have to be considered globally, together with all the other pertinent factors. There is clearly no presumption that a third party should be able to rely on the responsibility of member States.

(11) Subparagraphs (a) and (b) use the term "injured party". In the context of international responsibility, this injured party would in most cases be another State or another international organization. However, it could also be a subject of international law other than a State or an international organization. While Part One of the articles on the responsibility of States for internationally wrongful acts covers the breach of any obligation that a State may have under international law, Part Two, which concerns the content of international responsibility, only deals with relations between States, but contains in article 33 a saving clause concerning the rights that may arise for "any person or entity other than a State".[360] Similarly, subparagraph (b) is intended to cover any State, international organization, person or entity with regard to whom a member State may incur international responsibility.

(12) According to subparagraphs (a) and (b) international responsibility arises only for those member States who accepted that responsibility or whose conduct led to reliance.

---

[352] Judgment of 26 October 1989, *Australia & New Zealand Banking Group Ltd. and Others v. Commonwealth of Australia and 23 Others*; *Amalgamated Metal Trading Ltd. and Others v. Department of Trade and Industry and Others*; *Maclaine Watson & Co. Ltd. v. Department of Trade and Industry*; *Maclaine Watson & Co. Ltd. v. International Tin Council*, *ILM*, vol. 29 (1990), p. 675.

[353] Article 6 (a). *Annuaire de l'Institut de Droit International*, vol. 66-II (1996), p. 445. Article 5 reads as follows: "(a) The question of the liability of the members of an international organization for its obligations is determined by reference to the Rules of the organization; (b) In particular circumstances, members of an international organization may be liable for its obligations in accordance with a relevant general principle of law, such as acquiescence or the abuse of rights; (c) In addition, a member State may incur liability to a third party (i) through undertakings by the State, or (ii) if the international organization has acted as the agent of the State, in law or in fact."

[354] Judgment of 27 April 1988, *Maclaine Watson & Co. Ltd. v. Department of Trade and Industry*; *J.H. Rayner* (*Mincing Lane*) *Ltd. v. Department of Trade and Industry and Others*, *ILR*, vol. 80, p. 172.

[355] The conditions set by article 36 of the Vienna Convention on the Law of Treaties would then apply. United Nations, *Treaty Series*, vol. 1155, p. 331.

[356] For instance, article 300, para. 7, of the Treaty establishing the European Community read as follows: "Agreements concluded under the conditions set out in this article shall be binding on the institutions of the Community and on Member States." The European Court of Justice pointed out that this provision did not imply that member States were bound towards non-member States and would as a consequence incur responsibility towards them under international law. See judgment of 9 August 1994, *France v. Commission*, Case C-327/91, *European Court of Justice Reports*, 1994, p. I-3641 at p. I-3674, para. 25.

[357] C.F. Amerasinghe, "Liability to Third Parties of Member States of International Organizations: Practice, Principle and Juridical Precedent", *International and Comparative Law Quarterly*, vol. 40 (1991), p. 259 at p. 280, suggested that, on the basis of "policy reasons", "the presumption of non-liability could be displaced by evidence that members (some or all of them) or the organization with the approval of members gave creditors reason to assume that members (some or all of them) would accept concurrent or secondary liability, even without an express or implied intention to that effect in the constituent instrument". P. Klein, footnote 107 above, pp. 509–510 also considered that conduct of member States may imply that they provide a guarantee for the respect of obligations arising for the organization.

[358] Para. 56 of the award of 21 July 1991, quoted by R. Higgins, "The legal consequences for Member States of non-fulfilment by international organizations of their obligations towards third parties: provisional report", *Annuaire de l'Institut de Droit International*, vol. 66-I (1995), p. 373 at p. 393.

[359] See the comment made by Belarus, A/C.6/60/SR.12, para. 52.

[360] *Yearbook ... 2001*, vol. II (Part Two), p. 94.

Even when acceptance of responsibility results from the constituent instrument of the organization, this could provide for the responsibility only of certain member States.

(13) Paragraph 2 addresses the nature of the responsibility that is entailed in accordance with paragraph 1. The international responsibility of the international organization of which the State is a member remains unaffected. Acceptance of responsibility by a State could entail either subsidiary responsibility or joint and several responsibility. The same applies to responsibility based on reliance. As a general rule, only a rebuttable presumption may be stated. In view of the exceptional character of the cases in which responsibility arises according to the present article, it is reasonable to presume that, when member States accept responsibility, only subsidiary responsibility, which has a supplementary character, is intended.[361]

Article 63
Effect of this Part

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

Commentary

(1) The present article finds a parallel in article 19, according to which the chapter on responsibility of an international organization in connection with the act of a State or another international organization 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".

(2) The present article is a saving clause relating to the whole Part. It corresponds to article 19 on the responsibility of States for internationally wrongful acts.[362] The purpose of that provision, which concerns only relations between States, is first to clarify that the responsibility of the State aiding or assisting, or directing and controlling another State in the commission of an internationally wrongful act is without prejudice to the responsibility that the State committing the act may incur. Moreover, as the commentary on article 19 on the responsibility of States for internationally wrongful acts explains, the article is also intended to make it clear "that the provisions [of the chapter] are without prejudice to any other basis for establishing the responsibility of the assisting, directing or coercing State under any rule of international law defining particular conduct as wrongful" and to preserve the responsibility of any other State "to whom the internationally wrongful conduct might also be attributable under other provisions of the articles".[363]

(3) There appears to be less need for an analogous "without prejudice" provision in Part Five. It is hardly necessary to save responsibility that may arise for States according to the articles on the responsibility of States for internationally wrongful acts and not according to the present draft articles. On the contrary, a "without prejudice" provision analogous to that of article 19 on the responsibility of States for internationally wrongful acts would have some use if it concerned international organizations. The omission in this Part of a provision analogous to article 19 on the responsibility of States for internationally wrongful acts could have raised doubts. Moreover, at least in the case of a State aiding or assisting or directing and controlling an international organization in the commission of an internationally wrongful act, there is some use in setting forth that the responsibility of the State is without prejudice to the responsibility of the international organization that commits the act.

(4) In the present article the references to the term "State" in article 19 on the responsibility of States for internationally wrongful acts have been replaced by references to the term "international organization".

Part Six
General provisions

Commentary

This Part comprises general provisions that are designed to apply to issues concerning both the international responsibility of an international organization (Parts Two, Three and Four) and the responsibility of a State in connection with the conduct of an international organization (Part Five).

Article 64
Lex specialis

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or a State in connection with the conduct of an international organization, are governed by special rules of international law. Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members.

Commentary

(1) Special rules relating to international responsibility may supplement more general rules or may replace them, in whole or in part. These special rules may concern the relations that certain categories of international organizations or one specific international organization have with some or all States or other international organizations. They may also concern matters addressed in Part Five of the present articles.

(2) It would be impossible to try and identify each of the special rules and their scope of application. By way of illustration, it may be useful to refer to one issue which has given rise in practice to a variety of opinions concerning the possible existence of a special rule: that of the attribution to the European Community (now European Union) of conduct of States members of the Community when they implement binding acts of the Community. According to the Commission of the European Union, that conduct would have to be attributed to the Community; the same would apply to "other potentially similar organizations".[364]

---

[361] In the Judgment of 27 April 1988 referred to above (footnote 351), Lord Ralph Gibson held that, in case of acceptance of responsibility, "direct secondary liability has been assumed by the members", p. 172.

[362] *Yearbook ... 2001*, vol. II (Part Two), p. 70.

[363] *Ibid.*, pp. 70–71, paras. (2) and (3).

[364] A/C.6/56/SR.21, para. 18. This view was developed by P.J. Kuijper and E. Paasivirta, "Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organizations", *International Organizations Law Review*, vol. 1 (2004), p. 111 at p. 127, by S. Talmon, "Responsibility of International Organizations: Does the European Community Require Special Treatment?", in: M. Ragazzi (ed.), *International Responsibility Today: Essays in memory of Oscar Schachter* (Leiden/Boston: Martinus Nijhoff, 2005), p. 405 at pp. 412–414 and by F. Hoffmeister, "Litigating against the European Union and its member States: who responds under the ILC's draft articles on international responsibility of international organizations?", *European Journal of International Law*, vol. 21 (2010), p. 723.

(3) Several cases concern the relations between the European Community and its member States. In *M. & Co. v. Germany* the European Commission of Human Rights held:

> "The Commission first recalls that it is in fact not competent *ratione personae* to examine proceedings before or decisions of organs of the European Communities [...] This does not mean, however, that by granting executory power to a judgment of the European Court of Justice the competent German authorities acted quasi as Community organs and are to that extent beyond the scope of control exercised by the conventional organs."[365]

(4) A different view was taken in *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* by a World Trade Organization (WTO) panel, which:

> "accepted the European Communities' explanation of what amounts to its *sui generis* domestic constitutional arrangements that Community laws are generally not executed through authorities at Community level but rather through recourse to the authorities of its member States which, in such a situation, 'act de facto as organs of the Community, for which the Community would be responsible under WTO law and international law in general'".[366]

This approach implies admitting the existence of a special rule on attribution, to the effect that, in the case of a European Community act binding a member State, State authorities would be considered as acting as organs of the Community.

(5) The issue came before the European Court of Human Rights in *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*. The Court said in its decision on admissibility in this case that it would examine at a later stage of the proceedings:

> "whether the impugned acts can be considered to fall within the jurisdiction of the Irish State within the meaning of article 1 of the Convention, when that State claims that it was obliged to act in furtherance of a directly effective and obligatory EC Regulation".[367]

In its unanimous judgment on the merits of 30 June 2005 the Grand Chamber of the Court held:

> "In the present case it is not disputed that the act about which the applicant complained, the detention of the aircraft leased by it for a period of time, was implemented by the authorities of the respondent State on its territory following a decision to impound of the Irish Minister for Transport. In such circumstances the applicant company, as the addressee of the impugned act fell within the 'jurisdiction' of the Irish State, with the consequence that its complaint about that act is compatible *ratione loci*, *personae* and *materiae* with the provisions of the Convention."[368]

[365] Decision of 9 February 1990, Application No. 13258/87, *Decisions and Reports*, vol. 64, p. 138.

[366] WTO Panel Report, *European Communities — Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs — Complaint by the United States ("EC – Trademarks and Geographical Indications (US)")*, WT/DS174/R, adopted on 20 April 2005, para. 7.725. With regard to a claim brought against the European Communities, the panel report on *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R and WT/DS293/R, adopted on 29 September 2006, para. 7.101, reiterated the same view.

[367] Decision of 13 September 2001, para. A.

[368] *ECHR Reports*, 2005-VI, p. 152, para. 137.

(6) The decision of the European Court of Human Rights in *Kokkelvisserij v. Netherlands* considered "the guarantees offered by the European Community — especially the European Court of Justice — in discharging its own jurisdictional tasks" with regard to a preliminary reference by a court in the Netherlands. The Court reiterated its view that the conduct of an organ of a member State should in any event by attributed to that State. The Court said:

> "A Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations."[369]

(7) The present article is modelled on article 55 on the responsibility of States for internationally wrongful acts.[370] It is designed to make it unnecessary to add to many of the preceding articles a proviso such as "subject to special rules".

(8) Given the particular importance that the rules of the organization are likely to have as special rules concerning international responsibility in the relations between an international organization and its members, a specific reference to the rules of the organization has been added at the end of the present article. The rules of the organization may, expressly or implicitly, govern various aspects of the issues dealt with in Parts Two to Five. For instance, they may affect the consequences of a breach of international law that an international organization may commit when the injured party is a member State or international organization. The relevance of special rules with regard to the issue of countermeasures has been considered in articles 22 and 52 and the related commentaries.

Article 65
Questions of international responsibility not regulated by these articles

> The applicable rules of international law continue to govern questions concerning the responsibility of an international organization or a State for an internationally wrongful act to the extent that they are not regulated by these draft articles.

Commentary

(1) Like article 56 on the responsibility of States for internationally wrongful acts,[371] the present article points to the fact that the present draft articles do not address all the issues that may be relevant in order to establish whether an international organization or a State is responsible and what international responsibility entails. This also in view of possible developments on matters that are not yet governed by international law.

(2) Since issues relating to the international responsibility of a State are considered in the present draft articles only to the extent that they are addressed in Part Five, it may seem unnecessary to specify that other matters concerning the international responsibility of a State — for instance, questions relating to attribution of conduct to a State — continue to be governed by the applicable rules of international law, including the principles and rules set forth in the articles on the responsibility of States for internationally wrongful acts. However, if the present article only mentioned international organizations, the omission of a reference to States could lead to unintended implications. Therefore, the present article reproduces article 56 on the responsibility of States for internationally wrongful acts with the addition of a reference to "an international organization".

[369] Decision of 20 January 2009, application No. 13645/05.

[370] *Yearbook ...*, vol. II (Part Two), p. 140.

[371] *Ibid.*, p. 141.

Article 66
Individual responsibility

These draft articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of an international organization or a State.

Commentary

(1) With the addition of the reference to "an international organization", the present article reproduces article 58 on the responsibility of States for internationally wrongful acts.[372] The statement may appear obvious, since the scope of the present draft articles, as defined in article 1, only concern the international responsibility of an international organization or a State. However, it may not be superfluous as a reminder of the fact that issues of individual responsibility may arise under international law in connection with a wrongful act of an international organization or a State and that these issues are not regulated in the present draft.

(2) Thus, the fact that the conduct of an individual is attributed to an international organization or a State does not exempt that individual from the international criminal responsibility that he or she may incur for his or her conduct. On the other hand, when an internationally wrongful act of an international organization or a State is committed, the international responsibility of individuals that have been instrumental to the wrongful act cannot be taken as implied. However, in certain cases the international criminal responsibility of some individuals may arise, for instance when they have been instrumental to the serious breach of an obligation under a peremptory norm in the circumstances envisaged in article 41.

(3) Individual responsibility could also relate to damage caused by an act of a person acting on behalf of an international organization. For instance, when the victims of an international crime suffer damage, the responsible individual may have an obligation to make reparation.

Article 67
Charter of the United Nations

These draft articles are without prejudice to the Charter of the United Nations.

Commentary

(1) The present article reproduces article 59 on the responsibility of States for internationally wrongful acts,[373] which sets forth a "without prejudice" provision concerning the Charter of the United Nations. The reference to the Charter includes obligations that are directly stated in the Charter as well as those flowing from binding decisions of the Security Council, which according to the International Court of Justice similarly prevail over other obligations under international law on the basis of article 103 of the United Nations Charter.[374] According to article 103 of the Charter, "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail".

(2) Insofar as issues of State responsibility are covered in the present draft articles, there could be no reason to query the applicability of the same "without prejudice" provision as the corresponding article on the responsibility of States for internationally wrongful acts. A question may be raised with regard to the responsibility of international organizations, since they are not members of the United Nations and therefore have not formally agreed to be bound by the Charter. However, even if the prevailing effect of obligations under the Charter may have a legal basis for international organizations that differs from the legal basis applicable to States,[375] one may reach the conclusion that the Charter has a prevailing effect also with regard to international organizations. For instance, when establishing an arms embargo which requires all its addressees not to comply with an obligation to supply arms that they may have accepted under a treaty, the Security Council does not distinguish between States and international organizations.[376] It is at any event not necessary, for the purpose of the present draft, to determine the extent to which the international responsibility of an international organization is affected, directly or indirectly, by the Charter of the United Nations.

(3) The present article is not intended to exclude the applicability of the principles and rules set forth in the preceding articles to the international responsibility of the United Nations.

---

[372] *Ibid.*, p. 142.

[373] *Ibid.*, p. 143.

[374] Orders on provisional measures in the cases *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom; Libyan Arab Jamahiriya v. United States of America)*, *I.C.J. Reports 1992*, p. 15 and p. 126.

[375] One explanation is that Article 103 of the United Nations Charter prevails over the constituent instruments of the international organizations. See R.H. Lauwaars, "The Interrelationship between United Nations Law and the Law of Other International Organizations", *Michigan Law Review*, vol. 82 (1983–1984), p. 1604 ff.

[376] As was noted by B. Fassbender, "The United Nations Charter as Constitution of the International Community", *Columbia Journal of Transnational Law*, vol. 36 (1998), p. 529 at p. 609, "intergovernmental organizations are generally required to comply with Council resolutions".

United Nations Security Council resolution 1244 (1999) of 10 June 1999

UNITED NATIONS **S**

Security Council

Distr.
GENERAL

S/RES/1244 (1999)
10 June 1999

RESOLUTION 1244 (1999)

Adopted by the Security Council at its 4011th meeting,
on 10 June 1999

The Security Council,

Bearing in mind the purposes and principles of the Charter of the United Nations, and the primary responsibility of the Security Council for the maintenance of international peace and security,

Recalling its resolutions 1160 (1998) of 31 March 1998, 1199 (1998) of 23 September 1998, 1203 (1998) of 24 October 1998 and 1239 (1999) of 14 May 1999,

Regretting that there has not been full compliance with the requirements of these resolutions,

Determined to resolve the grave humanitarian situation in Kosovo, Federal Republic of Yugoslavia, and to provide for the safe and free return of all refugees and displaced persons to their homes,

Condemning all acts of violence against the Kosovo population as well as all terrorist acts by any party,

Recalling the statement made by the Secretary-General on 9 April 1999, expressing concern at the humanitarian tragedy taking place in Kosovo,

Reaffirming the right of all refugees and displaced persons to return to their homes in safety,

Recalling the jurisdiction and the mandate of the International Tribunal for the Former Yugoslavia,

Welcoming the general principles on a political solution to the Kosovo crisis adopted on 6 May 1999 (S/1999/516, annex 1 to this resolution) and welcoming also the acceptance by the Federal Republic of Yugoslavia of the principles set forth in points 1 to 9 of the paper presented in Belgrade on

2 June 1999 (S/1999/649, annex 2 to this resolution), and the Federal Republic of Yugoslavia's agreement to that paper,

Reaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act and annex 2,

Reaffirming the call in previous resolutions for substantial autonomy and meaningful self-administration for Kosovo,

Determining that the situation in the region continues to constitute a threat to international peace and security,

Determined to ensure the safety and security of international personnel and the implementation by all concerned of their responsibilities under the present resolution, and acting for these purposes under Chapter VII of the Charter of the United Nations,

1. Decides that a political solution to the Kosovo crisis shall be based on the general principles in annex 1 and as further elaborated in the principles and other required elements in annex 2;

2. Welcomes the acceptance by the Federal Republic of Yugoslavia of the principles and other required elements referred to in paragraph 1 above, and demands the full cooperation of the Federal Republic of Yugoslavia in their rapid implementation;

3. Demands in particular that the Federal Republic of Yugoslavia put an immediate and verifiable end to violence and repression in Kosovo, and begin and complete verifiable phased withdrawal from Kosovo of all military, police and paramilitary forces according to a rapid timetable, with which the deployment of the international security presence in Kosovo will be synchronized;

4. Confirms that after the withdrawal an agreed number of Yugoslav and Serb military and police personnel will be permitted to return to Kosovo to perform the functions in accordance with annex 2;

5. Decides on the deployment in Kosovo, under United Nations auspices, of international civil and security presences, with appropriate equipment and personnel as required, and welcomes the agreement of the Federal Republic of Yugoslavia to such presences;

6. Requests the Secretary-General to appoint, in consultation with the Security Council, a Special Representative to control the implementation of the international civil presence, and further requests the Secretary-General to instruct his Special Representative to coordinate closely with the international security presence to ensure that both presences operate towards the same goals and in a mutually supportive manner;

7. Authorizes Member States and relevant international organizations to establish the international security presence in Kosovo as set out in point 4 of annex 2 with all necessary means to fulfil its responsibilities under paragraph 9 below;

8. Affirms the need for the rapid early deployment of effective international civil and security presences to Kosovo, and demands that the parties cooperate fully in their deployment;

9. Decides that the responsibilities of the international security presence to be deployed and acting in Kosovo will include:

(a) Deterring renewed hostilities, maintaining and where necessary enforcing a ceasefire, and ensuring the withdrawal and preventing the return into Kosovo of Federal and Republic military, police and paramilitary forces, except as provided in point 6 of annex 2;

(b) Demilitarizing the Kosovo Liberation Army (KLA) and other armed Kosovo Albanian groups as required in paragraph 15 below;

(c) Establishing a secure environment in which refugees and displaced persons can return home in safety, the international civil presence can operate, a transitional administration can be established, and humanitarian aid can be delivered;

(d) Ensuring public safety and order until the international civil presence can take responsibility for this task;

(e) Supervising demining until the international civil presence can, as appropriate, take over responsibility for this task;

(f) Supporting, as appropriate, and coordinating closely with the work of the international civil presence;

(g) Conducting border monitoring duties as required;

(h) Ensuring the protection and freedom of movement of itself, the international civil presence, and other international organizations;

10. Authorizes the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo;

11. Decides that the main responsibilities of the international civil presence will include:

(a) Promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo, taking full account of annex 2 and of the Rambouillet accords (S/1999/648);

(b) Performing basic civilian administrative functions where and as long as required;

(c) Organizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections;

(d) Transferring, as these institutions are established, its administrative responsibilities while overseeing and supporting the consolidation of Kosovo's local provisional institutions and other peace-building activities;

(e) Facilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords (S/1999/648);

(f) In a final stage, overseeing the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement;

(g) Supporting the reconstruction of key infrastructure and other economic reconstruction;

(h) Supporting, in coordination with international humanitarian organizations, humanitarian and disaster relief aid;

(i) Maintaining civil law and order, including establishing local police forces and meanwhile through the deployment of international police personnel to serve in Kosovo;

(j) Protecting and promoting human rights;

(k) Assuring the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo;

12. Emphasizes the need for coordinated humanitarian relief operations, and for the Federal Republic of Yugoslavia to allow unimpeded access to Kosovo by humanitarian aid organizations and to cooperate with such organizations so as to ensure the fast and effective delivery of international aid;

13. Encourages all Member States and international organizations to contribute to economic and social reconstruction as well as to the safe return of refugees and displaced persons, and emphasizes in this context the importance of convening an international donors' conference, particularly for the purposes set out in paragraph 11 (g) above, at the earliest possible date;

14. Demands full cooperation by all concerned, including the international security presence, with the International Tribunal for the Former Yugoslavia;

15. Demands that the KLA and other armed Kosovo Albanian groups end immediately all offensive actions and comply with the requirements for demilitarization as laid down by the head of the international security presence in consultation with the Special Representative of the Secretary-General;

16. Decides that the prohibitions imposed by paragraph 8 of resolution 1160 (1998) shall not apply to arms and related matériel for the use of the international civil and security presences;

17. Welcomes the work in hand in the European Union and other international organizations to develop a comprehensive approach to the economic development and stabilization of the region affected by the Kosovo crisis, including the implementation of a Stability Pact for South Eastern Europe with broad international participation in order to further the promotion of democracy, economic prosperity, stability and regional cooperation;

18. Demands that all States in the region cooperate fully in the implementation of all aspects of this resolution;

19. Decides that the international civil and security presences are established for an initial period of 12 months, to continue thereafter unless the Security Council decides otherwise;

20. Requests the Secretary-General to report to the Council at regular intervals on the implementation of this resolution, including reports from the leaderships of the international civil and security presences, the first reports to be submitted within 30 days of the adoption of this resolution;

21. Decides to remain actively seized of the matter.

Annex 1

Statement by the Chairman on the conclusion of the meeting of the G-8 Foreign Ministers held at the Petersberg Centre on 6 May 1999

The G-8 Foreign Ministers adopted the following general principles on the political solution to the Kosovo crisis:

- Immediate and verifiable end of violence and repression in Kosovo;

- Withdrawal from Kosovo of military, police and paramilitary forces;

- Deployment in Kosovo of effective international civil and security presences, endorsed and adopted by the United Nations, capable of guaranteeing the achievement of the common objectives;

- Establishment of an interim administration for Kosovo to be decided by the Security Council of the United Nations to ensure conditions for a peaceful and normal life for all inhabitants in Kosovo;

- The safe and free return of all refugees and displaced persons and unimpeded access to Kosovo by humanitarian aid organizations;

- A political process towards the establishment of an interim political framework agreement providing for a substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of the KLA;

- Comprehensive approach to the economic development and stabilization of the crisis region.

Annex 2

Agreement should be reached on the following principles to move towards a resolution of the Kosovo crisis:

1. An immediate and verifiable end of violence and repression in Kosovo.

2. Verifiable withdrawal from Kosovo of all military, police and paramilitary forces according to a rapid timetable.

3. Deployment in Kosovo under United Nations auspices of effective international civil and security presences, acting as may be decided under Chapter VII of the Charter, capable of guaranteeing the achievement of common objectives.

4. The international security presence with substantial North Atlantic Treaty Organization participation must be deployed under unified command and control and authorized to establish a safe environment for all people in Kosovo and to facilitate the safe return to their homes of all displaced persons and refugees.

5. Establishment of an interim administration for Kosovo as a part of the international civil presence under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, to be decided by the Security Council of the United Nations. The interim administration to provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants in Kosovo.

6. After withdrawal, an agreed number of Yugoslav and Serbian personnel will be permitted to return to perform the following functions:

- Liaison with the international civil mission and the international security presence;

- Marking/clearing minefields;

- Maintaining a presence at Serb patrimonial sites;

- Maintaining a presence at key border crossings.

7. Safe and free return of all refugees and displaced persons under the supervision of the Office of the United Nations High Commissioner for Refugees and unimpeded access to Kosovo by humanitarian aid organizations.

8. A political process towards the establishment of an interim political framework agreement providing for substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other

countries of the region, and the demilitarization of UCK. Negotiations between the parties for a settlement should not delay or disrupt the establishment of democratic self-governing institutions.

9. A comprehensive approach to the economic development and stabilization of the crisis region. This will include the implementation of a stability pact for South-Eastern Europe with broad international participation in order to further promotion of democracy, economic prosperity, stability and regional cooperation.

10. Suspension of military activity will require acceptance of the principles set forth above in addition to agreement to other, previously identified, required elements, which are specified in the footnote below.[1] A military-technical agreement will then be rapidly concluded that would, among other things, specify additional modalities, including the roles and functions of Yugoslav/Serb personnel in Kosovo:

Withdrawal

- Procedures for withdrawals, including the phased, detailed schedule and delineation of a buffer area in Serbia beyond which forces will be withdrawn;

Returning personnel

- Equipment associated with returning personnel;

- Terms of reference for their functional responsibilities;

- Timetable for their return;

- Delineation of their geographical areas of operation;

- Rules governing their relationship to the international security presence and the international civil mission.

Notes

[1] Other required elements:

- A rapid and precise timetable for withdrawals, meaning, e.g., seven days to complete withdrawal and air defence weapons withdrawn outside a 25 kilometre mutual safety zone within 48 hours;

- Return of personnel for the four functions specified above will be under the supervision of the international security presence and will be limited to a small agreed number (hundreds, not thousands);

- Suspension of military activity will occur after the beginning of verifiable withdrawals;

- The discussion and achievement of a military-technical agreement shall not extend the previously determined time for completion of withdrawals.

United Nations Security Council resolution 1546 (2004) of 8 June 2004

United Nations S/RES/1546 (2004)

Security Council

Distr.: General
8 June 2004

Resolution 1546 (2004)

Adopted by the Security Council at its 4987th meeting, on 8 June 2004

The Security Council,

Welcoming the beginning of a new phase in Iraq's transition to a democratically elected government, and *looking forward* to the end of the occupation and the assumption of full responsibility and authority by a fully sovereign and independent Interim Government of Iraq by 30 June 2004,

Recalling all of its previous relevant resolutions on Iraq,

Reaffirming the independence, sovereignty, unity, and territorial integrity of Iraq,

Reaffirming also the right of the Iraqi people freely to determine their own political future and control their own natural resources,

Recognizing the importance of international support, particularly that of countries in the region, Iraq's neighbours, and regional organizations, for the people of Iraq in their efforts to achieve security and prosperity, and *noting* that the successful implementation of this resolution will contribute to regional stability,

Welcoming the efforts of the Special Adviser to the Secretary-General to assist the people of Iraq in achieving the formation of the Interim Government of Iraq, as set out in the letter of the Secretary-General of 7 June 2004 (S/2004/461),

Taking note of the dissolution of the Governing Council of Iraq, and *welcoming* the progress made in implementing the arrangements for Iraq's political transition referred to in resolution 1511 (2003) of 16 October 2003,

Welcoming the commitment of the Interim Government of Iraq to work towards a federal, democratic, pluralist, and unified Iraq, in which there is full respect for political and human rights,

Stressing the need for all parties to respect and protect Iraq's archaeological, historical, cultural, and religious heritage,

Affirming the importance of the rule of law, national reconciliation, respect for human rights including the rights of women, fundamental freedoms, and democracy including free and fair elections,

04-38116 (E)
0438116

Recalling the establishment of the United Nations Assistance Mission for Iraq (UNAMI) on 14 August 2003, and *affirming* that the United Nations should play a leading role in assisting the Iraqi people and government in the formation of institutions for representative government,

Recognizing that international support for restoration of stability and security is essential to the well-being of the people of Iraq as well as to the ability of all concerned to carry out their work on behalf of the people of Iraq, and *welcoming* Member State contributions in this regard under resolution 1483 (2003) of 22 May 2003 and resolution 1511 (2003),

Recalling the report provided by the United States to the Security Council on 16 April 2004 on the efforts and progress made by the multinational force,

Recognizing the request conveyed in the letter of 5 June 2004 from the Prime Minister of the Interim Government of Iraq to the President of the Council, which is annexed to this resolution, to retain the presence of the multinational force,

Recognizing also the importance of the consent of the sovereign Government of Iraq for the presence of the multinational force and of close coordination between the multinational force and that government,

Welcoming the willingness of the multinational force to continue efforts to contribute to the maintenance of security and stability in Iraq in support of the political transition, especially for upcoming elections, and to provide security for the United Nations presence in Iraq, as described in the letter of 5 June 2004 from the United States Secretary of State to the President of the Council, which is annexed to this resolution,

Noting the commitment of all forces promoting the maintenance of security and stability in Iraq to act in accordance with international law, including obligations under international humanitarian law, and to cooperate with relevant international organizations,

Affirming the importance of international assistance in reconstruction and development of the Iraqi economy,

Recognizing the benefits to Iraq of the immunities and privileges enjoyed by Iraqi oil revenues and by the Development Fund for Iraq, and *noting* the importance of providing for continued disbursements of this fund by the Interim Government of Iraq and its successors upon dissolution of the Coalition Provisional Authority,

Determining that the situation in Iraq continues to constitute a threat to international peace and security,

Acting under Chapter VII of the Charter of the United Nations,

1. *Endorses* the formation of a sovereign Interim Government of Iraq, as presented on 1 June 2004, which will assume full responsibility and authority by 30 June 2004 for governing Iraq while refraining from taking any actions affecting Iraq's destiny beyond the limited interim period until an elected Transitional Government of Iraq assumes office as envisaged in paragraph four below;

2. *Welcomes* that, also by 30 June 2004, the occupation will end and the Coalition Provisional Authority will cease to exist, and that Iraq will reassert its full sovereignty;

3. *Reaffirms* the right of the Iraqi people freely to determine their own political future and to exercise full authority and control over their financial and natural resources;

4. *Endorses* the proposed timetable for Iraq's political transition to democratic government including:

(a) formation of the sovereign Interim Government of Iraq that will assume governing responsibility and authority by 30 June 2004;

(b) convening of a national conference reflecting the diversity of Iraqi society; and

(c) holding of direct democratic elections by 31 December 2004 if possible, and in no case later than 31 January 2005, to a Transitional National Assembly, which will, inter alia, have responsibility for forming a Transitional Government of Iraq and drafting a permanent constitution for Iraq leading to a constitutionally elected government by 31 December 2005;

5. *Invites* the Government of Iraq to consider how the convening of an international meeting could support the above process, and *notes* that it would welcome such a meeting to support the Iraqi political transition and Iraqi recovery, to the benefit of the Iraqi people and in the interest of stability in the region;

6. *Calls on* all Iraqis to implement these arrangements peaceably and in full, and on all States and relevant organizations to support such implementation;

7. *Decides* that in implementing, as circumstances permit, their mandate to assist the Iraqi people and government, the Special Representative of the Secretary-General and the United Nations Assistance Mission for Iraq (UNAMI), as requested by the Government of Iraq, shall:

(a) play a leading role to:

(i) assist in the convening, during the month of July 2004, of a national conference to select a Consultative Council;

(ii) advise and support the Independent Electoral Commission of Iraq, as well as the Interim Government of Iraq and the Transitional National Assembly, on the process for holding elections;

(iii) promote national dialogue and consensus-building on the drafting of a national constitution by the people of Iraq;

(b) and also:

(i) advise the Government of Iraq in the development of effective civil and social services;

(ii) contribute to the coordination and delivery of reconstruction, development, and humanitarian assistance;

(iii) promote the protection of human rights, national reconciliation, and judicial and legal reform in order to strengthen the rule of law in Iraq; and

(iv) advise and assist the Government of Iraq on initial planning for the eventual conduct of a comprehensive census;

8. *Welcomes* ongoing efforts by the incoming Interim Government of Iraq to develop Iraqi security forces including the Iraqi armed forces (hereinafter referred to as "Iraqi security forces"), operating under the authority of the Interim Government of Iraq and its successors, which will progressively play a greater role and ultimately assume full responsibility for the maintenance of security and stability in Iraq;

9. *Notes* that the presence of the multinational force in Iraq is at the request of the incoming Interim Government of Iraq and therefore *reaffirms* the authorization for the multinational force under unified command established under resolution 1511 (2003), having regard to the letters annexed to this resolution;

10. *Decides* that the multinational force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution expressing, inter alia, the Iraqi request for the continued presence of the multinational force and setting out its tasks, including by preventing and deterring terrorism, so that, inter alia, the United Nations can fulfil its role in assisting the Iraqi people as outlined in paragraph seven above and the Iraqi people can implement freely and without intimidation the timetable and programme for the political process and benefit from reconstruction and rehabilitation activities;

11. *Welcomes*, in this regard, the letters annexed to this resolution stating, inter alia, that arrangements are being put in place to establish a security partnership between the sovereign Government of Iraq and the multinational force and to ensure coordination between the two, and *notes also* in this regard that Iraqi security forces are responsible to appropriate Iraqi ministers, that the Government of Iraq has authority to commit Iraqi security forces to the multinational force to engage in operations with it, and that the security structures described in the letters will serve as the fora for the Government of Iraq and the multinational force to reach agreement on the full range of fundamental security and policy issues, including policy on sensitive offensive operations, and will ensure full partnership between Iraqi security forces and the multinational force, through close coordination and consultation;

12. *Decides further* that the mandate for the multinational force shall be reviewed at the request of the Government of Iraq or twelve months from the date of this resolution, and that this mandate shall expire upon the completion of the political process set out in paragraph four above, and *declares* that it will terminate this mandate earlier if requested by the Government of Iraq;

13. *Notes* the intention, set out in the annexed letter from the United States Secretary of State, to create a distinct entity under unified command of the multinational force with a dedicated mission to provide security for the United Nations presence in Iraq, *recognizes* that the implementation of measures to provide security for staff members of the United Nations system working in Iraq would require significant resources, and *calls upon* Member States and relevant organizations to provide such resources, including contributions to that entity;

14. *Recognizes* that the multinational force will also assist in building the capability of the Iraqi security forces and institutions, through a programme of recruitment, training, equipping, mentoring, and monitoring;

15. *Requests* Member States and international and regional organizations to contribute assistance to the multinational force, including military forces, as agreed with the Government of Iraq, to help meet the needs of the Iraqi people for security and stability, humanitarian and reconstruction assistance, and to support the efforts of UNAMI;

16. *Emphasizes* the importance of developing effective Iraqi police, border enforcement, and the Facilities Protection Service, under the control of the Interior Ministry of Iraq, and, in the case of the Facilities Protection Service, other Iraqi ministries, for the maintenance of law, order, and security, including combating terrorism, and *requests* Member States and international organizations to assist the Government of Iraq in building the capability of these Iraqi institutions;

17. *Condemns* all acts of terrorism in Iraq, *reaffirms* the obligations of Member States under resolutions 1373 (2001) of 28 September 2001, 1267 (1999) of 15 October 1999, 1333 (2000) of 19 December 2000, 1390 (2002) of 16 January 2002, 1455 (2003) of 17 January 2003, and 1526 (2004) of 30 January 2004, and other relevant international obligations with respect, inter alia, to terrorist activities in and from Iraq or against its citizens, and specifically *reiterates* its call upon Member States to prevent the transit of terrorists to and from Iraq, arms for terrorists, and financing that would support terrorists, and *re-emphasizes* the importance of strengthening the cooperation of the countries of the region, particularly neighbours of Iraq, in this regard;

18. *Recognizes* that the Interim Government of Iraq will assume the primary role in coordinating international assistance to Iraq;

19. *Welcomes* efforts by Member States and international organizations to respond in support of requests by the Interim Government of Iraq to provide technical and expert assistance while Iraq is rebuilding administrative capacity;

20. *Reiterates* its request that Member States, international financial institutions and other organizations strengthen their efforts to assist the people of Iraq in the reconstruction and development of the Iraqi economy, including by providing international experts and necessary resources through a coordinated programme of donor assistance;

21. *Decides* that the prohibitions related to the sale or supply to Iraq of arms and related materiel under previous resolutions shall not apply to arms or related materiel required by the Government of Iraq or the multinational force to serve the purposes of this resolution, *stresses* the importance for all States to abide strictly by them, and *notes* the significance of Iraq's neighbours in this regard, and *calls upon* the Government of Iraq and the multinational force each to ensure that appropriate implementation procedures are in place;

22. *Notes* that nothing in the preceding paragraph affects the prohibitions on or obligations of States related to items specified in paragraphs 8 and 12 of resolution 687 (1991) of 3 April 1991 or activities described in paragraph 3 (f) of resolution 707 (1991) of 15 August 1991, and *reaffirms* its intention to revisit the mandates of the United Nations Monitoring, Verification, and Inspection Commission and the International Atomic Energy Agency;

23. *Calls on* Member States and international organizations to respond to Iraqi requests to assist Iraqi efforts to integrate Iraqi veterans and former militia members into Iraqi society;

24. *Notes* that, upon dissolution of the Coalition Provisional Authority, the funds in the Development Fund for Iraq shall be disbursed solely at the direction of the Government of Iraq, and *decides* that the Development Fund for Iraq shall be utilized in a transparent and equitable manner and through the Iraqi budget including to satisfy outstanding obligations against the Development Fund for Iraq, that the arrangements for the depositing of proceeds from export sales of petroleum, petroleum products, and natural gas established in paragraph 20 of resolution 1483 (2003) shall continue to apply, that the International Advisory and Monitoring Board shall continue its activities in monitoring the Development Fund for Iraq and shall include as an additional full voting member a duly qualified individual designated by the Government of Iraq and that appropriate arrangements shall be made for the continuation of deposits of the proceeds referred to in paragraph 21 of resolution 1483 (2003);

25. *Decides further* that the provisions in the above paragraph for the deposit of proceeds into the Development Fund for Iraq and for the role of the IAMB shall be reviewed at the request of the Transitional Government of Iraq or twelve months from the date of this resolution, and shall expire upon the completion of the political process set out in paragraph four above;

26. *Decides* that, in connection with the dissolution of the Coalition Provisional Authority, the Interim Government of Iraq and its successors shall assume the rights, responsibilities and obligations relating to the Oil-for-Food Programme that were transferred to the Authority, including all operational responsibility for the Programme and any obligations undertaken by the Authority in connection with such responsibility, and responsibility for ensuring independently authenticated confirmation that goods have been delivered, and *further decides* that, following a 120-day transition period from the date of adoption of this resolution, the Interim Government of Iraq and its successors shall assume responsibility for certifying delivery of goods under previously prioritized contracts, and that such certification shall be deemed to constitute the independent authentication required for the release of funds associated with such contracts, consulting as appropriate to ensure the smooth implementation of these arrangements;

27. *Further decides* that the provisions of paragraph 22 of resolution 1483 (2003) shall continue to apply, except that the privileges and immunities provided in that paragraph shall not apply with respect to any final judgement arising out of a contractual obligation entered into by Iraq after 30 June 2004;

28. *Welcomes* the commitments of many creditors, including those of the Paris Club, to identify ways to reduce substantially Iraq's sovereign debt, *calls on* Member States, as well as internationa1 and regional organizations, to support the Iraq reconstruction effort, *urges* the international financial institutions and bilateral donors to take the immediate steps necessary to provide their full range of loans and other financial assistance and arrangements to Iraq, *recognizes* that the Interim Government of Iraq will have the authority to conclude and implement such agreements and other arrangements as may be necessary in this regard, and *requests* creditors, institutions and donors to work as a priority on these matters with the Interim Government of Iraq and its successors;

29. *Recalls* the continuing obligations of Member States to freeze and transfer certain funds, assets, and economic resources to the Development Fund for Iraq in accordance with paragraphs 19 and 23 of resolution 1483 (2003) and with resolution 1518 (2003) of 24 November 2003;

30. *Requests* the Secretary-General to report to the Council within three months from the date of this resolution on UNAMI operations in Iraq, and on a quarterly basis thereafter on the progress made towards national elections and fulfilment of all UNAMI's responsibilities;

31. *Requests* that the United States, on behalf of the multinational force, report to the Council within three months from the date of this resolution on the efforts and progress of this force, and on a quarterly basis thereafter;

32. *Decides* to remain actively seized of the matter.

Annex

Text of letters from the Prime Minister of the Interim Government of Iraq Dr. Ayad Allawi and United States Secretary of State Colin L. Powell to the President of the Council

5 June 2004

Republic of Iraq
Prime Minister Office

Excellency:

On my appointment as Prime Minister of the Interim Government of Iraq, I am writing to express the commitment of the people of Iraq to complete the political transition process to establish a free, and democratic Iraq and to be a partner in preventing and combating terrorism. As we enter a critical new stage, regain full sovereignty and move towards elections, we will need the assistance of the international community.

The Interim Government of Iraq will make every effort to ensure that these elections are fully democratic, free and fair. Security and stability continue to be essential to our political transition. There continue, however, to be forces in Iraq, including foreign elements, that are opposed to our transition to peace, democracy, and security. The Government is determined to overcome these forces, and to develop security forces capable of providing adequate security for the Iraqi people. Until we are able to provide security for ourselves, including the defence of Iraq's land, sea and air space, we ask for the support of the Security Council and the international community in this endeavour. We seek a new resolution on the Multinational Force (MNF) mandate to contribute to maintaining security in Iraq, including through the tasks and arrangements set out in the letter from Secretary of State Colin Powell to the President of the United Nations Security Council. The Government requests that the Security Council review the mandate of the MNF at the request of the Transitional Government of Iraq, or twelve months from the date on which such a resolution is adopted.

In order to discharge the Iraqi Government's responsibility for security, I intend to establish appropriate security structures that will allow my Government and Iraqi security forces to progressively take on that responsibility. One such structure is the Ministerial Committee for National Security, consisting of myself as the Chair, the Deputy Prime Minister, and the Minister of Defense, Interior, Foreign Affairs, Justice, and Finance. The National Security Advisor, and Director of the Iraqi National Intelligence Service will serve as permanent advisory members of the committee. This forum will set the broad framework for Iraqi security policy. I intend to invite, as appropriate, the MNF commander, his Deputy, or the MNF

His Excellency
Mr. Lauro L. Baja, Jr.
President of the Security Council
United Nations
New York, New York

Commander's designative representative, and other appropriate individuals, to attend and participate as well, and will stand ready to discuss mechanisms of coordination and cooperation with the MNF. Iraqi armed forces will be responsible to the Chief of Staff and Minister of Defense. Other security forces (the Iraqi police, border guards and Facilities Protection Service) will be responsible to the Minister of the Interior or other government ministers.

In addition, the relevant ministers and I will develop further mechanisms for coordination with the MNF. Intend to create with the MNF coordination bodies at national, regional, and local levels, that will include Iraqi security forces commanders and civilian leadership, to ensure that Iraqi security forces will coordinate with the MNF on all security policy and operations issues in order to achieve unity of command of military operations in which Iraqi forces are engaged with MNF. In addition, the MNF and Iraqi government leaders will keep each other informed of their activities, consult regularly to ensure effective allocation and use of personnel, resources and facilities, will share intelligence, and will refer issues up the respective chains of command where necessary, Iraqi security forces will take on progressively greater responsibility as Iraqi capabilities improve.

The structures I have described in this letter will serve as the fora for the MNF and the Iraqi government to reach agreement on the full range of fundamental security and policy issues, including policy on sensitive offensive operations, and will ensure full partnership between Iraqi forces and the MNF, through close coordination and consultation. Since these are sensitive issues for a number of sovereign governments, including Iraq and the United States, they need to be resolved in the framework of a mutual understanding on our strategic partnership. We will be working closely with the MNF leadership in the coming weeks to ensure that we have such an agreed strategic framework.

We are ready to take sovereign responsibility for governing Iraq by June 30. We are well aware of the difficulties facing us, and of our responsibilities to the Iraqi people. The stakes are great, and we need the support of the international community to succeed. We ask the Security Council to help us by acting now to adopt a Security Council resolution giving us necessary support.

I understand that the Co-sponsors intend to annex this letter to the resolution on Iraq under consideration. In the meantime, I request that you provide copies of this letter to members of the Council as quickly as possible.

(*Signed*) Dr. Ayad **Allawi**

The Secretary of State
Washington

5 June 2004

Excellency:

Recognizing the request of the government of Iraq for the continued presence of the Multi-National Force (MNF) in Iraq, and following consultations with Prime Minister Ayad Allawi of the Iraqi Interim Government, I am writing to confirm that the MNF under unified command is prepared to continue to contribute to the maintenance of security in Iraq, including by preventing and deterring terrorism and protecting the territory of Iraq. The goal of the MNF will be to help the Iraqi people to complete the political transition and will permit the United Nations and the international community to work to facilitate Iraq's reconstruction.

The ability of the Iraqi people to achieve their goals will be heavily influenced by the security situation in Iraq. As recent events have demonstrated, continuing attacks by insurgents, including former regime elements, foreign fighters, and illegal militias challenge all those who are working for a better Iraq.

Development of an effective and cooperative security partnership between the MNF and the sovereign Government of Iraq is critical to the stability of Iraq. The commander of the MNF will work in partnership with the sovereign Government of Iraq in helping to provide security while recognizing and respecting its sovereignty. To that end, the MNF stands ready to participate in discussions of the Ministerial Committee for National Security on the broad framework of security policy, as referred to in the letter from Prime Minister of the Interim Government of Iraq Allawi dated June 5, 2004. On the implementation of this policy, recognizing that Iraqi security forces are responsible to the appropriate Iraqi ministers, the MNF will coordinate with Iraqi security forces at all levels — national, regional, and local — in order to achieve unity of command of military operations in which Iraqi forces are engaged with the MNF. In addition, the MNF and the Iraqi government leaders will keep each other informed of their activities, consult regularly to ensure effective allocation and use of personnel, resources, and facilities, will share intelligence, and will refer issues up the respective chains of command where necessary. We will work in the fora described by Prime Minister Allawi in his June 5 letter to reach agreement on the full range of fundamental security and policy issues, including policy on sensitive offensive operations, and will ensure full partnership between MNF and Iraqi forces, through close coordination and consultation.

His Excellency
Mr. Lauro L. Baja, Jr.
President of the Security Council
United Nations
New York, New York

Under the agreed arrangement, the MNF stands ready to continue to undertake a broad range of tasks to contribute to the maintenance of security and to ensure force protection. These include activities necessary to counter ongoing security threats posed by forces seeking to influence Iraq's political future through violence. This will include combat operations against members of these groups, internment where this is necessary for imperative reasons of security, and the continued search for and securing of weapons that threaten Iraq's security. A further objective will be to train and equip Iraqi security forces that will increasingly take responsibility for maintaining Iraq's security. The MNF also stands ready as needed to participate in the provision of humanitarian assistance, civil affairs support, and relief and reconstruction assistance requested by the Iraqi Interim Government and in line with previous Security Council Resolutions.

In addition, the MNF is prepared to establish or support a force within the MNF to provide for the security of personnel and facilities of the United Nations. We have consulted closely with UN officials regarding the United Nations' security requirements and believe that a brigade-size force will be needed to support the United Nations' security effort. This force will be under the command and control of the MNF commander, and its missions will include static and perimeter security at UN facilities, and convoy escort duties for the UN mission's travel requirements.

In order to continue to contribute to security, the MNF must continue to function under a framework that affords the force and its personnel the status that they need to accomplish their mission, and in which the contributing states have responsibility for exercising jurisdiction over their personnel and which will ensure arrangements for, and use of assets by, the MNF. The existing framework governing these matters is sufficient for these purposes. In addition, the forces that make up the MNF are and will remain committed at all times to act consistently with their obligations under the law of armed conflict, including the Geneva Conventions.

The MNF is prepared to continue to pursue its current efforts to assist in providing a secure environment in which the broader international community is able to fulfil its important role in facilitating Iraq's reconstruction. In meeting these responsibilities in the period ahead, we will act in full recognition of and respect for Iraqi sovereignty. We look to other member states and international and regional organizations to assist the people of Iraq and the sovereign Iraqi government in overcoming the challenges that lie ahead to build a democratic, secure and prosperous country.

The co-sponsors intend to annex this letter to the resolution on Iraq under consideration. In the meantime, I request that you provide copies of this letter to members of the Council as quickly as possible.

Sincerely,
(*Signed*) Colin L. **Powell**

European Court of Human Rights

Behrami *v.* France and
Saramati *v.* France, Germany and Norway
Decision of 2 May 2007

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

GRAND CHAMBER

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 71412/01
by Agim BEHRAMI and Bekir BEHRAMI
against France
and
Application no. 78166/01
by Ruzhdi SARAMATI
against France, Germany and Norway

The European Court of Human Rights, sitting on 2 May 2007 as a Grand Chamber composed of:

Mr C.L. ROZAKIS, *President,*
Mr J.-P. COSTA,
Sir Nicolas BRATZA,
Mr B.M. ZUPANČIČ,
Mr P. LORENZEN,
Mr I. CABRAL BARRETO,
Mr M. PELLONPÄÄ,
Mr A.B. BAKA,
Mr K. TRAJA,
Mrs S. BOTOUCHAROVA,
Mr M. UGREKHELIDZE,
Mrs A. MULARONI,
Mrs E. FURA-SANDSTRÖM,
Mrs A. GYULUMYAN,
Mr E. MYJER,
Ms D. JOČIENĖ,
Mr D. POPOVIĆ, *judges,*

and Mr M. O'BOYLE, *Deputy Registrar*,

Having regard to the above applications lodged on 28 September 2000 and 28 September 2001, respectively

Having regard to the decision of 13 June 2006 by which the Chamber of the Second Section to which the cases had originally been assigned relinquished its jurisdiction in favour of the Grand Chamber, none of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72 of the Rules of Court),

Having regard to the agreement of the parties to the *Saramati* case to the appointment of a common interest judge (Judge Costa) pursuant to Rule 30 of the Rules of Court,

Having regard to the parties' written and oral submissions and noting the agreement of Germany not to make oral submissions following the applicant's request to withdraw his case against that State (paragraphs 64-65 of the decision below),

Having regard to the written submissions of the United Nations requested by the Court, the comments submitted by the Governments of the Denmark, Estonia, Greece, Poland, Portugal and of the United Kingdom as well as those of the German Government accepted as third party submissions, all under Rule 44(2) of the Rules of Court,

Having regard to the oral submissions in both applications at a hearing on 15 November 2006,

Having decided to join its examination of both applications pursuant to Rule 42 § 1 of the Rules of Court,

Having deliberated on 15 November 2006 and on 2 May 2007, decides as follows:

THE FACTS[1]

1. Mr Agim Behrami, was born in 1962 and his son, Mr Bekir Behrami, was born in 1990. Both are of Albanian origin. Mr Agim Behrami complained on his own behalf, and on behalf of his deceased son, Gadaf Behrami born in 1988. These applicants live in the municipality of Mitrovica in Kosovo, Republic of Serbia. They were represented by Mr Gazmend Nushi, a lawyer with the Council for the Defence of Human Rights and Freedoms, an organisation based in Pristina, Kosovo. Mr Saramati was born in 1950. He is also of Albanian origin living in Kosovo. He was represented by Mr Hazer Susuri of the Criminal Defence Resource Centre, Kosovo. At the oral hearing in the cases, the applicants were further represented by Mr Keir Starmer, QC and Mr Paul Troop as Counsel, assisted by Ms Nuala Mole, Mr David Norris and Mr Ahmet Hasolli, as Advisers.

The French Government were represented by their Agents, Mr R. Abraham, Mr J.-L. Florent and, subsequently, Ms Edwige Belliard, assisted

[1] The abbreviations used are explained in the text but also listed in alphabetical order in the Appendix to this decision.

by Ms Anne-Françoise Tissier and by Mr Mostafa Mihraje, advisers, all of the legal directorate of the Ministry of Foreign Affairs.

The German Government were represented by Dr Hans-Jörg Behrens, Deputy Agent and Professor Dr. Christian Tomuschat, Counsel. The Norwegian Government were represented by their Agents, Mr Rolf Einar Fife and Ms Therese Steen, assisted by Mr Torfinn Rislaa Arnsten, Adviser.

I. RELEVANT BACKGROUND TO THE CASES

2. The conflict between Serbian and Kosovar Albanian forces during 1998 and 1999 is well documented. On 30 January 1999, and following a decision of the North Atlantic Council ("NAC") of the North Atlantic Treaty Organisation ("NATO"), NATO announced air strikes on the territory of the then Federal Republic of Yugoslavia ("FRY") should the FRY not comply with the demands of the international community. Negotiations took place between the parties to the conflict in February and March 1999. The resulting proposed peace agreement was signed by the Kosovar Albanian delegation but not by the Serbian delegation. The NAC decided on, and on 23 March 1999 the Secretary General of NATO announced, the beginning of air strikes against the FRY. The air strikes began on 24 March 1999 and ended on 8 June 1999 when the FRY troops agreed to withdraw from Kosovo. On 9 June 1999 "KFOR", the FRY and the Republic of Serbia signed a "Military Technical Agreement" ("MTA") by which they agreed on FRY withdrawal and the presence of an international security force following an appropriate UN Security Council Resolution ("UNSC Resolution").

3. UNSC Resolution 1244 of 10 June 1999 provided for the establishment of a security presence (KFOR) by "Member States and relevant international institutions", "under UN auspices", with "substantial NATO participation" but under "unified command and control". NATO pre-deployment to The Former Yugoslav Republic of Macedonia allowed deployment of significant forces to Kosovo by 12 June 1999 (in accordance with OPLAN 10413, NATO's operational plan for the UNSC Resolution 1244 mission called "Operation Joint Guardian"). By 20 June FRY withdrawal was complete. KFOR contingents were grouped into four multinational brigades ("MNBs") each of which was responsible for a specific sector of operations with a lead country. They included MNB Northeast (Mitrovica) and MNB Southeast (Prizren), led by France and Germany, respectively. Given the deployment of Russian forces after the arrival of KFOR, a further agreement on 18 June 1999 (between Russia and the United States) allocated various areas and roles to the Russian forces.

4. UNSC Resolution 1244 also decided on the deployment, under UN auspices, of an interim administration for Kosovo (UNMIK) and requested the Secretary General ("SG"), with the assistance of relevant international

organisations, to establish it and to appoint a Special Representative to the SG ("SRSG") to control its implementation. UNMIK was to coordinate closely with KFOR. UNMIK comprised four pillars corresponding to the tasks assigned to it. Each pillar was placed under the authority of the SRSG and was headed by a Deputy SRSG. Pillar I (as it was at the relevant time) concerned humanitarian assistance and was led by UNHCR before it was phased out in June 2000. A new Pillar I (police and justice administration) was established in May 2001 and was led directly by the UN, as was Pillar II (civil administration). Pillar III, concerning democratisation and institution building, was led by the Organisation for Security and Co-operation in Europe ("OSCE") and Pillar IV (reconstruction and economic development) was led by the European Union.

II THE CIRCUMSTANCES OF THE BEHRAMI CASE

5. On 11 March 2000 eight boys were playing in the hills in the municipality of Mitrovica. The group included two of Agim Behrami's sons, Gadaf and Bekim Behrami. At around midday, the group came upon a number of undetonated cluster bomb units ("CBUs") which had been dropped during the bombardment by NATO in 1999 and the children began playing with the CBUs. Believing it was safe, one of the children threw a CBU in the air: it detonated and killed Gadaf Behrami. Bekim Behrami was also seriously injured and taken to hospital in Pristina (where he later had eye surgery and was released on 4 April 2000). Medical reports submitted indicate that he underwent two further eye operations (on 7 April and 22 May 2000) in a hospital in Bern, Switzerland. It is not disputed that Bekim Behrami was disfigured and is now blind.

6. UNMIK police investigated. They took witness statements from, *inter alia*, the boys involved in the incident and completed an initial report. Further investigation reports dated 11, 12 and 13 March 2000 indicated, *inter alia*, that UNMIK police could not access the site without KFOR agreement; reported that a French KFOR officer had accepted that KFOR had been aware of the unexploded CBUs for months but that they were not a high priority; and pointed out that the detonation site had been marked out by KFOR the day after the detonation. The autopsy report confirmed Gadaf Behrami's death from multiple injuries resulting from the CBU explosion. The UNMIK Police report of 18 March 2000 concluded that the incident amounted to "unintentional homicide committed by imprudence".

7. By letter dated 22 May 2000 the District Public Prosecutor wrote to Agim Behrami to the effect that the evidence was that the CBU detonation was an accident, that criminal charges would not be pursued but that Mr Behrami had the right to pursue a criminal prosecution within eight days of the date of that letter. On 25 October 2001 Agim Behrami complained to the Kosovo Claims Office ("KCO") that France had not respected UNSC Resolution 1244. The KCO forwarded the complaint to the French Troop

Contributing Nation Claims Office (TCNCO"). By letter of 5 February 2003 that TCNCO rejected the complaint stating, *inter alia*, that the UNSC Resolution 1244 had required KFOR to supervise mine clearing operations until UNMIK could take over and that such operations had been the responsibility of the UN since 5 July 1999.

III. THE CIRCUMSTANCES OF THE SARAMATI CASE

8. On 24 April 2001 Mr Saramati was arrested by UNMIK police and brought before an investigating judge on suspicion of attempted murder and illegal possession of a weapon. On 25 April 2001 that judge ordered his pre-trial detention and an investigation into those and additional charges. On 23 May 2001 a prosecutor filed an indictment and on 24 May 2001 the District Court ordered his detention to be extended. On 4 June 2001 the Supreme Court allowed Mr Saramati's appeal and he was released.

9. In early July 2001 UNMIK police informed him by telephone that he had to report to the police station to collect his money and belongings. The station was located in Prizren in the sector assigned to MNB Southeast, of which the lead nation was Germany. On 13 July 2001 he so reported and was arrested by UNMIK police officers by order of the Commander of KFOR ("COMKFOR"), who was a Norwegian officer at the time.

10. On 14 July 2001 detention was extended by COMKFOR for 30 days.

11. On 26 July 2001, and in response to a letter from Mr Saramati's representatives taking issue with the legality of his detention, KFOR Legal Adviser advised that KFOR had the authority to detain under the UNSC Resolution 1244 as it was necessary "to maintain a safe and secure environment" and to protect KFOR troops. KFOR had information concerning Mr Saramati's alleged involvement with armed groups operating in the border region between Kosovo and the Former Yugoslav Republic of Macedonia and was satisfied that Mr Saramati represented a threat to the security of KFOR and to those residing in Kosovo.

12. On 26 July 2001 the Russian representative in the UNSC referred to "the arrest of Major Saramati, the Commander of a Kosovo Protection Corps Brigade, accused of undertaking activities threatening the international presence in Kosovo".

13. On 11 August 2001 Mr Saramati's detention was again extended by order of COMKFOR. On 6 September 2001 his case was transferred to the District Court for trial, the indictment retaining charges of, *inter alia*, attempted murder and the illegal possession of weapons and explosives. By letter dated 20 September 2001, the decision of COMKFOR to prolong his detention was communicated to his representatives.

14. During each trial hearing from 17 September 2001 to 23 January 2002 Mr Saramati's representatives requested his release and the trial court

responded that, although the Supreme Court had so ruled in June 2001, his detention was entirely the responsibility of KFOR.

15. On 3 October 2001 a French General was appointed to the position of COMKFOR.

16. On 23 January 2002 Mr Saramati was convicted of attempted murder under Article 30 § 2(6) of the Criminal Code of Kosovo in conjunction with Article 19 of the Criminal Code of the FRY. He was acquitted on certain charges and certain charges were either rejected or dropped. Mr Saramati was transferred by KFOR to the UNMIK detention facilities in Prishtina.

17. On 9 October 2002 the Supreme Court of Kosovo quashed Mr Saramati's conviction and his case was sent for re-trial. His release from detention was ordered. A re-trial has yet to be fixed.

IV. RELEVANT LAW AND PRACTICE

A. The prohibition on the unilateral use of force and its collective security counterpart

18. The prohibition on the unilateral use of force by States, together with its counterpart principle of collective security, mark the dividing line between the classic concept of international law, characterised by the right to have recourse to war (*ius ad bellum*) as an indivisible part of State sovereignty, and modern international law which recognises the prohibition on the use of force as a fundamental legal norm (*ius contra bellum*).

19. More particularly, the *ius contra bellum* era of public international law is accepted to have begun (at the latest, having regard, *inter alia*, to the Kellog-Briand Pact signed in 1928) with the end of the First World War and with the constitution of the League of Nations. The aim of this organisation of universal vocation was maintaining peace through an obligation not to resort to war (First recital and Article 11 of the Covenant of the League of Nations) as well as through universal systems of peaceful settlement of disputes (Articles 12-15 of the Covenant) and of collective security (Article 16 of the Covenant). It is argued by commentators that, by that stage, customary international law prohibited unilateral recourse to the use of force unless in self-defence or as a collective security measure (for example, R. Kolb, "*Ius Contra Bellum – Le Droit international relatif au maintien de la paix*", Helbing and Lichtenhahn, Bruylant, 2003, pp. 60-68).

20. The UN succeeded the League of Nations in 1946. The primary objective of the UN was to maintain international peace and security (First recital and Article 1 § 1 of the Charter) and this was to be achieved through two complimentary actions. The first, often described as "positive peace" (the Preamble to the Charter as well as Article 2 § 3, Chapter VI, Chapter IX-X and certain measures under Article 41 of Chapter VII), aimed at the suppression of the causes of dispute and the building of sustainable peace.

The second type of action, "negative peace", was founded on the Preamble, Article 2 § 4 and most of the Chapter VII measures and amounted to the prohibition of the unilateral use of force (Article 2 § 4) in favour of collective security implemented by a central UN organ (the UNSC) with the monopoly on the right to use force in conflicts identified as threatening peace. Two matters were essential to this peace and security mechanism: its "collective" nature (States had to act together against an aggressor identified by the UNSC) as well as its "universality" (competing alliances were considered to undermine the mechanism so that coercive action by regional organisations was subjected to the universal system by Article 53 of the Charter).

B. The Charter of the UN, 1945

21. The Preamble as well as Articles 1 and 2, in so far as relevant, provide as follows:

"WE THE PEOPLES OF THE UNITED NATIONS DETERMINED

- to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and

- to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and

- to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and

- to promote social progress and better standards of life in larger freedom,

AND FOR THESE ENDS

- to practice tolerance and live together in peace with one another as good neighbours, and

- to unite our strength to maintain international peace and security, and

- to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and

- to employ international machinery for the promotion of the economic and social advancement of all peoples,

HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS

Accordingly, our respective Governments, ..., have agreed to the present Charter of the United Nations and do hereby establish an international organisation to be known as the United Nations.

Article 1

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

...

Article 2

...

5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

...

7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

22. Chapter V deals with the UNSC and Article 24 outlines its "Functions and Powers" as follows:

"1. In order to ensure prompt and effective action by the [UN], its Members confer on the [UNSC] primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the [UNSC] acts on their behalf.

2. In discharging these duties the [UNSC] shall act in accordance with the Purposes and Principles of the [UN]. The specific powers granted to the [UNSC] for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII. ..."

Article 25 provides:

"The Members of the United Nations agree to accept and carry out the decisions of the [UNSC] in accordance with the present Charter."

23. Chapter VII is entitled "Action with respect to threats to the peace, breaches of the peace and acts of aggression". Article 39 provides:

"The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

The notion of a "threat to the peace" within the meaning of Article 39 has evolved to include internal conflicts which threaten to "spill over" or

concern serious violations of fundamental international (often humanitarian) norms. Large scale cross border displacement of refugees can also render a threat international (Article 2(7) of the UN Charter; and, for example, R. Kolb, "*Ius Contra Bellum – Le Droit international relatif au maintien de la paix*", Helbing and Lichtenhahn, Bruylant, 2003, pp. 60-68; and "*Yugoslav Territory, United Nations Trusteeship or Sovereign State? Reflections on the current and Future Legal Status of Kosovo*", Zimmermann and Stahn, NJIL 70, 2001, p. 437).

Articles 41 and 42 read as follows:

> "41. The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."
>
> 42. Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."

24. Articles 43-45 provide for the conclusion of agreements between member states and the UNSC for the former to contribute to the latter land and air forces necessary for the purpose of maintaining international peace and security. No such agreements have been concluded. There is, consequently, no basis in the Charter for the UN to oblige Member States to contribute resources to Chapter VII missions. Articles 46-47 provide for the UNSC to be advised by a Military Staff Committee (comprising military representatives of the permanent members of the UNSC) on, *inter alia*, military requirements for the maintenance of international peace and security and on the employment and command of forces placed at the UNSC's disposal. The MSC has had very limited activity due to the absence of Article 43 agreements.

25. Chapter VII continues:

> "Article 48
>
> The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.
>
> Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.
>
> Article 49
>
> The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council."

C. Article 103 of the Charter

26. This Article reads as follows:

> "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

27. The ICJ considers Article 103 to mean that the Charter obligations of UN member states prevail over conflicting obligations from another international treaty, regardless of whether the latter treaty was concluded before or after the UN Charter or was only a regional arrangement (*Nicaragua v. United States of America*, ICJ Reports, 1984, p. 392, at § 107. See also *Kadi v. Council and Commission*, § 183, judgment of the Court of First Instance of the European Communities ("CFI") of 21 September 2005 (under appeal) and two more recent judgments of the CFI in the same vein: *Yusuf and Al Barakaat v. Council and Commission*, 21 September 2005, §§ 231, 234, 242-243 and 254 as well as *Ayadi v. Council*, 12 July 2006, § 116). The ICJ has also found Article 25 to mean that UN member states' obligations under a UNSC Resolution prevail over obligations arising under any other international agreement (Orders of 14 April 1992 (provisional measures), Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya v United States of America and Libyan Arab Jamahiriya v United Kingdom*), ICJ Reports, 1992, p. 16,§ 42 and p. 113, § 39, respectively).

D. The International Law Commission ("ILC")

28. Article 13 of the UN Charter provided that the UN General Assembly should initiate studies and make recommendations for the purpose of, *inter alia*, encouraging the progressive development of international law and its codification. On 21 November 1947, the General Assembly adopted Resolution 174(II) establishing the ILC and approving its Statute.

1. Draft Articles on the Responsibility of International Organisations

29. Article 3 of these draft Articles adopted in 2003 during the 55th session of the ILC is entitled "General principles" and it reads as follows (see the Report of the ILC, General Assembly Official Records, 55th session, Supplement No. 10 A/58/10 (2003):

> "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.

30. Article 5 of the draft Articles adopted in 2004 during the 56th session of the ILC is entitled "Conduct of organs or agents placed at the disposal of an international organisation by a State or another international organisation" and reads as follows (see the Report of the ILC, General Assembly Official Records, 56th session, Supplement No. 10 A/59/10 (2004) and Report of the Special Rapporteur on the Responsibility of International Organisations, UN, Official Documents, A/CN.4/541, 2 April 2004):

"The conduct of an organ of a State or an organ or agent of an international organisation that is placed at the disposal of another international organisation shall be considered under international law an act of the latter organisation if the organisation exercises effective control over that conduct."

31. The ILC Commentary on Article 5, in so far as relevant, provides:

"When an organ of a State is placed at the disposal of an international organization, the organ may be fully seconded to that organization. In this case the organ's conduct would clearly be attributable only to the receiving organization. ... Article 5 deals with the different situation in which the lent organ or agent still acts to a certain extent as organ of the lending State or as organ or agent of the lending organization. This occurs for instance in the case of military contingents that a State placed at the disposal of the [UN] for a peacekeeping operation, since the State retains disciplinary powers and criminal jurisdiction over the members of the national contingent. In this situation the problem arises whether a specific conduct of the lent organ or agent has to be attributed to the receiving organization or to the lending State or organization. ...

Practice relating to peacekeeping forces is particularly significant in the present context because of the control that the contributing State retains over disciplinary matters and criminal affairs. This may have consequences with regard to attribution of conduct. ...

Attribution of conduct to the contributing State is clearly linked with the retention of some powers by that State over its national contingent and thus on the control that the State possesses in the relevant respect.

As has been held by several scholars, when an organ or agent is placed at the disposal of an international organization, the decisive question in relation to attribution of a given conduct appears to be who has effective control over the conduct in question."

32. The report noted that it would be difficult to attribute to the UN action resulting from contingents operating under national rather than UN command and that in joint operations, international responsibility would be determined, absent an agreement, according to the degree of effective control exercised by either party in the conduct of the operation. It continued:

"What has been held with regard to joint operations ... should also apply to peacekeeping operations, insofar as it is possible to distinguish in their regard areas of effective control respectively pertaining to the [UN] and the [TCN]. While it is understandable that, for the sake of efficiency of military operations, the [UN] insists on claiming exclusive command and control over peacekeeping forces, attribution of conduct should also in this regard be based on a factual criterion."

33. As regards UN peacekeeping forces (namely, those directly commanded by the UN and considered subsidiary organs of the UN), the Report quoted the UN's legal counsel as stating that the acts of such subsidiary organs were in principle attributable to the organisation and, if committed in violation of an international obligation, entailed the international responsibility of the organisation and its liability in compensation. This, according to the Report, summed up the UN practice in respect of several UN peacekeeping missions referenced in the Report.

2. Draft Articles on State Responsibility

34. Article 6 if these draft Articles is entitled "Conduct of organs placed at the disposal of a State by another State" and it reads as follows (Report of the ILC, General Assembly Official Records, 56th session, Supplement No. 10 (A/56/10)):

"The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed."

Article 6 addresses the situation in which an organ of a State is put at the disposal of another, so that the organ may act temporarily for the latter's benefit and under its authority. In such a case, the organ, originally that of one State, acts exclusively for the purposes of and on behalf of another State and its conduct is attributed to the latter State alone.

E. The Vienna Convention on the Law of Treaties

35. Article 30 is entitled "Application of successive treaties relating to the same subject matter" and its first paragraph reads as follows:

"1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs."

F. The MTA of 9 June 1999

36. Following the agreement by the FRY that its troops would withdraw from Kosovo and the consequent suspension of air operations against the FRY, the MTA was signed between "KFOR" and the Governments of the FRY and the Republic of Serbia on 9 June 1999 which provided for the

phased withdrawal of FRY forces and the deployment of international presences. Article I (entitled "General Obligations") noted that it was an agreement for the deployment in Kosovo:

> "under United Nations auspices of effective international civil and security presences. The Parties note that the [UNSC] is prepared to adopt a resolution, which has been introduced, regarding these measures."

37. Paragraph 2 of Article I provided for the cessation of hostilities and the withdrawal of FRY forces and, further, that:

> "The State governmental authorities of the [FRY] and the Republic of Serbia understand and agree that the international security force ("KFOR") will deploy following the adoption of the UNSC [Resolution] ... and operate without hindrance within Kosovo and with the authority to take all necessary action to establish and maintain a secure environment for all citizens of Kosovo and otherwise carry out its mission. They further agree to comply with all of the obligations of this Agreement and to facilitate the deployment and operation of this force."

38. Article V provided that COMKFOR would provide the authoritative interpretation of the MTA and the security aspects of the peace settlement it supported.

39. Appendix B set out in some detail the breadth and elements of the envisaged security role of KFOR in Kosovo. Paragraph 3 provided that neither the international security force nor its personnel would be "liable for any damages to public or private property that they may cause in the course of duties related to the implementation of this agreement".

40. The letter of 10 June 1999 from NATO submitting the MTA to the SG of the UN and the latter's letter onwards to the UNSC, described the MTA as having been signed by the "NATO military authorities".

G. The UNSC Resolution 1244 of 10 June 1999

41. The Resolution reads, in so far as relevant, as follows:

> "Bearing in mind the purposes and principles of the Charter of the United Nations, and the primary responsibility of the Security Council for the maintenance of international peace and security,
>
> Recalling its [previous relevant] resolutions ...,
>
> Regretting that there has not been full compliance with the requirements of these resolutions,
>
> Determined to resolve the grave humanitarian situation in Kosovo ... and to provide for the safe and free return of all refugees and displaced persons to their homes,
>
> ...
>
> Welcoming the general principles on a political solution to the Kosovo crisis adopted on 6 May 1999 (S/1999/516, annex 1 to this resolution) and welcoming also

> the acceptance by the [FRY] of the principles set forth in points 1 to 9 of the paper presented in Belgrade on 2 June 1999 (S/1999/649, annex 2 to this resolution), and the [FRY's] agreement to that paper,
>
> ...
>
> Determining that the situation in the region continues to constitute a threat to international peace and security,
>
> Determined to ensure the safety and security of international personnel and the implementation by all concerned of their responsibilities under the present resolution, and acting for these purposes under Chapter VII of the Charter of the United Nations,
>
> ...
>
> 5. Decides on the deployment in Kosovo, under United Nations auspices, of international civil and security presences, with appropriate equipment and personnel as required, and welcomes the agreement of the [FRY] to such presences;
>
> 6. Requests the Secretary-General to appoint, in consultation with the Security Council, a Special Representative to control the implementation of the international civil presence, and further requests the Secretary-General to instruct his Special Representative to coordinate closely with the international security presence to ensure that both presences operate towards the same goals and in a mutually supportive manner;
>
> 7. Authorizes Member States and relevant international organizations to establish the international security presence in Kosovo as set out in point 4 of annex 2 with all necessary means to fulfil its responsibilities under paragraph 9 below;
>
> ...
>
> 9. Decides that the responsibilities of the international security presence to be deployed and acting in Kosovo will include:
>
> ...
>
> (e) Supervising de-mining until the international civil presence can, as appropriate, take over responsibility for this task;
>
> (f) Supporting, as appropriate, and coordinating closely with the work of the international civil presence;
>
> (g) Conducting border monitoring duties as required;
>
> ...
>
> 10. Authorizes the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the [FRY], and which will provide transitional administration while establishing and overseeing the development of provisional

democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo;

11. Decides that the main responsibilities of the international civil presence will include: ...

(b) Performing basic civilian administrative functions where and as long as required;

(c) Organizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections;

(d) Transferring, as these institutions are established, its administrative responsibilities while overseeing and supporting the consolidation of Kosovo's local provisional institutions and other peace-building activities;

...

(i) Maintaining civil law and order, including establishing local police forces and meanwhile through the deployment of international police personnel to serve in Kosovo;

(j) Protecting and promoting human rights;

(k) Assuring the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo;

...

19. Decides that the international civil and security presences are established for an initial period of 12 months, to continue thereafter unless the Security Council decides otherwise;

20. Requests the Secretary-General to report to the Council at regular intervals on the implementation of this resolution, including reports from the leaderships of the international civil and security presences, the first reports to be submitted within 30 days of the adoption of this resolution;

21. Decides to remain actively seized of the matter."

42. Annex 1 listed the general principles on a political solution to the Kosovo crisis adopted by the G-8 Foreign Ministers on 6 May 1999. Annex 2 comprised nine principles (guiding the resolution of the crisis presented in Belgrade on 2 June 1999 to which the FRY had agreed) including:

"... 3. Deployment in Kosovo under [UN] auspices of effective international civil and security presences, acting as may be decided under Chapter VII of the Charter, capable of guaranteeing the achievement of common objectives.

4. The international security presence with substantial [NATO] participation must be deployed under unified command and control and authorized to establish a safe environment for all people in Kosovo and to facilitate the safe return to their homes of all displaced persons and refugees.

5. Establishment of an interim administration for Kosovo as a part of the international civil presence ..., to be decided by the Security Council of the [UN]. The interim administration to provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants in Kosovo. ..."

43. While this Resolution used the term "authorise", that term and the term "delegation" are used interchangeably. Use of the term "delegation" in the present decision refers to the empowering by the UNSC of another entity to exercise its function as opposed to "authorising" an entity to carry out functions which it could not itself perform.

H. Agreed Points on Russian Participation in KFOR (18 June 1999)

44. Following Russia's involvement in Kosovo after the deployment of KFOR troops, an Agreement was concluded as to the basis on which Russian troops would participate in KFOR. Russian troops would operate in certain sectors according to a command and control model annexed to the agreement: all command arrangements would preserve the principle of unity of command and, while the Russian contingent was to be under the political and military control of the Russian Government, COMKFOR had authority to order NATO forces to execute missions refused by Russian forces.

45. Its command and control annex described the link between the UNSC and the NAC as one of "Consultation/Interaction" and between the NAC and COMKFOR as one of "operational control".

I. Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo

46. This Regulation was adopted on 18 August 2000 by the SRSG to implement the Joint Declaration of 17 August 2000 on the status of KFOR and UNMIK and their personnel, and the privileges and immunities to which they are entitled. It was deemed to enter into force on 10 June 1999.

KFOR personnel were to be immune from jurisdiction before the courts in Kosovo in respect of any administrative, civil or criminal act committed by them in Kosovo and such personnel were to be "subject to the exclusive jurisdiction of their respective sending States" (section 2 of the Regulation). UNMIK personnel were also to be immune from legal process in respect of words spoken and all acts performed by them in their official capacity (section 3). The SG could waive the immunity of UNMIK personnel and requests to waive jurisdiction over KFOR personnel were to be referred to the relevant national commander (section 6).

J. NATO/KFOR (unclassified) HQ KFOR Main Standing Operating Procedures ("SOP"), March 2003

47. Referring to UNSC Resolution 1244 and UNMIK Regulation No. 2000/47, the SOP was intended as a guide. The KCO would adjudicate claims relating to the overall administration of military operations in Kosovo by KFOR in accordance with Annex A to the SOP. It would also determine whether the matter was against a TCN, in which case the claim would be forwarded to that TCN.

48. TCNs were responsible for adjudicating claims that arose from their own activities in accordance with their own rules and procedures. While there was at that time no approved policy for processing and paying claims that arose out of KFOR operations in Kosovo, TCNs were encouraged to process claims (through TCN Claims Offices – "TCNCOs") in accordance with Annex B which provided guidelines on the claims procedure. While the adjudication of claims against a TCN was purely a "national matter for the TCN concerned", the payment of claims in a fair manner was considered to further the rule of law, enhance the reputation of KFOR and to serve the interests of force protection for KFOR.

49. Annex C provided guidelines for the structure and procedures before the Kosovo Appeals Commission (from the KCO or from a TCNCO).

K. European Commission for Democracy through Law ("the Venice Commission"), Opinion on human rights in Kosovo: Possible establishment of review mechanisms (no. 280/2004, CDL-AD (2004) 033)

50. The relevant parts of paragraph 14 of the Opinion read:

> "KFOR contingents are grouped into four multinational brigades. KFOR troops come from 35 NATO and non-NATO countries. Although brigades are responsible for a specific area of operations, they all fall "under the unified command and control" (UN SC Resolution 1244, Annex 2, para. 4) of [COMKFOR] from NATO. "Unified command and control" is a military term of art which only encompasses a limited form of transfer of power over troops. [TCNs] have therefore not transferred "full command" over their troops. When [TCNs] contribute troops to a NATO-led operation they usually transfer only the limited powers of "operational control" and/or "operational command". These powers give the NATO commander the right to give orders of an operational nature to the commanders of the respective national units. The national commanders must implement such orders on the basis of their own national authority. NATO commanders may not give other kinds of orders (e.g. those affecting the personal status of a soldier, including taking disciplinary measures) and NATO commanders, in principle, do not have the right to give orders to individual soldiers ... . In addition, [TCNs] always retain the power to withdraw their soldiers at any moment. The underlying reason for such a rather complex arrangement is the desire of [TCNs] to preserve as much political responsibility and democratic control over their troops as is compatible with the requirements of military efficiency. This enables states to do the utmost for the safety of their soldiers, to preserve their discipline according to national custom and rules, to maintain constitutional accountability and, finally, to preserve the possibility to respond to demands from the national democratic process concerning the use of their soldiers."

L. Detention and De-mining in Kosovo

1. Detention

51. A letter from COMKFOR to the OSCE of 6 September 2001 described how COMKFOR authorised detention: each case was reviewed by KFOR staff, the MNB commander and by a review panel at KFOR HQ, before being authorised by COMKFOR based on KFOR/OPS/FRAGO997 (superseded by COMKFOR Detention Directive 42 in October 2001).

2. De-mining

52. Landmines and unexploded ordinance (from the NATO bombardment of early 1999) posed a significant problem in post-conflict Kosovo, a problem exacerbated by the relative absence of local knowledge given the large scale displacement of the population during the conflict. The UN Mine Action Service (UNMAS) was the primary UN body charged with monitoring de-mining developments in general.

53. On 12 June 1999 the SG delivered his operational plan for the civil mission in Kosovo to the UNSC (Doc. No. S/1999/672). In outlining the structure of UNMIK, he noted that mine action was dealt with under humanitarian affairs (the former Pillar I of UNMIK) and that UNMIK had been tasked to establish, as soon as possible, a mine action centre. The UN Mine Action Coordination Centre ("UNMACC": used interchangeably with "UNMIK MACC") opened its office in Kosovo on 17 June 1999 and it was placed under the direction of the Deputy SRSG of Pillar I. Pending the transfer of responsibility for mine action to UNMACC, in accordance with the UNSC Resolution 1244, KFOR acted as the *de facto* coordination centre. The SG's detailed report on UNMIK of 12 July 1999 (Doc No. S/1999/779) confirmed that UNMACC would plan mine action activities and act as the point of coordination between the mine action partners including KFOR, UN agencies, NGOs and commercial companies".

54. On 24 August 1999 the Concept Plan for UNMIK Mine Action Programme ("MAP") was published in a document entitled "UNMIK MACC, Office of the Deputy SRSG (Humanitarian Affairs)". It confirmed that the UN, through UNMAS, the SRSG and the Deputy SRSG of Pillar I of UNMIK retained "overall responsibility" for the MAP in terms of providing policy guidance, identifying needs and priorities, coordinating with UN and non-UN partners as well as member states, and defining the overall operational plan and structure. The MAP was an "integral component of UNMIK". As to the role of UNMIK MACC, it was

underlined that, since the UN did not intend to implement the mine action activities in Kosovo itself, it would rely on a variety of operators including UN agencies, KFOR contingents, NGOs and commercial companies. Those operators had to be accredited, supported and co-ordinated to ensure they worked in a coherent and integrated manner. Accordingly, a key factor in the execution of the MAP was the integration and coordination of all de-mining activities through an appropriately structured UNMIK MACC which would, *inter alia*, act as the "focal point and coordination mechanism for all mine activities in Kosovo". The Concept Plan went on to define the nature of the problem and the consequent phases and priorities for mine clearance.

55. Accordingly, on 24 August 1999 a memorandum was sent by the Deputy SRSG of Pillar I to the SRSG, requesting that, since the Concept Plan had been approved, it should also be forwarded to KFOR "along with an appropriate annotation that UNMIK have now assumed the responsibility for humanitarian mine action in Kosovo".

56. KFOR Directive on CBU Marking (KFOR/OPS/FRAGO 300) was adopted on 29 August 1999 and provided:

> "...KFOR will only clear mines/CBUs when deemed essential to the conduct of the mission and to maintain freedom of movement. KFOR does not wish to undertake de-mining, which is the responsibility of UNMACC and the NGOs. However, there is growing pressure for KFOR to dispose of NATO munitions. Therefore it has been decided that KFOR will do more to reduce the threat without amending its policy by marking the perimeter of each of the CBU footprints ... MNBs are to conduct these tasks against a priority list co-ordinated with UNMACC and UNMIK regional offices. The intent is to mark all known areas by 10 October 1999".

57. On 5 October 1999 that Deputy SRSG wrote to COMKFOR noting paragraph 9(e) of UNSC Resolution 1244, attaching the Concept Plan, confirming that "we are now in a position to officially assume responsibility for mine action in Kosovo" and underlining the critical need for UNMIK and KFOR to co-operate and to work closely together.

58. The report of KFOR for July 1999 (submitted to the UNSC by the SG's letter of 10 August 1999) explained that KFOR worked closely with UNMAS and had "jointly established" UNMACC. The report continued:

> "Upon entry into Kosovo and prior to establishment of UNMACC, KFOR organized a Mines Action Centre, which has since been augmented by [UN] personnel and has now become UNMACC. This is now ... charged by the [UN] with de-mining the region. It accomplishes this task using civilian contracted de-mining teams. KFOR is principally conducting mission-essential mine and unexploded ordnance clearance, including clearance of essential civilian infrastructure and public buildings."

KFOR's report for August 1999 (submitted to the UNSC by the SG's letter of 15 September 1999) confirmed that KFOR worked closely with UNMACC which had been "set up jointly" by KFOR and the UN. KFOR's subsequent monthly reports (submitted to the UNSC by the SG) noted that KFOR worked closely with UNMAS and UNMACC and emphasised that the eradication of the CBU threat was a priority for MNBs, the aim being to

mark and clear as many areas as possible before the first snow (report Nos. S/1999/868, S/1999/982, S/1999/1062, S/1999/1185 and S/1999/1266).

59. By letter dated 6 April 2000 to COMKFOR, the Deputy SRSG drew the latter's attention to recent CBU explosions involving deaths and asked for the latter's personal support to ensure KFOR continued to support the mine clearance project by marking CBU sites as a matter of urgency and providing any further information they had.

60. In 2001 UNMAS commissioned an external evaluation of its mine action programme in Kosovo for the period mid-1999–2001. The report, entitled "*An evaluation of the United Nations Mine Action Programme in Kosovo 1999-2001*", commented as follows:

> "At the beginning of August 1999, the MACC had *de facto* taken full control of the mine action programme, although formally it still fell under KFOR's responsibility. ... This was followed, on 24 August, by UNMIK's approval of the [Concept Plan]. ... [which] coincided with a Memo being sent by ... DSRSG (24 August) to ... SRSG ... [T]hat request was followed up with a letter dated 5 October 1999 from [Deputy SRSG] to General Jackson, [COMKFOR], ... Through this letter the formal handing over from the military to the civilian sector of the mine action programme for Kosovo took place, as mandated in [UNSC Resolution] 1244; although, in reality, this had already taken place towards the end of August."

COMPLAINTS

61. Agim Behami complained under Article 2, on his own behalf and on behalf of his son Gadaf Behrami, about the latter's death and Bekir Behrami complained about his serious injury. They submitted that the incident took place because of the failure of French KFOR troops to mark and/or defuse the un-detonated CBUs which those troops knew to be present on that site.

62. Mr Saramati complained under Article 5 alone, and in conjunction with Article 13 of the Convention, about his extra-judicial detention by KFOR between 13 July 2001 and 26 January 2002. He also complained under Article 6 § 1 that he did not have access to court and about a breach of the respondent States' positive obligation to guarantee the Convention rights of those residing in Kosovo.

THE LAW

63. Messrs Behrami invoked Article 2 of the Convention as regards the impugned inaction of KFOR troops. Mr Saramati relied on Articles 5, 6 and 13 as regards his detention by, and on the orders of, KFOR. The President of the Court agreed that the parties' submissions to the Grand Chamber could be limited to the admissibility of the cases.

I. WITHDRAWAL OF THE SARAMATI CASE AGAINST GERMANY

64. In arguing that he fell within the jurisdiction of, *inter alia*, Germany, Mr Saramati initially maintained that a German KFOR officer had been involved in his arrest in July 2001 and he also referred to the fact that Germany was the lead nation in MNB Southeast. In their written submissions to the Grand Chamber, the German Government indicated that, despite detailed investigations, they had not been able to establish any involvement of a German KFOR officer in Mr Saramati's arrest.

Mr Saramati responded that, while German KFOR involvement was his recollection and while he had made that submission in good faith, he was unable to produce any objective evidence in support. He therefore accepted the contrary submission of Germany and, further, that German KFOR control of the relevant sector was of itself an insufficient factual nexus to bring him within the jurisdiction of Germany. By letter of 2 November 2006 he requested the Court to allow him to withdraw his case against Germany, which State did not therefore make oral submissions at the subsequent Grand Chamber hearing.

65. The Court considers reasonable the grounds for Mr Saramati's request. There being two remaining respondent States in this case also disputing, *inter alia*, that Mr Saramati fell within their jurisdiction as well as the compatibility of his complaints, the Court does not find that respect for human rights requires a continued examination of Mr Saramati's case against Germany (Article 37 § 1 *in fine* of the Convention) and it should therefore be struck out as against that State.

In such circumstances, the President of the Court has accepted the submissions of the German Government as third party observations under Rule 44 § 2 of the Rules of Court. References hereunder to the respondent States do not therefore include Germany and it is referred to below as a third party.

II. THE CASES AGAINST FRANCE AND NORWAY

A. The issue to be examined by the Court

66. The applicants maintained that there was a sufficient jurisdictional link, within the meaning of Article 1 of the Convention, between them and the respondent States and that their complaints were compatible *ratione loci*, *personae* and *materiae* with its provisions.

67. The respondent and third party States disagreed.

The respondent Governments essentially contended that the applications were incompatible *ratione loci* and *personae* with the provisions of the Convention because the applicants did not fall within their jurisdiction

within the meaning of Article 1 of the Convention. They further maintained that, in accordance with the *"Monetary Gold* principle" (*Monetary Gold Removed from Rome in 1943*, ICJ Reports 1954), this Court could not decide the merits of the case as it would be determining the rights and obligations of non-Contracting Parties to the Convention.

The French Government also submitted that the cases were inadmissible under Article 35 § 1 mainly because the applicants had not exhausted remedies available to them, although they accepted that issues of jurisdiction and compatibility had to be first examined. While the Norwegian Government responded to questions during the oral hearing as to the remedies available to Mr Saramati, they did not argue that his case was inadmissible under Article 35 § 1 of the Convention.

The third party States submitted in essence that the respondent States had no jurisdiction *loci* or *personae*. The UN, intervening as a third party in the *Behrami* case at the request of the Court, submitted that, while de-mining fell within the mandate of UNMACC created by UNMIK, the absence of the necessary CBU location information from KFOR meant that the impugned inaction could not be attributed to UNMIK.

68. Accordingly, much of these submissions concerned the question of whether the applicants fell within the extra-territorial "jurisdiction" of the respondent States within the meaning of Article 1 of the Convention, the compatibility *ratione loci* of the complaints and, consequently, the decision in *Banković and Others v. Belgium and 16 Other Contracting States* ((dec.) [GC], no. 52207/99, ECHR 2001 XII) as well as related jurisprudence of this Court (*Drozd and Janousek v. France and Spain*, judgment of 26 June 1992, Series A no. 240; *Loizidou v. Turkey*, judgment of 18 December 1996, Reports 1996 VI, § 56; *Cyprus v. Turkey* [GC], no. 25781/94, ECHR 2001-IV; *Issa and Others v. Turkey*, no. 31821/96, 16 November 2004; *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, ECHR 2004-VII; *Öcalan v. Turkey* [GC], no. 46221/99, ECHR 2005-IV; and No. 23276/04, *Hussein v. Albania and Others*, (dec.) 14 March 2006).

In this respect, it was significant for the applicants in the *Behrami* case that, *inter alia*, France was the lead nation in MNB Northeast and Mr Saramati underlined that French and Norwegian COMKFOR issued the relevant detention orders. The respondent (as well as third party) States disputed their jurisdiction *ratione loci* arguing, *inter alia*, that the applicants were not on their national territory, that it was the UN which had overall effective control of Kosovo, that KFOR controlled Mr Saramati and not the individual COMKFORs and that the applicants were not resident in the "legal space" of the Convention.

69. The Court recalls that Article 1 requires Contracting Parties to guarantee Convention rights to individuals falling with their "jurisdiction". This jurisdictional competence is primarily territorial and, while the notion of compatibility *ratione personae* of complaints is distinct, the two concepts can be inter-dependent (*Banković and Others, cited above, at § 75 and*

Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi (Bosphorus Airways) v. Ireland [GC], no. 45036/98, §§ 136 and 137, ECHR 2005-VI). In the present case, the Court considers, and indeed it was not disputed, that the FRY did not "control" Kosovo (within the meaning of the word in the above-cited jurisprudence of the Court concerning northern Cyprus) since prior to the relevant events it had agreed in the MTA, as it was entitled to do as the sovereign power (*Banković and Others*, cited above, at §§ 60 and 71 and further references therein; Shaw, *International Law*, 1997, 4th Edition, p. 462, Nguyen Quoc Dinh, *Droit International Public*, 1999, 6th Edition, pp. 475-478; and Dixon, *International Law*, 2000, 4th Edition, pp. 133-135), to withdraw its own forces in favour of the deployment of international civil (UNMIK) and security (KFOR) presences to be further elaborated in a UNSC Resolution, which Resolution had already been introduced under Chapter VII of the UN Charter (see Article 1 of the MTA, paragraph 36 above).

70. The following day, 10 June 1999, UNSC Resolution 1244 was adopted. KFOR was mandated to exercise complete military control in Kosovo. UNMIK was to provide an interim international administration and its first Regulation confirmed that the authority vested in it by the UNSC comprised all legislative and executive power as well as the authority to administer the judiciary (UNMIK Regulation 1999/1 and see also UNMIK Regulation 2001/9). While the UNSC foresaw a progressive transfer to the local authorities of UNMIK's responsibilities, there is no evidence that either the security or civil situation had relevantly changed by the dates of the present events. Kosovo was, therefore, on those dates under the effective control of the international presences which exercised the public powers normally exercised by the Government of the FRY (*Banković and Others*, cited above, at § 71).

71. The Court therefore considers that the question raised by the present cases is, less whether the respondent States exercised extra-territorial jurisdiction in Kosovo but far more centrally, whether this Court is competent to examine under the Convention those States' contribution to the civil and security presences which did exercise the relevant control of Kosovo.

72. Accordingly, the first issue to be examined by this Court is the compatibility *ratione personae* of the applicants' complaints with the provisions of the Convention. The Court has summarised and examined below the parties' submissions relevant to this question.

B. The applicants' submissions

73. The applicants maintained that KFOR (as opposed to the UN or UNMIK) was the relevant responsible organisation in both cases.

The MTA and UNSC Resolution 1244 provided that KFOR, on which UNMIK relied to exist, controlled and administered Kosovo in a manner equivalent to that of a State. In addition, KFOR was responsible for de-mining and the applicants referred in support to KFOR's duties outlined in the MTA, in UNSC Resolution 1244, in FRAGO300, in the UNSG reports to the UNSC (which indicated that UNMACC had been "set up jointly" by KFOR and the UN to co-ordinate de-mining (see the SG reports cited at paragraph 58 above) and in a report of the International Committee of the Red Cross ("*Explosive Remnants of War, Cluster Bombs and Landmines in Kosovo*", Geneva, August 2000, revised June 2001). Since KFOR had been aware of the unexploded ordinance and controlled the site, it should have excluded the public. Moreover, NATO had initially dropped the cluster bombs. Their oral submissions endorsed the UN submissions to the effect that, if UNMACC had responsibility for co-ordinating de-mining, KFOR retained direct responsibility for supporting de-mining which was "critical" to the success of the clearance operation. Mr Saramati's detention was clearly a security matter for KFOR (citing the KFOR documents referred to at paragraph 51 above).

74. The impugned acts involved the responsibility *ratione personae* of France, in the *Behrami* case, as well as Norway in the *Saramati* case.

75. In the first place, France had voted in the NAC in favour of deploying an international force to Kosovo.

76. Secondly, the French contingent's control of MNB Northeast was a relevant jurisdictional link in the *Behrami* case. While Germany was the lead nation in MNB Southeast, the applicants considered that that was, of itself, an insufficient jurisdictional link in the *Saramati* case.

77. Thirdly, neither the acts nor omissions of KFOR soldiers were attributable to the UN or NATO. KFOR was a NATO-led multinational force made up of NATO and non-NATO troops (from 10-14 States) allegedly under "unified" command and control. KFOR was not established as a UN force or organ, in contrast to other peacekeeping forces and to UNMIK and UNMACC under direct UN command. If KFOR had been such a UN force (with the prefix "UN"), it would have had a UN Commander in Chief, troops would not have accepted instructions from TCNs and all personnel would have had UN immunities. On the contrary, NATO and other States were authorised to establish the security mission in Kosovo under "unified command and control". However, this was a "term of art" (the Venice Commission, cited at paragraph 50 above): since there was no operational command link between the UNSC and NATO and since the TCNs retained such significant power, there was no unified chain of command from the UNSC so that neither the acts nor the omissions of KFOR troops could be attributed to NATO or to the UN (relying, in addition, on detailed academic publications).

As to the link between KFOR and the UNSC, the applicants referred to the Attachment to the Agreement on Russian Participation (paragraph 45 above) which described that link as one of "consultation/interaction".

As to the input of TCNs, the applicants noted that KFOR troops (including COMKFOR) were directly answerable to their national commanders and fell exclusively within the jurisdiction of their TCN: the rules of engagement were national; troops were disciplined by national command; deployment decisions were national; the troops were financed by the States; individual TCNCOs had been set up; TCNs retained disciplinary, civil and criminal jurisdiction over troops for their actions in Kosovo (UNMIK Regulation 2000/47 and HQ KFOR Main SOP, paragraphs 47-49 above) and, since a British court considered itself competent to examine a case about the actions of British KFOR in Kosovo, individual State accountability was feasible (*Bici & Anor v Ministry of Defence* [2004] EWHC 786); and it was national commanders who decided on the waiver of the immunity of KFOR troops whereas the SG so decided for UNMIK personnel. It was disingenuous to accept that KFOR troops were subject to the exclusive control of their TCN and yet deny that they fell within their jurisdiction. There was no TCN/UN agreement or a Status of Forces Agreement ("SOFA") between the UN and the FRY.

78. Fourthly, as regards Mr Saramati's case, final decisions on detention lay with COMKFOR who decided without reference to NATO high command or other TCN's and he was not accountable to, nor reliant on, NATO for those decisions. Since the ordering of detention was a separate exercise of jurisdiction by each COMKFOR, this case was distinguishable from the case of *Hess v. the United Kingdom* (28 May 1975, Decisions and Reports no. 2, p. 72).

79. Fifthly, and alternatively, KFOR did not have a separate legal personality and could not be a subject of international law or bear international responsibility for the acts or omissions of its personnel.

80. Even if this Court were to consider that the relevant States were executing an international (UN/NATO) mandate, this would not absolve them from their Convention responsibility for two alternative reasons. In the first place, Article 103 of the UN Charter would have applied to relieve States of their Convention responsibilities only if UNSC Resolution 1244 required them to act in a manner which breached the Convention which was not the case: there was no conflict between the demands of that Resolution and the Convention. Secondly, the Convention permitted States to transfer sovereign power to an international organisation to pursue common goals if it was necessary to comply with international legal obligations and if the organisation imposing the obligation provided substantive and procedural protection "equivalent" to that of the Convention (*Bosphorus*, cited above, § 155): neither NATO nor KFOR provided such protection.

81. Finally, and as to the respondent States' arguments, their submissions on the *Monetary Gold* principle were fundamentally misconceived. In addition, it would be inconsistent with the object and purpose of the Convention to accept that States should be deterred from participating in peacekeeping missions by the recognition of this Court's jurisdiction in the present cases.

C. The submissions of the respondent States

1. The French Government

82. The Government argued that the term "jurisdiction" in Article 1 was closely linked to the notion of a State's competence *ratione personae*. In addition, and according to the ILC, the criterion by which the responsibility of an international organisation was engaged in respect of acts of agents at its disposal was the overall effective, as opposed to exclusive, control of the agent by the organisation (paragraphs 30-33 above).

83. The French contingent was placed at the disposal of KFOR which, from a security point of view, exercised effective control in Kosovo. KFOR was an international force under unified command, as could be seen from numerous constituent and applying instruments, over which the French State did not exercise any authority. The MNBs were commanded by an officer from a lead nation, the latter was commanded by COMKFOR who was in turn commanded, through the NATO chain of command, by the UNSC. Operational control of the forces was that of COMKFOR, strategic control was exercised by Supreme Allied Commander Europe of NATO ("SACEUR") and political control was exercised by the NAC of NATO and, finally, by the UNSC. Decisions and acts were therefore taken in the name of KFOR and the French contingent acted at all times according to the OPLAN devised and controlled by NATO. KFOR was therefore an application of the peace-keeping operations authorised by the UNSC whose resolutions formed the legal basis for NATO to form and command KFOR. In such circumstances, the acts of the national contingents could not be imputed to a State but rather to the UN which exercised overall effective control of the territory.

84. The lack of jurisdiction *ratione personae* of France was confirmed by the following. In the first place, reference was made to the immunities of KFOR and UNMIK and to the special remedies put in place for obtaining damages which were adapted to the particular context of the international mission of KFOR (paragraphs 46-49 above). Secondly, if the Parliamentary Assembly of the Council of Europe ("PACE") recommended (Resolution 1417 (2005) of 25 January 2005) the creation of a human rights' court in Kosovo, it could not have considered that Convention Contracting Parties already exercised Article 1 jurisdiction there. Thirdly, the Committee for the

Prevention of Torture, Inhuman and Degrading Treatment ("the CPT") concluded agreements with KFOR and UNMIK in May 2006 as it considered that Kosovo did not fall under the several jurisdiction of Contracting States. Fourthly, the Venice Commission, in its above-cited Opinion, did not consider that the jurisdiction of Convention States, or therefore of this Court, extended to Kosovo. Fifthly, any recognition of this Court's jurisdiction would involve judging the actions of non-Contracting States contrary to the *Monetary Gold* principle (judgment cited above). Sixthly, the ILC draft Articles on State Responsibility (paragraph 34 above) meant that the French contingent's acts and omissions (carried out under the authority of NATO and on behalf of KFOR) were not imputable to France.

2. The Norwegian Government

85. The case was incompatible *ratione personae* as Mr Saramati was not within the jurisdiction of the respondent States.

86. The legal framework for KFOR detention was the MTA, UNSC Resolution 1244, OPLAN 10413, KFOR Rules of Engagement, FRAGO997 replaced (in October 2001) by COMKFOR Detention Directive 42.

87. The command structure was hierarchical under unified command and control: each TCN transferred authority over their contingents to the NATO chain of command to ensure the attainment of the common KFOR objective. That chain of command ran from COMKFOR (appointed every 6 months with NATO approval), through a NATO chain of command to the NAC of NATO and onward to the UNSC which had overall authority and control. In all operational matters, no national military chain of command existed between Norway and COMKFOR so that the former could not instruct COMKFOR nor could COMKFOR deviate from NATO orders. All MNBs and their lead countries were fully within the KFOR chain of command. The present case was distinguishable from the above-cited *Bosphorus* case since no TCN had any sovereign rights over or in Kosovo.

88. KFOR was therefore a cohesive military force under the authority of the UNSC which monitored the discharge of the mandate through the SG reports. This constituted, with the civilian presence (UNMIK), a comprehensive UN administration of which national contributions were building blocks and not autonomous units.

89. The monitoring systems in place confirmed this: as noted above, the UNSC received feedback *via* the SG from KFOR and UNMIK; it was UNMIK which submitted a report to the UN Human Rights Committee on the human rights situation in Kosovo (Concluding Observations of the Human Rights Committee: Serbia and Montenegro, 12 August 2004, CCPR/CO/81/SEMO) and this Government also referred to the PACE, CPT and the Venice Commission positions relied on by the French Government (paragraph 84 above).

90. Finally, this Government underlined the serious repercussions of extending Article 1 to cover peacekeeping missions and, notably, the possibility of deterring States from participating in such missions and of making already complex peacekeeping missions unworkable due to overlapping and perhaps conflicting national or regional standards.

3. Joint (oral) submissions of France and Norway

91. In these submissions, the States also explained the necessarily evolved nature of modern peacekeeping missions, developed in response to growing demand. That the UN was the controlling umbrella was consistent with UNMIK and KFOR having independent command and control structures and applied regardless of whether KFOR was a traditionally established UN security presence under direct UN operational command or whether, as in the present cases, the UNSC had authorised an organisation or States to implement its security functions. The structure adopted in the present cases maintained the necessary integrity, effectiveness and centrality of the mandate (Report of the Panel on United Nations Peace Operations (the "Brahami report", A/55/305-S/2000/809). The security presence acted under UN auspices and action was taken by, and on behalf of, the international structures established by the UNSC and not by, or on behalf of, any TCN. Neither the status of "lead nation" of a MNB and its consequent control of a sector of Kosovo nor the nationality of the French and Norwegian COMKFOR could detach those States from their international mandate.

92. As to the de-mining and detention mandates, UNSC Resolution 1244 authorised KFOR to use all necessary means to secure, *inter alia*, the environment, public safety and, until UNMIK could take over responsibility, de-mining. That Resolution also authorized KFOR to carry out security assessments related to arms smuggling (to the Former Yugoslav Republic of Macedonia) and to detain persons according to detention directives and orders adopted under unified command.

93. Referring to the above-cited *Bosphorus* judgment, they noted that neither of the respondent States exercised sovereignty in Kosovo and none had handed over sovereign powers over Kosovo to an international organisation.

94. There were important sub-issues in the case including liability for involvement in a UN peacekeeping mission and the link between a regional instrument and international peacekeeping mission authorised by an organisation of universal vocation. In this context, they underlined the serious repercussions which the recognition of TCN jurisdiction would have including deterring TCN participation in, and undermining the coherence and therefore effectiveness of, such peacekeeping missions.

95. Finally, the applicants' suggestion, that the impugned action and inaction constituted a sufficient jurisdictional link between the States and the applicants, was misconceived. The applicants had also confused the

legal personality of international structures (such as NATO and the UN) and that of their member states. Even if KFOR did not have separate legal personality, it was under the control of the UN, which did. Neither the retention of disciplinary control by TCN's nor the Venice Commission Opinion relied upon by the applicants was inconsistent with the international operational control of such an operation by NATO through KFOR.

D. The submissions of the third parties

1. The Government of Denmark

96. The applicants did not fall within the jurisdiction of the respondent States and the applications were therefore inadmissible as incompatible *ratione personae*.

97. The cases raised fundamental issues as to the scope of the Convention as a regional instrument and its application to acts of the international peace-keeping forces authorised under Chapter VII of the UN Charter. 192 States had vested the UNSC (including all Convention Contracting States) with primary responsibility for the maintenance of international peace and security (Article 24 of the UN Charter) and, in fulfilling that function, it had the authority to make binding decisions (Article 25) which prevailed over other international obligations (Article 103). The UNSC could lay down the necessary framework for civil and military assistance and, in the case of Kosovo, this was UNSC Resolution 1244. The central question was, therefore, whether personnel contributed by TCNs were also exercising jurisdiction on behalf of the TCN.

98. In the first place, even if the most relevant recognised instance of extra-territorial jurisdiction was the notion (developed in the above-cited jurisprudence concerning Northern Cyprus and the subsequent *Issa* case) of "effective overall control", the TCNs could not have exercised such control since the relevant TCN personnel acted in fulfilment of UNMIK and KFOR functions. UNMIK exercised virtually all governmental powers in Kosovo and was answerable, *via* the SRSG and SG, to the UNSC. Its staff were employed by the UN. The "unified command and control" structure of KFOR, a coherent multinational force established under UNSC Resolution 1244 and falling under a single line of command under the authority of COMKFOR, rendered untenable the proposition of individual TCN liability for the acts or inaction of their troops carried out in the exercise of international authority.

99. Secondly, States put personnel at the disposal of the UN in Kosovo to pursue the purposes and principles of the UN Charter. A finding of "no jurisdiction" would not leave the applicants in a human rights' vacuum, as

they suggested, given the steps being taken by those international presences to promote human rights' protection.

100. Thirdly, the Convention had to be interpreted and applied in the light of international law, in particular, on the responsibility of international organisations for organs placed at their disposal. Referring to the ongoing work of the ILC in this respect (paragraphs 30-33 above), they noted that that work so far had demonstrated no basis for holding a State responsible for peacekeeping forces placed at the disposal of the UNSC acting under Chapter VII, under unified command and control, within the mandate outlined and in execution of orders from that command structure.

101. Finally, if there were specific inadequacies in human rights' protection in Kosovo, these should be dealt with within the UN context. Seeking to address those deficiencies through this Court risked deterring States from participating in UN peacekeeping missions and undermining the coherence and effectiveness of such missions.

2. The Government of Estonia

102. The impugned action and inaction were regulated by UNSC Resolution 1244 adopted under Chapter VII of the UN Charter and the States were thereby fulfilling an obligation which fell within the scope of, and complied with, that Resolution in a manner which complied with international human rights standards as prescribed in the UN Charter. Even if there was a conflict between a State's UN and other treaty obligations, the former took precedent (Articles 25 and 103 of the UN Charter).

3. The German Government's written submissions

103. There was no jurisdictional link between Mr Saramati and the respondents because, *inter alia*, the agents of the respondents acted on behalf of UNMIK and KFOR.

104. Ultimate responsibility for Kosovo lay with the UN since effective control of Kosovo was exercised by UNMIK and KFOR pursuant to UNSC Resolution 1244. The UNSC retained overall responsibility and delegated the implementation of the Resolution's objectives to certain international actors all the while monitoring the discharge of mandates. KFOR retained, and operated under the principle of, "unified command and control": neither the national contingents nor COMKFOR had roles other than their international mandate under UNSC Resolution 1244 and none exercised sovereign powers, a fact not changed by the retention by TCNs of criminal and disciplinary competence over soldiers. The UNSC, *via* the SG and the SRSG, continued to be the guiding and legal authority for UNMIK. In short, both presences were international, coherent and comprehensive structures admitting of no national instruction.

105. These submissions as to the unity of the UN operation were confirmed by secondary legislation in Kosovo: if UNMIK took care to

ensure in its regulations human rights' protection and monitoring, that implied that the Convention control mechanisms did not apply. In addition, the Human Rights Committee of the UN regarded the inhabitants of Kosovo as falling under the jurisdiction of UNMIK (see paragraph 89 above).

106. This Court could not review acts of the UN, not least since Article 103 of the UN Charter established the primacy of the UN legal order. The above-cited *Bosphorus* case could be distinguished since the impugned actions of the Irish authorities took place on Irish territory over which they were deemed to have had full and effective control (relying on the above-cited judgment of *Ilaşcu and Others*, §§ 312-33 and *Assanidze v. Georgia* [GC], no. 71503/01, §§ 19-142, ECHR 2004-II) whereas none of the present respondent States enjoyed any sovereign rights or authority over the territory of Kosovo (the above cited Opinion of the Venice Commission and Resolution of PACE). Any determination by this Court of a complaint against UNMIK/KFOR would also breach the *Monetary Gold* principle (cited at paragraph 67 above).

107. Even if the respondent States were found to have "jurisdiction", the impugned act could not be imputed to those States and, in this respect, the actual command structure was clearly determinative. Having regard to Article 6 of the ILC draft Articles on Responsibility of States for international wrongful acts, Article 5 of the ILC draft Articles on the Responsibility of International Organisations and the report of the Special Rapporteur to the ILC as regards the latter (see paragraphs 30-33 above), any damage caused by UN peacekeeping forces acting within their mandate would be attributable to the UN.

108. Finally, the difficulties to which post-conflict situations gave rise had to be recalled, notably the fact that full human rights' protection was not possible in such a reconstructive context. If TCNs feared their several liability if standards fell below those of the Convention, they might restrain from participating in such missions which would run counter to the spirit of the Convention and its jurisprudence which supported international co-operation and the proper functioning of international organisations (the above-cited cases of *Banković and Others*, at § 62, *Ilaşcu and Others*, at § 332 and *Bosphorus*, at § 150).

4. The Greek Government

109. The legal basis for the civil and military presence in Kosovo was UNSC Resolution 1244. KFOR formed part, and acted in Kosovo under the direction, of a multinational framework formed by the UN and NATO. Even assuming that KFOR (along with UNMIK) exercised effective control in Kosovo, that presence was under the control of the UN and/or NATO and once the TCNs stayed within the relevant mandate they did not exercise any individual control or jurisdiction in Kosovo. Referring to the Opinion of the Venice Commission (cited at paragraph 50 above), the Government

concluded that any action/inaction of KFOR was attributable to the UN and/or NATO and not to the respondent States.

5. The Polish Government

110. A State could not be held responsible for the activities of KFOR or UNMIK, those entities acted under the authority of the UN pursuant to UNSC Resolution 1244 and the UN could not be held accountable under the Convention. In providing resources and personnel to the UN (with a legal personality distinct from its member states), TCNs were not exercising governmental authority in Kosovo. The complaints were therefore incompatible *ratione personae*.

111. A finding that States were severally liable for participating in peacekeeping and democracy-building missions would have a devastating effect on such missions notably as regards the States' willingness to participate in such missions which result would run counter to the values of the UN Charter, the Statute of the Council of Europe and the Convention.

6. The Government of the United Kingdom

112. The applicants did not fall within the jurisdiction of the respondent States so the question of the attribution of actions to those States did not arise (*Banković and Others* decision, at § 75).

113. UNSC Resolution 1244 was adopted under Chapter VII of the UN Charter and, according to Article 103 of that Charter, the obligations of members states of the UN under that Resolution took priority over other international treaty obligations.

The administration of Kosovo was in the hands of the UN, *via* UNMIK and the SRSG, and that administration was not subject to the Convention. UNMIK was an international civil presence created by the UN in Kosovo answerable, *via* the SRSG, to the UNSC on its tasks set out in UNSC Resolution 1244. UNMIK was responsible for the civil administration of Kosovo and was therefore responsible for human rights matters. As to de-mining in particular, responsibility was that of UNMACC: regard was had to the terms of UNSC Resolution 1244, to the establishment of UNMACC and its taking *de facto* and then formal control of de-mining in August and October 1999, respectively. UNMACC being an agency of the UN, any allegation about de-mining could not engage the responsibility of France.

KFOR was a multinational and international security presence so that at no time did any respondent State exercise effective overall control over a part of Kosovo. The MNBs comprised contingents from many TCNs (including substantial contingents from States not parties to the Convention and from outside Europe) and were answerable to an overall commander ("unified command and control"). Even if a State was a "lead nation" of a MNB which controlled a particular sector, that gave that State no degree of control or authority over the inhabitants or territory of Kosovo. Neither

KFOR as a whole nor the TCNs exercised control over any part of Kosovo: UNMIK was tasked with civil administration and with human rights matters and KFOR did not control that administration in a manner comparable to the Turkish forces identified by the Court as regards Northern Cyprus (see cases cited at paragraph 68 above).

114. Accordingly, the effect of UNSC Resolution 1244 was that, at the relevant time, the UNSC exercised the powers of government in Kosovo through an international administration supported by an international security presence to which the respondent States and other non-Contracting States had provided troops.

None of the respondent States were therefore in a position to secure the rights and freedoms defined in Article 1 of the Convention to any of the inhabitants of Kosovo. None were asserting sovereign authority but rather international authority through an international security presence mandated by the UNSC and acting pursuant to powers conferred by a binding Chapter VII decision. This conclusion was reinforced by the above-cited *Hess* case. The present case could be distinguished from the situation in *R (Al-Skeini) v. Secretary of State for Defence* ([2005] EWCA Ci 1609) where a contingent in an international operation had exclusive control of a place of detention.

In addition, while the duty under Article 1 was indivisible (*Banković and Others*, at § 75), the respondent States had neither the power nor the responsibility to secure the rights and freedoms defined in Article 1 since that responsibility was specifically vested in UNMIK.

115. The application raised fundamental questions about the relationship between the Convention (a regional treaty and "constitutional instrument of European public order") and the universal system for the maintenance of international peace in which the Council of Europe played an important part. To superimpose that regional human rights' structure upon a peace keeping force established by the universal organisation would be inappropriate as a matter of principle and run counter to the *ordre public* to which the Court frequently referred and, further, risked causing serious difficulties to Contracting States in participating in UN and other multinational peacekeeping operations outside the territories of the Convention States.

116. To avoid this result, Article 1 should be interpreted to mean that, where officials from States act together within the scope of an international operation authorised by the UN, they are not exercising sovereign jurisdiction but that of the international authority, so that their acts did not bring those affected within the jurisdiction of the States or engage the Convention responsibility of those States.

7. The Government of Portugal.

117. They adopted the observations of the UK Government.

8. The UN

118. The UN outlined the respective mandates and responsibilities of UNMIK and KFOR as set out in UNSC Resolution 1244. The mandate adopted by the UNSC was an expression of the will of the member states to grant a UN organ authority, as opposed to a duty, to act: it was not an obligation of result. In executing the mandate, the UN operation retained, unless otherwise specified, discretion to determine implementation including timing and priorities. The UN recalled the relevant provisions of UNSC Resolution 1244 which outlined the main responsibilities of the civil and security presences, noting that the general and at time "imprecise" mandate was, for the most part, left to be concretised and agreed upon in the realities of their daily operations.

In addition, it was important to understand the legal status of UNMIK and its relationship to KFOR. UNMIK was a subsidiary organ of the UN endowed with all-inclusive legislative and administrative powers in Kosovo including the administration of justice (UNMIK Regulation 1999/1, at paragraph 70 above), it was headed by a SRSG and reported directing to the UNSC *via* the SG. KFOR was established as an equal presence but with a separate mandate and control structure: it was a NATO led operation authorised by the UNSC under unified command and control. There was no formal or hierarchical relationship between the two presences nor was the military in any way accountable to the civil presence. However, both were required to co-ordinate and operate in a mutually supportive manner towards the same goals.

119. As to de-mining in particular, paragraph 9(e) of UNSC Resolution 1244 (according responsibility for de-mining to KFOR but expressly leaving for determination by the two presences how that task would be transferred to UNMIK) and paragraph 11(k) (entrusting UNMIK with ensuring the safe and unimpeded return of persons to their homes) constituted the mandate for the UNMIK MAP. On 17 June 1999 UNMACC was established as the focal point and co-ordination mechanism for all mine action activities in Kosovo (the Concept Plan, paragraph 54 above). To fulfil these functions it depended largely on close co-operation with all de-mining partners and, notably, KFOR. Responsibility for de-mining was *de facto* assumed by UNMACC in August 1999 although it was not until October 1999 that UNMIK officially informed KFOR (letter from the Deputy SRSG at paragraph 57 above). However, this did not relieve KFOR of its residual and continuous responsibility to support de-mining activities and, in particular, to identify, mark and report on the location of CBU sites. KFOR's continuing responsibilities for de-mining activities were set out in the Concept Plan and, more particularly, in the NATO OPLAN 10413 (paragraph 3 above). One of KFOR's most important tasks was information sharing and marking strike sites. Indeed, according to FRAGO300 (paragraph 56 above), KFOR had decided to increase its commitment to

CBU site marking. Accordingly, UNMIK's responsibility for de-mining was dependant on accurate information being available on locations and, since UNMACC was unaware of the location of the unmarked CBUs relevant to the present case, it took no action to de-mine.

120. In sum, while the de-mining operation would have fallen within UNMACCs mandate, in the absence of the necessary location information from KFOR, the impugned inaction could not be attributed to UNMIK.

E. The Court's assessment

121. The Court has adopted the following structure in its decision set out below. It has, in the first instance, established which entity, KFOR or UNMIK, had a mandate to detain and de-mine, the parties having disputed the latter point. Secondly, it has ascertained whether the impugned action of KFOR (detention in *Saramati*) and inaction of UNMIK (failure to de-mine in *Behrami*) could be attributed to the UN: in so doing, it has examined whether there was a Chapter VII framework for KFOR and UNMIK and, if so, whether their impugned action and omission could be attributed, in principle, to the UN. The Court has used the term "attribution" in the same way as the ILC in Article 3 of its draft Articles on the Responsibility of International Organisations (see paragraph 29 above). Thirdly, the Court has then examined whether it is competent *ratione personae* to review any such action or omission found to be attributable to the UN.

122. In so doing, the Court has borne in mind that it is not its role to seek to define authoritatively the meaning of provisions of the UN Charter and other international instruments: it must nevertheless examine whether there was a plausible basis in such instruments for the matters impugned before it (*mutatis mutandis*, *Brannigan and McBride v. the United Kingdom*, judgment of 26 May 1993, Series A no. 258-B, § 72).

It also recalls that the principles underlying the Convention cannot be interpreted and applied in a vacuum. It must also take into account relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity and harmony with the governing principles of international law of which it forms part, although it must remain mindful of the Convention's special character as a human rights treaty (Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties of 23 May 1969; *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI; and the above-cited decision of *Banković and Others*, at § 57).

1. The entity with the mandate to detain and to de-mine

123. The respondent and third party States argued that it made no difference whether it was KFOR or UNMIK which had the mandate to detain (the *Saramati* case) and to de-mine (the *Behrami* case) since both

were international structures established by, and answerable to, the UNSC. The applicants maintained that KFOR had the mandate to both detain and de-mine and that the nature and structure of KFOR was sufficiently different to UNMIK as to engage the respondent States individually.

124. Having regard to the MTA (notably paragraph 2 of Article 1), UNSC Resolution 1244 (paragraph 9 as well as paragraph 4 of Annex 2 to the Resolution) as confirmed by FRAGO997 and later COMKFOR Detention Directive 42 (see paragraph 51 above), the Court considers it evident that KFOR's security mandate included issuing detention orders.

125. As regards de-mining, the Court notes that Article 9(e) of UNSC Resolution 1244 provided that KFOR retained responsibility for supervising de-mining until UNMIK could take over, a provision supplemented by, as pointed out by the UN to the Court, Article 11(k) of the Resolution. The report of the SG to the UNSC of 12 June 1999 (paragraph 53 above) confirmed that this activity was a humanitarian one (former Pillar I of UNMIK) so UNMIK was to establish UNMACC pending which KFOR continued to act as the *de facto* coordination centre. When UNMACC began operations, it was therefore placed under the direction of the Deputy SRSG of Pillar I. The UN submissions to this Court, the above-cited Evaluation Report, the Concept Plan, FRAGO 300 and the letters of the Deputy SRSG of August and October 1999 to KFOR (paragraphs 55 and 57 above) confirm, in the first place, that the mandate for supervising de-mining was *de facto* and *de jure* taken over by UNMACC, created by UNMIK, at the very latest, by October 1999 and therefore prior to the detonation date in the *Behrami* case and, secondly, that KFOR remained involved in de-mining as a service provider whose personnel therefore acted on UNMIK's behalf.

126. The Court does not find persuasive the parties' arguments to the contrary. Whether, as noted by the applicants and the UN respectively, NATO had dropped the CBUs or KFOR had failed to secure the site and provide information thereon to UNMIK, this would not alter the mandate of UNMIK. The reports of the SG to the UNSC (53 above) cited by the applicants may have referred to UNMACC as having been set up jointly by KFOR and the UN, but this described the provision of assistance to UNMIK by the previous *de facto* co-ordination centre (KFOR): it was therefore transitional assistance which accorded with KFOR's general obligation to support UNMIK (paragraphs 6 and 9(f) of UNSC Resolution 1244) and such assistance in the field did not change UNMIK's mandate. The report of the International Committee of the Red Cross relied upon by the applicants, indicated (at p. 23) that mine clearance in Kosovo was coordinated by UNMACC which in turn fell under the aegis of UNMIK. Finally, even if KFOR support was, as a matter of fact, essential to the continued presence of UNMIK (the applicants' submission), this did not alter the fact that the Resolution created separate and distinct presences, with different mandates and responsibilities and, importantly, without any hierarchical relationship or accountability between them (UN submissions, paragraph 118 above).

127. Accordingly, the Court considers that issuing detention orders fell within the security mandate of KFOR and that the supervision of de-mining fell within UNMIK's mandate.

2. Can the impugned action and inaction be attributed to the UN?

(a) The Chapter VII foundation for KFOR and UNMIK

128. As the first step in the application of Chapter VII, the UNSC Resolution 1244 referred expressly to Chapter VII and made the necessary identification of a "threat to international peace and security" within the meaning of Article 39 of the Charter (paragraph 23 above). The UNSC Resolution 1244, *inter alia*, recalled the UNSC's "primary responsibility" for the "maintenance of international peace and security". Being "determined to resolve the grave humanitarian situation in Kosovo" and to "provide for the safe and free return of all refugees and displaced persons to their homes", it determined that the "situation in the region continues to constitute a threat to international peace and security" and, having expressly noted that it was acting under Chapter VII, it went on to set out the solutions found to the identified threat to peace and security.

129. The solution adopted by UNSC Resolution 1244 to this identified threat was, as noted above, the deployment of an international security force (KFOR) and the establishment of a civil administration (UNMIK).

In particular, that Resolution authorised "Member States and relevant international organisations" to establish the international security presence in Kosovo as set out in point 4 of Annex 2 to the Resolution with all necessary means to fulfil its responsibilities listed in Article 9. Point 4 of Annex 2 added that the security presence would have "substantial [NATO] participation" and had to be deployed under "unified command and control". The UNSC was thereby delegating to willing organisations and members states (see paragraph 43 as regards the meaning of the term "delegation" and paragraph 24 as regards the voluntary nature of this State contribution) the power to establish an international security presence as well as its operational command. Troops in that force would operate therefore on the basis of UN delegated, and not direct, command. In addition, the SG was authorised (Article 10) to establish UNMIK with the assistance of "relevant international organisations" and to appoint, in consultation with the UNSC, a SRSG to control its implementation (Articles 6 and 10 of the UNSC Resolution). The UNSC was thereby delegating civil administration powers to a UN subsidiary organ (UNMIK) established by the SG. Its broad mandate (an interim administration while establishing and overseeing the development of provisional self-government) was outlined in Article 11 of the Resolution.

130. While the Resolution referred to Chapter VII of the Charter, it did not identify the precise Articles of that Chapter under which the UNSC was

acting and the Court notes that there are a number of possible bases in Chapter VII for this delegation by the UNSC: the non-exhaustive Article 42 (read in conjunction with the widely formulated Article 48), the non-exhaustive nature of Article 41 under which territorial administrations could be authorised as a necessary instrument for sustainable peace; or implied powers under the Charter for the UNSC to so act in both respects based on an effective interpretation of the Charter. In any event, the Court considers that Chapter VII provided a framework for the above-described delegation of the UNSC's security powers to KFOR and of its civil administration powers to UNMIK (see generally and *inter alia*, White and Ulgen, "*The Security Council and the Decentralised Military Option: Constitutionality and Function*", Netherlands Law Review 44, 1997, 386; Sarooshi, "*The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII powers*", Oxford University (1999); Chesterman, "*Just War or Just Peace: Humanitarian Intervention and International Law*", (2002) Oxford University Press, pp. 167-169 and 172); *Zimmermann and Stahn*, cited above; De Wet, "*The Chapter VII Powers of the United Nations Security Council*", 2004, pp. 260-265; Wolfrum "*International Administration in Post-Conflict Situations by the United Nations and other International Actors*", Max Planck UNYB Vol. 9 (2005), pp. 667-672; Friedrich, "*UNMIK in Kosovo: struggling with Uncertainty*", Max Planck UNYB 9 (2005) and the references cited therein; and *Prosecutor v. Duško Tadić*, Decision of 2.10.95, Appeals Chamber of ICTY, §§ 35-36).

131. Whether or not the FRY was a UN member state at the relevant time (following the dissolution of the former Socialist Federal Republic of Yugoslavia), the FRY had agreed in the MTA to these presences. It is true that the MTA was signed by "KFOR" the day before the UNSC Resolution creating that force was adopted. However, the MTA was completed on the express basis of a security presence "under UN auspices" and with UN approval and the Resolution had already been introduced before the UNSC. The Resolution was adopted the following day, annexing the MTA and no international forces were deployed until the Resolution was adopted.

(b) Can the impugned action be attributed to KFOR?

132. While Chapter VII constituted the foundation for the above-described delegation of UNSC security powers, that delegation must be sufficiently limited so as to remain compatible with the degree of centralisation of UNSC collective security constitutionally necessary under the Charter and, more specifically, for the acts of the delegate entity to be attributable to the UN (as well as Chesterman, de Wet, Friedrich, Kolb and Sarooshi all cited above, see Gowlland-Debbas "*The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance*" EIL (2000) Vol 11, No. 2 369-370; Niels Blokker, "*Is the authorisation Authorised? Powers and Practice of the UN Security Council*

to Authorise the Use of Force by "Coalition of the Able and Willing", EJIL (2000), Vol. 11 No. 3; pp. 95-104 and *Meroni v. High Authority* Case 9/56, [1958] ECR 133).

Those limits strike a balance between the central security role of the UNSC and two realities of its implementation. In the first place, the absence of Article 43 agreements which means that the UNSC relies on States (notably its permanent members) and groups of States to provide the necessary military means to fulfil its collective security role. Secondly, the multilateral and complex nature of such security missions renders necessary some delegation of command.

133. The Court considers that the key question is whether the UNSC retained ultimate authority and control so that operational command only was delegated. This delegation model is now an established substitute for the Article 43 agreements never concluded.

134. That the UNSC retained such ultimate authority and control, in delegating its security powers by UNSC Resolution 1244, is borne out by the following factors.

In the first place, and as noted above, Chapter VII allowed the UNSC to delegate to "Member States and relevant international organisations". Secondly, the relevant power was a delegable power. Thirdly, that delegation was neither presumed nor implicit, but rather prior and explicit in the Resolution itself. Fourthly, the Resolution put sufficiently defined limits on the delegation by fixing the mandate with adequate precision as it set out the objectives to be attained, the roles and responsibilities accorded as well as the means to be employed. The broad nature of certain provisions (see the UN submissions, paragraph 118 above) could not be eliminated altogether given the constituent nature of such an instrument whose role was to fix broad objectives and goals and not to describe or interfere with the detail of operational implementation and choices. Fifthly, the leadership of the military presence was required by the Resolution to report to the UNSC so as to allow the UNSC to exercise its overall authority and control (consistently, the UNSC was to remain actively seized of the matter, Article 21 of the Resolution). The requirement that the SG present the KFOR report to the UNSC was an added safeguard since the SG is considered to represent the general interests of the UN.

While the text of Article 19 of UNSC Resolution 1244 meant that a veto by one permanent member of the UNSC could prevent termination of the relevant delegation, the Court does not consider this factor alone sufficient to conclude that the UNSC did not retain ultimate authority and control.

135. Accordingly, UNSC Resolution 1244 gave rise to the following chain of command in the present cases. The UNSC was to retain ultimate authority and control over the security mission and it delegated to NATO (in consultation with non-NATO member states) the power to establish, as well as the operational command of, the international presence, KFOR.

NATO fulfilled its command mission *via* a chain of command (from the NAC, to SHAPE, to SACEUR, to CIC South) to COMKFOR, the commander of KFOR. While the MNBs were commanded by an officer from a lead TCN, the latter was under the direct command of COMKFOR. MNB action was to be taken according to an operational plan devised by NATO and operated by COMKFOR in the name of KFOR.

136. This delegation model demonstrates that, contrary to the applicants' argument at paragraph 77 above, direct operational command from the UNSC is not a requirement of Chapter VII collective security missions.

137. However, the applicants made detailed submissions to the effect that the level of TCN control in the present cases was such that it detached troops from the international mandate and undermined the unity of operational command. They relied on various aspects of TCN involvement including that highlighted by the Venice Commission (paragraph 50 above) and noted KFOR's legal personality separate to that of the TCNs.

138. The Court considers it essential to recall at this point that the necessary (see paragraph 24 above) donation of troops by willing TCNs means that, in practice, those TCNs retain some authority over those troops (for reasons, *inter alia*, of safety, discipline and accountability) and certain obligations in their regard (material provision including uniforms and equipment). NATO's command of operational matters was not therefore intended to be exclusive, but the essential question was whether, despite such TCN involvement, it was "effective" (ILC Report cited at paragraph 32 above).

139. The Court is not persuaded that TCN involvement, either actual or structural, was incompatible with the effectiveness (including the unity) of NATO's operational command. The Court does not find any suggestion or evidence of any actual TCN orders concerning, or interference in, the present operational (detention) matter. Equally there is no reason to consider that the TCN structural involvement highlighted by the applicants undermined the effectiveness of NATO's operational control. Since TCN troop contributions are in law voluntary, the continued level of national deployment is equally so. That TCNs provided materially for their troops would have no relevant impact on NATO's operational control. It was not argued that any NATO rules of engagement imposed would not be respected. National command (over own troops or a sector in Kosovo) was under the direct operational authority of COMKFOR. While individual claims might potentially be treated differently depending on which TCN was the source of the alleged problem (national commanders decided on whether immunity was to be waived, TCNs had exclusive jurisdiction in (at least) disciplinary and criminal matters, certain TCNs had put in place their own TCNCOs and at least one TCN accepted civil jurisdiction (the above-cited *Bici* case)), it has not been explained how this, of itself, could undermine the effectiveness or unity of NATO command in *operational* matters. The Court does not see how the failure to conclude a SOFA

between the UN and the host FRY could affect, as the applicants suggested, NATO's operational command. That COMKFOR was charged (the applicants at paragraph 78 above) exclusively with issuing detention orders amounts to a division of labour and not a break in a unified command structure since COMKFOR acted at all times as a KFOR officer answerable to NATO through the above-described chain of command.

140. Accordingly, even if the UN itself would accept that there is room for progress in co-operation and command structures between the UNSC, TCNs and contributing international organisations (see, for example, Supplement to an Agenda for Peace: Position paper of the SG on the Occasion of the 50th Anniversary of the UN, A/50/60 - S/1995/1; the *Brahami* report, cited above; UNSC Resolutions 1327 (2000) and 1353 (2001); and Reports of the SG of 1 June and 21 December 2001 on the Implementation of the Recommendations of the Special Committee on Peacekeeping Operations and the Panel on UN Peace Operations (A/55/977, A/56/732)), the Court finds that the UNSC retained ultimate authority and control and that effective command of the relevant operational matters was retained by NATO.

141. In such circumstances, the Court observes that KFOR was exercising lawfully delegated Chapter VII powers of the UNSC so that the impugned action was, in principle, "attributable" to the UN within the meaning of the word outlined at paragraphs 29 and 121 above.

(c) Can the impugned inaction be attributed to UNMIK?

142. In contrast to KFOR, UNMIK was a subsidiary organ of the UN. Whether it was a subsidiary organ of the SG or of the UNSC, whether it had a legal personality separate to the UN, whether the delegation of power by the UNSC to the SG and/or UNMIK also respected the role of the UNSC for which Article 24 of the Charter provided, UNMIK was a subsidiary organ of the UN institutionally directly and fully answerable to the UNSC (see ILC report at paragraph 33 above). While UNMIK comprised four pillars (three of which were at the time led by UNHCR, the OSCE and the EU), each pillar was under the authority of a Deputy SRSG, who reported to the SRSG who in turn reported to the UNSC (Article 20 of UNSC Resolution 1244).

143. Accordingly, the Court notes that UNMIK was a subsidiary organ of the UN created under Chapter VII of the Charter so that the impugned inaction was, in principle, "attributable" to the UN in the same sense.

3. Is the Court competent ratione personae?

144. It is therefore the case that the impugned action and inaction are, in principle, attributable to the UN. It is, moreover, clear that the UN has a legal personality separate from that of its member states (*The Reparations*

case, ICJ Reports 1949) and that that organisation is not a Contracting Party to the Convention.

145. In its *Bosphorus* judgment (cited above, §§152-153), the Court held that, while a State was not prohibited by the Convention from transferring sovereign power to an international organisation in order to pursue cooperation in certain fields of activity, the State remained responsible under Article 1 of the Convention for all acts and omissions of its organs, regardless of whether they were a consequence of the necessity to comply with international legal obligations, Article 1 making no distinction as to the rule or measure concerned and not excluding any part of a State's "jurisdiction" from scrutiny under the Convention. The Court went on, however, to hold that where such State action was taken in compliance with international legal obligations flowing from its membership of an international organisation and where the relevant organisation protected fundamental rights in a manner which could be considered at least equivalent to that which the Convention provides, a presumption arose that the State had not departed from the requirements of the Convention. Such presumption could be rebutted, if in the circumstances of a particular case, it was considered that the protection of Convention rights was manifestly deficient: in such a case, the interest of international cooperation would be outweighed by the Convention's role as a "constitutional instrument of European public order" in the field of human rights (*ibid.*, §§ 155-156).

146. The question arises in the present case whether the Court is competent *ratione personae* to review the acts of the respondent States carried out on behalf of the UN and, more generally, as to the relationship between the Convention and the UN acting under Chapter VII of its Charter.

147. The Court first observes that nine of the twelve original signatory parties to the Convention in 1950 had been members of the UN since 1945 (including the two Respondent States), that the great majority of the current Contracting Parties joined the UN before they signed the Convention and that currently all Contracting Parties are members of the UN. Indeed, one of the aims of this Convention (see its preamble) is the collective enforcement of rights in the Universal Declaration of Human Rights of the General Assembly of the UN. More generally, it is further recalled, as noted at paragraph 122 above, that the Convention has to be interpreted in the light of any relevant rules and principles of international law applicable in relations between its Contracting Parties. The Court has therefore had regard to two complementary provisions of the Charter, Articles 25 and 103, as interpreted by the International Court of Justice (see paragraph 27 above).

148. Of even greater significance is the imperative nature of the principle aim of the UN and, consequently, of the powers accorded to the UNSC under Chapter VII to fulfil that aim. In particular, it is evident from the Preamble, Articles 1, 2 and 24 as well as Chapter VII of the Charter that the primary objective of the UN is the maintenance of international peace and security. While it is equally clear that ensuring respect for human rights

represents an important contribution to achieving international peace (see the Preamble to the Convention), the fact remains that the UNSC has primary responsibility, as well as extensive means under Chapter VII, to fulfil this objective, notably through the use of coercive measures. The responsibility of the UNSC in this respect is unique and has evolved as a counterpart to the prohibition, now customary international law, on the unilateral use of force (see paragraphs 18-20 above).

149. In the present case, Chapter VII allowed the UNSC to adopt coercive measures in reaction to an identified conflict considered to threaten peace, namely UNSC Resolution 1244 establishing UNMIK and KFOR.

Since operations established by UNSC Resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security and since they rely for their effectiveness on support from member states, the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with the fulfilment of the UN's key mission in this field including, as argued by certain parties, with the effective conduct of its operations. It would also be tantamount to imposing conditions on the implementation of a UNSC Resolution which were not provided for in the text of the Resolution itself. This reasoning equally applies to voluntary acts of the respondent States such as the vote of a permanent member of the UNSC in favour of the relevant Chapter VII Resolution and the contribution of troops to the security mission: such acts may not have amounted to obligations flowing from membership of the UN but they remained crucial to the effective fulfilment by the UNSC of its Chapter VII mandate and, consequently, by the UN of its imperative peace and security aim.

150. The applicants argued that the substantive and procedural protection of fundamental rights provided by KFOR was in any event not "equivalent" to that under the Convention within the meaning of the Court's *Bosphorus* judgment, with the consequence that the presumption of Convention compliance on the part of the respondent States was rebutted.

151. The Court, however, considers that the circumstances of the present cases are essentially different from those with which the Court was concerned in the *Bosphorus* case. In its judgment in that case, the Court noted that the impugned act (seizure of the applicant's leased aircraft) had been carried out by the respondent State authorities, on its territory and following a decision by one of its Ministers (§ 137 of that judgment). The Court did not therefore consider that any question arose as to its competence, notably *ratione personae*, vis-à-vis the respondent State despite the fact that the source of the impugned seizure was an EC Council Regulation which, in turn, applied a UNSC Resolution. In the present cases, the impugned acts and omissions of KFOR and UNMIK cannot be

attributed to the respondent States and, moreover, did not take place on the territory of those States or by virtue of a decision of their authorities. The present cases are therefore clearly distinguishable from the *Bosphorus* case in terms both of the responsibility of the respondent States under Article 1 and of the Court's competence *ratione personae*.

There exists, in any event, a fundamental distinction between the nature of the international organisation and of the international cooperation with which the Court was there concerned and those in the present cases. As the Court has found above, UNMIK was a subsidiary organ of the UN created under Chapter VII and KFOR was exercising powers lawfully delegated under Chapter VII of the Charter by the UNSC. As such, their actions were directly attributable to the UN, an organisation of universal jurisdiction fulfilling its imperative collective security objective.

152. In these circumstances, the Court concludes that the applicants' complaints must be declared incompatible *ratione personae* with the provisions of the Convention.

4. Remaining admissibility issues

153. In light of the above conclusion, the Court considers that it is not necessary to examine the remaining submissions of the parties on the admissibility of the application including on the competence *ratione loci* of the Court to examine complaints against the respondent States about extra-territorial acts or omissions, on whether the applicants had exhausted any effective remedies available to them within the meaning of Article 35 § 1 of the Convention and on whether the Court was competent to consider the case given the principles established by the above-cited *Monetary Gold* judgment (the above-cited cited *Banković and Others* decision, at § 83).

For these reasons, the Court

Decides, unanimously, to strike the *Saramati* application against Germany out of its list of cases.

Declares, by a majority, inadmissible the application of *Behrami* and *Behrami* and the remainder of the *Saramati* application against France and Norway.

Christos ROZAKIS
President

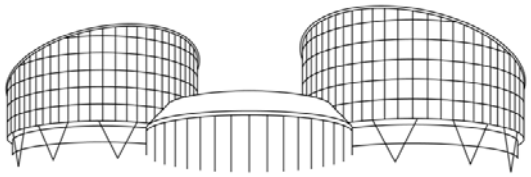
Michael O'BOYLE
Deputy Registrar

APPENDIX
List of Abbreviations

- CBU: Cluster Bomb Unit
- CFI: Court of First Instance of the European Communities
- CIC SOUTH: Commander in Chief of Allied Forces Southern Europe
- COMKFOR: Commander of KFOR
- CPT: Committee for the Prevention of Torture and Inhuman and Degrading Treatment, Council of Europe
- DSRSG – Deputy Special Representative to the Secretary General, UN
- EU: European Union
- FRAGO: Fragmentary Order
- FRY: Federal Republic of Yugoslavia
- ICJ: International Court of Justice
- ICTY: International Criminal Tribunal for the former Yugoslavia
- ILC: International Law Commission
- KCO: Kosovo Claims Office
- KFOR: Kosovo Force
- MAP : Mine Action Programme
- MNB : Multinational Brigade
- MTA: Military Technical Agreement
- NAC: North Atlantic Council, NATO
- NATO: North Atlantic Treaty Organisation
- OPLAN: Operational Plan
- OSCE: Organisation for Security and Co-operation in Europe
- PACE: Parliamentary Assembly, Council of Europe
- SACEUR: Supreme Allied Commander Europe, NATO
- SG: Secretary General, UN
- SHAPE – Supreme Headquarters Allied Powers Europe, NATO
- SOFA: Status of Forces Agreement
- SOP: Standing Operating Procedures
- SRSG: Special Representative to the Secretary General, UN
- TCN: Troop Contributing Nation
- TCNCO: Troop Contributing Nation Claims' Office
- UN: United Nations
- UNHCR: United Nations High Commissioner for Refugees
- UNMACC: United Nations Mine Action Co-ordination Centre
- UNMAS: United Nations Mine Action Service
- UNMIK: United Nations Interim Administration Mission in Kosovo
- UNICEF: United Nations Children's Fund
- UNPROFOR: United Nations Protection Force
- UNSC: United Nations Security Council
- UNTAC: United Nations Transitional Administration for Cambodia
- UNTAES: United Nations Transitional Administration for Eastern Slavonia
- UNTAET: United Nations Transitional Administration for East Timor
- Venice Commission – European Commission for Democracy through Law, Council of Europe

European Court of Human Rights

Al-Jedda *v.* The United Kingdom
Judgment of 7 July 2011



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

This judgment is final but may be subject to editorial revision.

GRAND CHAMBER

CASE OF AL-JEDDA v. THE UNITED KINGDOM

(Application no. 27021/08)

JUDGMENT

STRASBOURG

7 July 2011

TABLE OF CONTENTS

In the case of Al-Jedda v. the United Kingdom**,**

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Jean-Paul Costa, *President,*
Christos Rozakis,
Nicolas Bratza,
Françoise Tulkens,
Josep Casadevall,
Dean Spielmann,
Giovanni Bonello,
Elisabeth Steiner,
Lech Garlicki,
Ljiljana Mijović,
David Thór Björgvinsson,
Isabelle Berro-Lefèvre,
George Nicolaou,
Luis López Guerra,
Ledi Bianku,
Ann Power,
Mihai Poalelungi, *judges,*

and Michael O'Boyle, *Deputy Registrar,*

Having deliberated in private on 9 and 16 June 2010 and 15 June 2011,

Delivers the following judgment, which was adopted on that last date:

PROCEDURE

1. The case originated in an application (no. 27021/08) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a joint Iraqi/British national, Mr Hilal Abdul-Razzaq Ali Al-Jedda, on 3 June 2008.

2. The applicant, who had been granted legal aid, was represented by Public Interest Lawyers, solicitors based in Birmingham. The United Kingdom Government ("the Government") were represented by their Agent, Mr D. Walton, Foreign and Commonwealth Office.

3. The applicant complained that he had been detained by British troops in Iraq in breach of Article 5 § 1 of the Convention.

4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). On 17 February 2009 the Court decided to give notice of the application to the Government. It also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 1). The parties took turns to file written observations on the admissibility and merits of the case. On 19 January 2010 the Chamber decided to relinquish jurisdiction to the Grand Chamber.

5. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24 of the Rules of Court. Judge Peer Lorenzen, President of the Fifth Section, withdrew and Judge Luis López Guerra, substitute judge, replaced him.

6. The applicants and the Government each filed a memorial on the admissibility and merits and joint third-party comments were received from Liberty and JUSTICE ("the interveners").

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 9 June 2010 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Mr D. WALTON, *Agent,*
Mr J. EADIE QC,
Ms C. IVIMY,
Mr S. WORDSWORTH, *Counsel,*
Ms L. DANN,
Ms H. AKIWUMI, *Advisers;*

(b) *for the applicants*
Mr RABINDER SINGH QC,
Mr R. HUSAIN QC,
Ms S. FATIMA,
Ms N. PATEL,
Mr T. TRIDIMAS,
Ms H. LAW, *Counsel,*
Mr P. SHINER,
Mr D. CAREY,
Ms T. GREGORY,
Mr J. DUFFY, *Advisers.*

The Court heard addresses by Mr Eadie and Mr Rabinder Singh.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The facts of the case may be summarised as follows.

A. The applicant, his arrest and internment

9. The applicant was born in Iraq in 1957. He played for the Iraqi basketball team until, following his refusal to join the Ba'ath Party, he left Iraq in 1978 and lived in the United Arab Emirates and Pakistan. He moved to the United Kingdom in 1992, where he made a claim for asylum and was granted indefinite leave to remain. He was granted British nationality in June 2000.

10. In September 2004 the applicant and his four eldest children travelled from London to Iraq, via Dubai. He was arrested and questioned in Dubai by United Arab Emirates intelligence officers, who released him after 12 hours, permitting him and his children to continue their journey to Iraq, where they arrived on 28 September 2004. On 10 October 2004 United States soldiers, apparently acting on information provided by the British intelligence services, arrested the applicant at his sister's house in Baghdad. He was taken to Basrah in a British military aircraft and then to the Sha'aibah Divisional Temporary Detention Facility in Basrah City, a detention centre run by British forces. He was held in internment there until 30 December 2007.

11. The applicant was held on the basis that his internment was necessary for imperative reasons of security in Iraq. He was believed by the British authorities to have been personally responsible for recruiting terrorists outside Iraq with a view to the commission of atrocities there; for facilitating the travel into Iraq of an identified terrorist explosives expert; for conspiring with that explosives expert to conduct attacks with improvised explosive devices against coalition forces in the areas around Fallujah and Baghdad; and for conspiring with the explosives expert and members of an Islamist terrorist cell in the Gulf to smuggle high tech detonation equipment into Iraq for use in attacks against coalition forces. No criminal charges were brought against him.

12. The applicant's internment was initially authorised by the senior officer in the detention facility. Reviews were conducted seven days and twenty-eight days later by the Divisional Internment Review Committee ("the DIRC"). This comprised the senior officer in the detention facility and Army legal and military personnel. Owing to the sensitivity of the intelligence material upon which the applicant's arrest and detention had been based, only two members of the DIRC were permitted to examine it. Their recommendations were passed to the Commander of the Coalition's Multinational Division (South East) ("the Commander"), who himself examined the intelligence file on the applicant and took the decision to continue the internment. Between January and July 2005 a monthly review was carried out by the Commander, on the basis of the recommendations of the DIRC. Between July 2005 and December 2007 the decision to intern was taken by the DIRC itself, which during this period included as members

the Commander together with members of the legal, intelligence and other staffs. There was no procedure for disclosure of evidence nor for an oral hearing, but representations could be made by the internee in writing which were considered by the legal branch and put before the DIRC for consideration. The two Commanders who authorised the applicant's internment in 2005 and 2006 gave evidence to the domestic courts that there was a substantial weight of intelligence material indicating that there were reasonable grounds for suspecting the applicant of the matters alleged against him.

13. When the applicant had been detained 18 months, the internment fell to be reviewed by the Joint Detention Committee (JDC). This body included senior representatives of the Multi-National Force, the Iraqi Interim Government and the Ambassador for the United Kingdom. It met once and thereafter delegated powers to a Joint Detention Review Committee, which comprised Iraqi representatives and officers from the Multi-National Force.

14. On 14 December 2007 the Secretary of State signed an order depriving the applicant of British citizenship, on the ground that it was conducive to the public good. The Secretary of State claimed, *inter alia,* that the applicant had connections with violent Islamist groups, in Iraq and elsewhere, and had been responsible for recruiting terrorists outside Iraq and facilitating their travel and the smuggling of bomb parts into Iraq.

15. The applicant was released from internment on 30 December 2007 and travelled to Turkey. He appealed against the deprivation of British citizenship. On 7 April 2009 the Special Immigration Appeals Commission dismissed the appeal, having heard both open and closed evidence, during a hearing where the applicant was represented by special advocates (see further *A. and Others v. the United Kingdom* [GC], no. 3455/05, §§ 91-93, ECHR 2009-...). The Special Immigration Appeals Commission held that, for reasons set out in detail in a closed judgment, it was satisfied on the balance of probabilities that the Secretary of State had proved that the applicant had facilitated the travel to Iraq of a terrorist explosives expert and conspired with him to smuggle explosives into Iraq and to conduct improvised explosives device attacks against coalition forces around Fallujah and Baghdad. The applicant did not appeal against the judgment.

B. The domestic proceedings under the Human Rights Act

16. On 8 June 2005 the applicant brought a judicial review claim in the United Kingdom, challenging the lawfulness of his continued detention and also the refusal of the Secretary of State for Defence to return him to the United Kingdom. The Secretary of State accepted that the applicant's detention within a British military facility brought him within the jurisdiction of the United Kingdom under Article 1 of the Convention. He also accepted that the detention did not fall within any of the permitted

cases set out in Article 5 § 1. However, the Secretary of State contended that Article 5 § 1 did not apply to the applicant because his detention was authorised by United Nations Security Council Resolution 1546 (see paragraph 35 below) and that, as a matter of international law, the effect of the Resolution was to displace Article 5. He also denied that his refusal to return the applicant to the United Kingdom was unreasonable. It was argued on behalf of the applicant that Article 103 of the United Nations Charter (see paragraph 46 below) had no application since, *inter alia*, United Nations Security Council Resolution 1546 placed no obligation on the United Kingdom and/or since the United Nations Charter placed an obligation on Member States to protect human rights.

17. Both the Divisional Court in its judgment of 12 August 2005 and the Court of Appeal in its judgment of 29 March 2006 unanimously held that United Nations Security Council Resolution 1546 explicitly authorised the Multi-National Force to take all necessary measures to contribute to the maintenance of security in Iraq, in accordance with the annexed letter from the United States Secretary of State. By the practice of the Members of the United Nations, a State which acted under such an authority was treated as having agreed to carry out the resolution for the purposes of Article 25 of the United Nations Charter and as being bound by it for the purposes of Article 103 (see paragraph 46 below). The United Kingdom's obligation under the Resolution therefore took precedence over its obligations under the Convention. The Court of Appeal also held that, under section 11 of the Private International Law (Miscellaneous Provisions) Act 1995, since the applicant was detained in Iraq, the law governing his claim for damages for false imprisonment was Iraqi law (*R. (on the application of Al-Jedda) v. Secretary of State for Defence*, [2005] EWHC 1809 (Admin); [2006] EWCA Civ 327)

18. The applicant appealed to the House of Lords (Lord Bingham of Cornhill, Lord Rodger of Earlsferry, Baroness Hale of Richmond, Lord Carswell and Lord Brown of Eaton-under-Heywood: see *R. (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent)* [2007] UKHL 58, 12 December 2007). The Secretary of State raised a new argument before the House of Lords, claiming that by virtue of United Nations Security Council Resolutions 1511 and 1546 the detention of the applicant was attributable to the United Nations and was thus outside the scope of the Convention. Lord Bingham introduced the attribution issue as follows:

> "5. It was common ground between the parties that the governing principle is that expressed by the International Law Commission in article 5 of its draft articles on the Responsibility of International Organizations..."

He referred to the Court's reasoning in *Behrami v. France*; *Saramati v. France, Germany and Norway* (dec.) [GC], nos. 71412/01 and 78166/01,

ECHR 2007 (henceforth: *"Behrami and Saramati*") and to the factual situation in Iraq at the relevant time and continued:

> "22. Against the factual background described above a number of questions must be asked in the present case. Were UK forces placed at the disposal of the UN? Did the UN exercise effective control over the conduct of UK forces? Is the specific conduct of the UK forces in detaining the appellant to be attributed to the UN rather than the UK? Did the UN have effective command and control over the conduct of UK forces when they detained the appellant? Were the UK forces part of a UN peacekeeping force in Iraq? In my opinion the answer to all these questions is in the negative.
>
> 23. The UN did not dispatch the coalition forces to Iraq. The CPA was established by the coalition states, notably the US, not the UN. When the coalition states became occupying powers in Iraq they had no UN mandate. Thus when the case of Mr Mousa reached the House as one of those considered in *R(Al-Skeini and others) v Secretary of State for Defence) (The Redress Trust intervening)* [2007] UKHL 26, [2007] 3 WLR 33 the Secretary of State accepted that the UK was liable under the European Convention for any ill-treatment Mr Mousa suffered, while unsuccessfully denying liability under the Human Rights Act 1998. It has not, to my knowledge, been suggested that the treatment of detainees at Abu Ghraib was attributable to the UN rather than the US. Following UNSCR 1483 in May 2003 the role of the UN was a limited one focused on humanitarian relief and reconstruction, a role strengthened but not fundamentally altered by UNSCR 1511 in October 2003. By UNSCR 1511, and again by UNSCR 1546 in June 2004, the UN gave the multinational force express authority to take steps to promote security and stability in Iraq, but (adopting the distinction formulated by the European Court in para 43 of its judgment in *Behrami and Saramati*) the Security Council was not delegating its power by empowering the UK to exercise its function but was authorising the UK to carry out functions it could not perform itself. At no time did the US or the UK disclaim responsibility for the conduct of their forces or the UN accept it. It cannot realistically be said that US and UK forces were under the effective command and control of the UN, or that UK forces were under such command and control when they detained the appellant.
>
> 24. The analogy with the situation in Kosovo breaks down, in my opinion, at almost every point. The international security and civil presences in Kosovo were established at the express behest of the UN and operated under its auspices, with UNMIK a subsidiary organ of the UN. The multinational force in Iraq was not established at the behest of the UN, was not mandated to operate under UN auspices and was not a subsidiary organ of the UN. There was no delegation of UN power in Iraq. It is quite true that duties to report were imposed in Iraq as in Kosovo. But the UN's proper concern for the protection of human rights and observance of humanitarian law called for no less, and it is one thing to receive reports, another to exercise effective command and control. It does not seem to me significant that in each case the UN reserved power to revoke its authority, since it could clearly do so whether or not it reserved power to do so.
>
> 25. I would resolve this first issue in favour of the appellant and against the Secretary of State."

Baroness Hale observed in this connection:

> "124. ... I agree with [Lord Bingham] that the analogy with the situation in Kosovo breaks down at almost every point. The United Nations made submissions to the European Court of Human Rights in *Behrami v France*, *Saramati v France, Germany*

and Norway ... concerning the respective roles of UNMIK and KFOR in clearing mines, which was the subject of the *Behrami* case. It did not deny that these were UN operations for which the UN might be responsible. It seems to me unlikely in the extreme that the United Nations would accept that the acts of the [Multi-National Force] were in any way attributable to the UN. My noble and learned friend, Lord Brown of Eaton-under-Heywood, has put his finger on the essential distinction. The UN's own role in Iraq was completely different from its role in Kosovo. Its concern in Iraq was for the protection of human rights and the observance of humanitarian law as well to protect its own humanitarian operations there. It looked to others to restore the peace and security which had broken down in the aftermath of events for which those others were responsible."

Lord Carswell similarly agreed with Lord Bingham on this issue (§ 131). Lord Brown of Eaton-under-Heywood also distinguished the situation in Kosovo from that in Iraq, as follows:

"145. To my mind it follows that any material distinction between the two cases must be found ... in the very circumstances in which the [Multi-National Force] came to be authorised and mandated in the first place. The delegation to KFOR of the UN's function of maintaining security was, the court observed [in *Behrami and Saramati*], 'neither presumed nor implicit but rather prior and explicit in the resolution itself'. Resolution 1244 decided (para 5) 'on the deployment in Kosovo, under United Nations auspices, of international civil and security presences' - the civil presence being UNMIK, recognised by the court in *Behrami* (para 142) as 'a subsidiary organ of the UN'; the security presence being KFOR. KFOR was, therefore, expressly formed under UN auspices. Para 7 of the resolution '[a]uthorise[d] member states and relevant international organisations to establish the international security presence in Kosovo as set out in point 4 of Annex 2...'. Point 4 of Annex 2 stated: 'The international security presence with substantial NATO participation must be deployed under unified command and control and authorised to establish a safe environment for all people in Kosovo and to facilitate the safe return to their homes of all displaced persons and refugees.'

146. Resolution 1511, by contrast, was adopted on 16 October 2003 during the USA's and UK's post-combat occupation of Iraq and in effect gave recognition to those occupying forces as an existing security presence. ...

148. Nor did the position change when resolution 1546 was adopted on 8 June 2004, three weeks before the end of the occupation and the transfer of authority from the CPA to the interim government of Iraq on 28 June 2004. ... Nothing either in the resolution [1546] itself or in the letters annexed suggested for a moment that the [Multi-National Force] had been under or was now being transferred to United Nations authority and control. True, the [Security Council] was acting throughout under Chapter VII of the Charter. But it does not follow that the UN is therefore to be regarded as having assumed ultimate authority or control over the force. The precise meaning of the term 'ultimate authority and control' I have found somewhat elusive. But it cannot automatically vest or remain in the UN every time there is an authorisation of UN powers under Chapter VII, else much of the analysis in *Behrami* would be mere surplusage."

19. Lord Rodger of Earlsferry dissented on this point. He found that the legal basis on which the members of KFOR were operating in Kosovo could not be distinguished from that on which British forces in the Multi-National

Force were operating during the period of the applicant's internment. He explained his views as follows:

"59. There is an obvious difference between the factual position in Kosovo that lay behind the *Behrami* case and the factual position in Iraq that lies behind the present case. The forces making up KFOR went into Kosovo, for the first time, as members of KFOR and in terms of Security Council Resolution 1244. By contrast, the Coalition forces were in Iraq and, indeed, in occupation of Iraq, for about six months before the Security Council adopted Resolution 1511, authorising the creation of the [Multi-National Force], on 16 October 2003.

61. It respectfully appears to me that the mere fact that Resolution 1244 was adopted before the forces making up KFOR entered Kosovo was legally irrelevant to the issue in *Behrami*. What mattered was that Resolution 1244 had been adopted before the French members of KFOR detained Mr Saramati. So the Resolution regulated the legal position at the time of his detention. Equally, in the present case, the fact that the British and other Coalition forces were in Iraq long before Resolution 1546 was adopted is legally irrelevant for present purposes. What matters is that Resolution 1546 was adopted before the British forces detained the appellant and so it regulated the legal position at that time. As renewed, the provisions of that Resolution have continued to do so ever since.

...

87. If one compares the terms of Resolution 1244 and Resolution 1511, for present purposes there appears to be no relevant legal difference between the two forces. Of course, in the case of Kosovo, there was no civil administration and there were no bodies of troops already assembled in Kosovo whom the Security Council could authorise to assume the necessary responsibilities. In paragraph 5 of Resolution 1244 the Security Council accordingly decided 'on the deployment in Kosovo, under United Nations auspices, of international civil and security presences.' Because there were no suitable troops on the ground, in paragraph 7 of Resolution 1244 the Council had actually to authorise the establishing of the international security presence and then to authorise it to carry out various responsibilities.

88. By contrast, in October 2003, in Iraq there were already forces in place, especially American and British forces, whom the Security Council could authorise to assume the necessary responsibilities. So it did not need to authorise the establishment of the [Multi-National Force]. In paragraph 13 the Council simply authorised 'a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq' - thereby proceeding on the basis that there would indeed be a multinational force under unified command. In paragraph 14 the Council urged member states to contribute forces to the [Multi-National Force]. Absolutely crucially, however, in paragraph 13 it spelled out the mandate which it was giving to the [Multi-National Force]. By 'authorising' the [Multi-National Force] to take the measures required to fulfil its 'mandate', the Council was asserting and exercising control over the [Multi-National Force] and was prescribing the mission that it was to carry out. The authorisation and mandate were to apply to all members of the [Multi-National Force] - the British and American, of course, but also those from member states who responded to the Council's call to contribute forces to the [Multi-National Force]. The intention must have been that all would be in the same legal position. This confirms that - as I have already held, at paragraph 61 – the fact that the British forces were in Iraq before Resolution 1511 was

adopted is irrelevant to their legal position under that Resolution and, indeed, under Resolution 1546."

20. The second issue before the House of Lords was whether the provisions of Article 5 § 1 of the Convention were qualified by the legal regime established pursuant to United Nations Security Council Resolution 1546 and subsequent resolutions. On this point, the House of Lords unanimously held that Article 103 of the United Nations Charter gave primacy to resolutions of the Security Council, even in relation to human rights agreements. Lord Bingham, with whom the other Law Lords agreed, explained:

"30. ... while the Secretary of State contends that the Charter, and UNSCRs 1511 (2003), 1546 (2004), 1637 (2005) and 1723 (2006), impose an obligation on the UK to detain the appellant which prevails over the appellant's conflicting right under article 5(1) of the European Convention, the appellant insists that the UNSCRs referred to, read in the light of the Charter, at most authorise the UK to take action to detain him but do not oblige it to do so, with the result that no conflict arises and article 103 is not engaged.

31. There is an obvious attraction in the appellant's argument since, as appears from the summaries of UNSCRs 1511 and 1546 given above in paras 12 and 15, the resolutions use the language of authorisation, not obligation, and the same usage is found in UNSCRs 1637 (2005) and 1723 (2006). In ordinary speech to authorise is to permit or allow or license, not to require or oblige. I am, however, persuaded that the appellant's argument is not sound, for three main reasons.

32. First, it appears to me that during the period when the UK was an occupying power (from the cessation of hostilities on 1 May 2003 to the transfer of power to the Iraqi Interim Government on 28 June 2004) it was obliged, in the area which it effectively occupied, to take necessary measures to protect the safety of the public and its own safety. [Lord Bingham here referred to Article 43 of the Hague Regulations and Articles 41, 42 and 78 of the Fourth Geneva Convention: see paragraphs 42-43 below.]

These three articles are designed to circumscribe the sanctions which may be applied to protected persons, and they have no direct application to the appellant, who is not a protected person. But they show plainly that there is a power to intern persons who are not protected persons, and it would seem to me that if the occupying power considers it necessary to detain a person who is judged to be a serious threat to the safety of the public or the occupying power there must be an obligation to detain such a person: see the decision of the International Court of Justice in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 116, paragraph 178. This is a matter of some importance, since although the appellant was not detained during the period of the occupation, both the evidence and the language of UNSCR 1546 (2004) and the later resolutions strongly suggest that the intention was to continue the pre-existing security regime and not to change it. There is not said to have been such an improvement in local security conditions as would have justified any relaxation.

33. There are, secondly, some situations in which the Security Council can adopt resolutions couched in mandatory terms. One example is UNSCR 820 (1993),

considered by the European Court (with reference to an EC regulation giving effect to it) in *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* (2005) 42 EHRR 1, which decided in paragraph 24 that 'all states shall impound all vessels, freight vehicles, rolling stock and aircraft in their territories...'. Such provisions cause no difficulty in principle, since member states can comply with them within their own borders and are bound by article 25 of the UN Charter to comply. But language of this kind cannot be used in relation to military or security operations overseas, since the UN and the Security Council have no standing forces at their own disposal and have concluded no agreements under article 43 of the Charter which entitle them to call on member states to provide them. Thus in practice the Security Council can do little more than give its authorisation to member states which are willing to conduct such tasks, and this is what (as I understand) it has done for some years past. Even in UNSCR 1244 (1999) relating to Kosovo, when (as I have concluded) the operations were very clearly conducted under UN auspices, the language of authorisation was used. There is, however, a strong and to my mind persuasive body of academic opinion which would treat article 103 as applicable where conduct is authorised by the Security Council as where it is required: see, for example, Goodrich, Hambro and Simons (eds), *Charter of the United Nations: Commentary and Documents*, 3rd ed (1969), pp 615-616; *Yearbook of the International Law Commission* (1979), Vol II, Part One, para 14; Sarooshi, *The United Nations and the Development of Collective Security* (1999), pp 150-151. The most recent and perhaps clearest opinion on the subject is that of Frowein and Krisch in Simma (ed), *The Charter of the United Nations: A Commentary*, 2nd ed (2002), p 729:

'Such authorizations, however, create difficulties with respect to article 103. According to the latter provision, the Charter-and thus also SC resolutions-override existing international law only insofar as they create 'obligations' (cf. Bernhardt on article 103 MN 27 et seq.). One could conclude that in case a state is not obliged but merely authorized to take action, it remains bound by its conventional obligations. Such a result, however, would not seem to correspond with state practice at least as regards authorizations of military action. These authorizations have not been opposed on the ground of conflicting treaty obligations, and if they could be opposed on this basis, the very idea of authorizations as a necessary substitute for direct action by the SC would be compromised. Thus, the interpretation of article 103 should be reconciled with that of article 42, and the prevalence over treaty obligations should be recognized for the authorization of military action as well (see Frowein/Krisch on article 42 MN 28). The same conclusion seems warranted with respect to authorizations of economic measures under article 41. Otherwise, the Charter would not reach its goal of allowing the SC to take the action it deems most appropriate to deal with threats to the peace-it would force the SC to act either by way of binding measures or by way of recommendations, but would not permit intermediate forms of action. This would deprive the SC of much of the flexibility it is supposed to enjoy. It seems therefore preferable to apply the rule of article 103 to all action under articles 41 and 42 and not only to mandatory measures.'

This approach seems to me to give a purposive interpretation to article 103 of the Charter, in the context of its other provisions, and to reflect the practice of the UN and member states as it has developed over the past 60 years.

34. I am further of the opinion, thirdly, that in a situation such as the present 'obligations' in article 103 should not in any event be given a narrow, contract-based, meaning. The importance of maintaining peace and security in the world can scarcely be exaggerated, and that (as evident from the articles of the Charter quoted above) is the mission of the UN. Its involvement in Iraq was directed to that end, following repeated determinations that the situation in Iraq continued to constitute a threat to international peace and security. As is well known, a large majority of states chose not to contribute to the multinational force, but those which did (including the UK) became bound by articles 2 and 25 to carry out the decisions of the Security Council in accordance with the Charter so as to achieve its lawful objectives. It is of course true that the UK did not become specifically bound to detain the appellant in particular. But it was, I think, bound to exercise its power of detention where this was necessary for imperative reasons of security. It could not be said to be giving effect to the decisions of the Security Council if, in such a situation, it neglected to take steps which were open to it.

35. Emphasis has often been laid on the special character of the European Convention as a human rights instrument. But the reference in article 103 to 'any other international agreement' leaves no room for any excepted category, and such appears to be the consensus of learned opinion. The decision of the International Court of Justice (*Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)* [1992] ICJ Rep 3, para 39 and *Application of the Convention on the Prevention and punishment of the Crime of Genocide* [1993] ICJ Rep 325, 439-440, paras. 99-100 per Judge *ad hoc* Lauterpacht) give no warrant for drawing any distinction save where an obligation is *jus cogens* and according to Judge Bernhardt it now seems to be generally recognised in practice that binding Security Council decisions taken under Chapter VII supersede all other treaty commitments (*The Charter of the United Nations: A Commentary* 2nd ed, ed Simma, pp. 1299-1300)."

Lord Bingham concluded on this issue:

"39. Thus there is a clash between on the one hand a power or duty to detain exercisable on the express authority of the Security Council and, on the other, a fundamental human right which the UK has undertaken to secure to those (like the appellant) within its jurisdiction. How are these to be reconciled? There is in my opinion only one way in which they can be reconciled: by ruling that the UK may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain authorised by UNSCR 1546 and successive resolutions, but must ensure that the detainee's rights under article 5 are not infringed to any greater extent than is inherent in such detention. I would resolve the second issue in this sense."

21. Baroness Hale commenced by observing:

"122. ... There is no doubt that prolonged detention in the hands of the military is not permitted by the laws of the United Kingdom. Nor could it be permitted without derogation from our obligations under the European Convention on Human Rights. Article 5(1) of the Convention provides that deprivation of liberty is only lawful in defined circumstances which do not include these. The drafters of the Convention had a choice between a general prohibition of 'arbitrary' detention, as provided in article 9 of the Universal Declaration of Human Rights, and a list of permitted grounds for detention. They deliberately chose the latter. They were well aware of Churchill's view that the internment even of enemy aliens in war time was 'in the highest degree odious'. They would not have contemplated the indefinite detention without trial of British citizens in peace time. I do not accept that this is less of a problem if people are suspected of very grave crimes. The graver the crime of which a person is suspected, the more difficult it will be for him to secure his release on the grounds that he is not a risk. The longer therefore he is likely to be incarcerated and the less substantial the evidence which will be relied upon to prove suspicion. These are the people most in need of the protection of the rule of law, rather than the small fry in whom the authorities will soon lose interest."

Baroness Hale agreed with Lord Bingham that the Convention rights could be qualified by "competing commitments under the United Nations Charter", but continued:

"126. That is, however, as far as I would go. The right is qualified but not displaced. This is an important distinction, insufficiently explored in the all or nothing arguments with which we were presented. We can go no further than the UN has implicitly required us to go in restoring peace and security to a troubled land. The right is qualified only to the extent required or authorised by the resolution. What remains of it thereafter must be observed. This may have both substantive and procedural consequences.

127. It is not clear to me how far UNSC resolution 1546 went when it authorised the [Multi-National Force] to 'take all necessary measures to contribute to the maintenance of security and stability in Iraq, in accordance with the letters annexed to this resolution expressing, *inter alia*, the Iraqi request for the continued presence of the multinational force and setting out its tasks' (para 10). The 'broad range of tasks' were listed by Secretary of State Powell as including 'combat operations against members of these groups [seeking to influence Iraq's political future through violence], internment where this is necessary for imperative reasons of security, and the continued search for and securing of weapons that threaten Iraq's security'. At the same time, the Secretary of State made clear the commitment of the forces which made up the MNF to 'act consistently with their obligations under the law of armed conflict, including the Geneva Conventions'.

128. On what basis is it said that the detention of this particular appellant is consistent with our obligations under the law of armed conflict? He is not a 'protected person' under the fourth Geneva Convention because he is one of our own citizens. Nor is the UK any longer in belligerent occupation of any part of Iraq. So resort must be had to some sort of post conflict, post occupation, analogous power to intern anyone where this is thought 'necessary for imperative reasons of security'. Even if the UNSC resolution can be read in this way, it is not immediately obvious why the prolonged detention of this person in Iraq is necessary, given that any problem he presents in Iraq could be solved by repatriating him to this country and dealing with him here. If we stand back a little from the particular circumstances of this case, this is the response which is so often urged when British people are in trouble with the law in foreign countries, and in this case it is within the power of the British authorities to achieve it.

129. But that is not the way in which the argument has been conducted before us. Why else could Lord Bingham and Lord Brown speak of 'displacing or qualifying' in one breath when clearly they mean very different things? We have been concerned at a more abstract level with attribution to or authorisation by the United Nations. We have devoted little attention to the precise scope of the authorisation. There must still

be room for argument about what precisely is covered by the resolution and whether it applies on the facts of this case. Quite how that is to be done remains for decision in the other proceedings. With that caveat, therefore, but otherwise in agreement with Lord Bingham, Lord Carswell and Lord Brown, I would dismiss this appeal."

22. Lord Carswell started his speech by observing:

"130. Internment without trial is so antithetical to the rule of law as understood in a democratic society that recourse to it requires to be carefully scrutinised by the courts of that society. There are, regrettably, circumstances in which the threat to the necessary stability of the state is so great that in order to maintain that stability the use of internment is unavoidable. The Secretary of State's contention is that such circumstances exist now in Iraq and have existed there since the conclusion of hostilities in 2003. If the intelligence concerning the danger posed by such persons is correct, - as to which your Lordships are not in a position to make any judgment and do not do so - they pose a real danger to stability and progress in Iraq. If sufficient evidence cannot be produced in criminal proceedings - which again the House has not been asked to and cannot judge - such persons may have to be detained without trial. Article 42 of the 4th Geneva Convention permits the ordering of internment of protected persons 'only if the security of the Detaining Power makes it absolutely necessary', and under article 78 the Occupying Power must consider that step necessary 'for imperative reasons of security.' Neither of these provisions applies directly to the appellant, who is not a protected person, but the degree of necessity which should exist before the Secretary of State detains persons in his position - if he has power to do so, as in my opinion he has - is substantially the same. I would only express the opinion that where a state can lawfully intern people, it is important that it adopt certain safeguards: the compilation of intelligence about such persons which is as accurate and reliable as possible, the regular review of the continuing need to detain each person and a system whereby that need and the underlying evidence can be checked and challenged by representatives on behalf of the detained persons, so far as is practicable and consistent with the needs of national security and the safety of other persons."

He continued:

"135. It was argued on behalf of the appellant that the Resolution did not go further than authorising the measures described in it, as distinct from imposing an obligation to carry them out, with the consequence that article 103 of the Charter did not apply to relieve the United Kingdom from observing the terms of article 5(1) of the Convention. This was an attractive and persuasively presented argument, but I am satisfied that it cannot succeed. For the reasons set out in paragraphs 32 to 39 of Lord Bingham's opinion I consider that Resolution 1546 did operate to impose an obligation upon the United Kingdom to carry out those measures. In particular, I am persuaded by State practice and the clear statements of authoritative academic opinion - recognised sources of international law - that expressions in Security Council Resolutions which appear on their face to confer no more than authority or power to carry out measures may take effect as imposing obligations, because of the fact that the United Nations have no standing forces at their own disposal and have concluded no agreements under article 43 of the Charter which would entitle them to call on member states to provide them.

136. I accordingly am of opinion that the United Kingdom may lawfully, where it is necessary for imperative reasons of security, exercise the power to intern conferred by Resolution 1546. I would emphasise, however, that that power has to be exercised in such a way as to minimise the infringements of the detainee's rights under article 5(1) of the Convention, in particular by adopting and operating to the fullest practicable extent safeguards of the nature of those to which I referred in paragraph 130 above."

C. The applicant's claim for damages under Iraqi law

23. Following the Court of Appeal's ruling on the applicable legal regime (see paragraph 17 above), which was upheld by the House of Lords, the applicant brought a claim for damages in the English courts claiming that, from 19 May 2006 onwards, his detention without judicial review was unlawful under the terms of the Iraqi Constitution, which came into force on that date (see paragraph 38 below).

24. This claim was finally determined by the Court of Appeal in a judgment dated 8 July 2010 ([2010] EWCA Civ 758). The majority found that, in the circumstances, the review procedure under Coalition Provisional Authority Memorandum No. 3 (Revised) (see paragraph 36 below) provided sufficient guarantees of fairness and independence to comply with Iraqi law.

D. Background: the occupation of Iraq 1 May 2003 to 28 June 2004

1. United Nations Security Council Resolution 1441 (2002)

25. On 8 November 2002 the United Nations Security Council, acting under Chapter VII of the United Nations Charter, adopted Resolution 1441. The Resolution decided, *inter alia*, that Iraq had been and remained in material breach of its obligations under previous United Nations Security Council Resolutions to disarm and to cooperate with United Nations and International Atomic Energy Agency weapons inspectors. United Nations Security Council Resolution 1441 decided to afford Iraq a final opportunity to comply with its disarmament obligations and set up an enhanced inspection regime. It requested the Secretary-General immediately to notify Iraq of the resolution and demanded that Iraq cooperate immediately, unconditionally, and actively with the inspectors. Resolution 1441 concluded by recalling that the United Nations Security Council had "repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations". The United Nations Security Council decided to remain seized of the matter.

2. Major combat operations: 20 March-1 May 2003

26. On 20 March 2003 a coalition of armed forces under unified command, led by the United States of America with a large force from the United Kingdom and small contingents from Australia, Denmark and Poland, commenced the invasion of Iraq. By 5 April 2003 the British had

captured Basrah and by 9 April 2003 United States troops had gained control of Baghdad. Major combat operations in Iraq were declared complete on 1 May 2003. Thereafter, other States sent troops to help with the reconstruction efforts in Iraq.

3. Legal and political developments in May 2003

27. On 8 May 2003 the Permanent Representatives of the United Kingdom and the United States at the United Nations addressed a joint letter to the President of the United Nations Security Council, which read as follows:

> "The United States of America, the United Kingdom of Great Britain and Northern Ireland and Coalition partners continue to act together to ensure the complete disarmament of Iraq of weapons of mass destruction and means of delivery in accordance with United Nations Security Council resolutions. The States participating in the Coalition will strictly abide by their obligations under international law, including those relating to the essential humanitarian needs of the people of Iraq. ...
>
> In order to meet these objectives and obligations in the post-conflict period in Iraq, the United States, the United Kingdom and Coalition partners, acting under existing command and control arrangements through the Commander of Coalition Forces, have created the Coalition Provisional Authority, which includes the Office of Reconstruction and Humanitarian Assistance, to exercise powers of government temporarily, and, as necessary, especially to provide security, to allow the delivery of humanitarian aid, and to eliminate weapons of mass destruction.
>
> The United States, the United Kingdom and Coalition partners, working through the Coalition Provisional Authority, shall *inter alia*, provide for security in and for the provisional administration of Iraq, including by: deterring hostilities; ... maintaining civil law and order, including through encouraging international efforts to rebuild the capacity of the Iraqi civilian police force; eliminating all terrorist infrastructure and resources within Iraq and working to ensure that terrorists and terrorist groups are denied safe haven; ... and assuming immediate control of Iraqi institutions responsible for military and security matters and providing, as appropriate, for the demilitarization, demobilization, control, command, reformation, disestablishment, or reorganization of those institutions so that they no longer pose a threat to the Iraqi people or international peace and security but will be capable of defending Iraq's sovereignty and territorial integrity.
>
> ...
>
> The United Nations has a vital role to play in providing humanitarian relief, in supporting the reconstruction of Iraq, and in helping in the formation of an Iraqi interim authority. The United States, the United Kingdom and Coalition partners are ready to work closely with representatives of the United Nations and its specialized agencies and look forward to the appointment of a special coordinator by the Secretary-General. We also welcome the support and contributions of Member States, international and regional organizations, and other entities, under appropriate coordination arrangements with the Coalition Provisional Authority.

> We would be grateful if you could arrange for the present letter to be circulated as a document of the Security Council.
>
> (Signed) Jeremy Greenstock
> Permanent Representative of the United Kingdom
>
> (Signed) John D. Negroponte
> Permanent Representative of the United States"

28. As mentioned in the above letter, the occupying States, acting through the Commander of Coalition Forces, created the Coalition Provisional Authority to act as a "caretaker administration" until an Iraqi government could be established. It had power, *inter alia*, to issue legislation. On 13 May 2003 the United States Secretary for Defence, Donald Rumsfeld, issued a memorandum formally appointing Ambassador Paul Bremer as Administrator of the Coalition Provisional Authority with responsibility for the temporary governance of Iraq. In CPA Regulation No. 1, dated 16 May 2003, Ambassador Bremer provided *inter alia* that the Coalition Provisional Authority "shall exercise powers of government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration" and that:

> "2) The CPA is vested with all executive, legislative and judicial authority necessary to achieve its objectives, to be exercised under relevant U.N. Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war. This authority shall be exercised by the CPA Administrator.
>
> 3) As the Commander of Coalition Forces, the Commander of U.S. Central Command shall directly support the CPA by deterring hostilities; maintaining Iraq's territorial integrity and security; searching for, securing and destroying weapons of mass destruction; and assisting in carrying out Coalition policy generally."

The Coalition Provisional Authority administration was divided into regional areas. CPA South was placed under United Kingdom responsibility and control, with a United Kingdom Regional Coordinator. It covered the southernmost four of Iraq's eighteen provinces, each having a governorate coordinator. United Kingdom troops were deployed in the same area.

29. The United Nations Security Council Resolution 1483 referred to by Ambassador Bremer in CPA Regulation No. 1 was actually adopted six days later, on 22 May 2003. It provided as follows:

> "*The Security Council,*
>
> *Recalling* all its previous relevant resolutions,
>
> ...
>
> *Resolved* that the United Nations should play a vital role in humanitarian relief, the reconstruction of Iraq, and the restoration and establishment of national and local institutions for representative governance,

...

Welcoming also the resumption of humanitarian assistance and the continuing efforts of the Secretary-General and the specialized agencies to provide food and medicine to the people of Iraq,

Welcoming the appointment by the Secretary-General of his Special Adviser on Iraq,

...

Noting the letter of 8 May 2003 from the Permanent Representatives of the United States of America and the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council (S/2003/538) and recognizing the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command (the 'Authority'),

Noting further that other States that are not occupying powers are working now or in the future may work under the Authority,

Welcoming further the willingness of Member States to contribute to stability and security in Iraq by contributing personnel, equipment, and other resources under the Authority,

...

Determining that the situation in Iraq, although improved, continues to constitute a threat to international peace and security,

Acting under Chapter VII of the Charter of the United Nations,

1. *Appeals* to Member States and concerned organizations to assist the people of Iraq in their efforts to reform their institutions and rebuild their country, and to contribute to conditions of stability and security in Iraq in accordance with this resolution;

2. *Calls upon* all Member States in a position to do so to respond immediately to the humanitarian appeals of the United Nations and other international organizations for Iraq and to help meet the humanitarian and other needs of the Iraqi people by providing food, medical supplies, and resources necessary for reconstruction and rehabilitation of Iraq's economic infrastructure;

...

4. *Calls upon* the Authority, consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future;

5. *Calls upon* all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907;

...

8. *Requests* the Secretary-General to appoint a Special Representative for Iraq whose independent responsibilities shall involve reporting regularly to the Council on his activities under this resolution, coordinating activities of the United Nations in post-conflict processes in Iraq, coordinating among United Nations and international agencies engaged in humanitarian assistance and reconstruction activities in Iraq, and, in coordination with the Authority, assisting the people of Iraq through:

(a) coordinating humanitarian and reconstruction assistance by United Nations agencies and between United Nations agencies and non-governmental organizations;

(b) promoting the safe, orderly, and voluntary return of refugees and displaced persons;

(c) working intensively with the Authority, the people of Iraq, and others concerned to advance efforts to restore and establish national and local institutions for representative governance, including by working together to facilitate a process leading to an internationally recognized, representative government of Iraq;

(d) facilitating the reconstruction of key infrastructure, in cooperation with other international organizations;

(e) promoting economic reconstruction and the conditions for sustainable development, including through coordination with national and regional organizations, as appropriate, civil society, donors, and the international financial institutions;

(f) encouraging international efforts to contribute to basic civilian administration functions;

(g) promoting the protection of human rights;

(h) encouraging international efforts to rebuild the capacity of the Iraqi civilian police force; and

(i) encouraging international efforts to promote legal and judicial reform;

...

24. *Requests* the Secretary-General to report to the Council at regular intervals on the work of the Special Representative with respect to the implementation of this resolution and on the work of the International Advisory and Monitoring Board and *encourages* the United Kingdom of Great Britain and Northern Ireland and the United States of America to inform the Council at regular intervals of their efforts under this resolution;

25. *Decides* to review the implementation of this resolution within twelve months of adoption and to consider further steps that might be necessary.

26. *Calls upon* Member States and international and regional organizations to contribute to the implementation of this resolution;

27. *Decides* to remain seized of this matter."

4. Developments between July 2003 and June 2004

30. In July 2003 the Governing Council of Iraq was established. The Coalition Provisional Authority was required to consult with it on all matters concerning the temporary governance of Iraq.

31. On 16 October 2003 the United Nations Security Council passed a further resolution, 1511, which provided, *inter alia*, as follows:

"*The Security Council*

...

Recognizing that international support for restoration of conditions of stability and security is essential to the well-being of the people of Iraq as well as to the ability of all concerned to carry out their work on behalf of the people of Iraq, and welcoming Member State contributions in this regard under resolution 1483 (2003),

...

Determining that the situation in Iraq, although improved, continues to constitute a threat to international peace and security,

Acting under Chapter VII of the Charter of the United Nations,

1. *Reaffirms* the sovereignty and territorial integrity of Iraq, and underscores, in that context, the temporary nature of the exercise by the Coalition Provisional Authority (Authority) of the specific responsibilities, authorities, and obligations under applicable international law recognized and set forth in resolution 1483 (2003), which will cease when an internationally recognized, representative government established by the people of Iraq is sworn in and assumes the responsibilities of the Authority, *inter alia*, through steps envisaged in paragraphs 4 through 7 and 10 below;

...

8. *Resolves* that the United Nations, acting through the Secretary-General, his Special Representative, and the United Nations Assistance Mission in Iraq, should strengthen its vital role in Iraq, including by providing humanitarian relief, promoting the economic reconstruction of and conditions for sustainable development in Iraq, and advancing efforts to restore and establish national and local institutions for representative government;

...

13. *Determines* that the provision of security and stability is essential to the successful completion of the political process as outlined in paragraph 7 above and to the ability of the United Nations to contribute effectively to that process and the implementation of resolution 1483 (2003), and *authorizes* a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq, including for the purpose of ensuring necessary conditions for the implementation of the timetable and programme as well as to

contribute to the security of the United Nations Assistance Mission for Iraq, the Governing Council of Iraq and other institutions of the Iraqi interim administration, and key humanitarian and economic infrastructure;

14. *Urges* Member States to contribute assistance under this United Nations mandate, including military forces, to the multinational force referred to in paragraph 13 above;

...

25. *Requests* that the United States, on behalf of the multinational force as outlined in paragraph 13 above, report to the Security Council on the efforts and progress of this force as appropriate and not less than every six months;

26. *Decides* to remain seized of the matter."

32. Reporting to the United Nations Security Council on 16 April 2004, the United States Permanent Representative said that the Multi-National Force had conducted "the full spectrum of military operations, which range from the provision of humanitarian assistance, civil affairs and relief and reconstruction activities to the detention of those who are threats to security..." In a submission made by the Coalition Provisional Authority to the United Nations High Commissioner for Human Rights on 28 May 2004 it was stated that the United States and United Kingdom military forces retained legal responsibility for the prisoners of war and detainees whom they respectively held in custody.

33. On 3 June 2004 the Iraqi Foreign Minister told the United Nations Security Council:

"We seek a new and unambiguous draft resolution that underlines the transfer of full sovereignty to the people of Iraq and their representatives. The draft resolution must mark a clear departure from Security Council resolutions 1483 (2003) and 1511 (2003) which legitimised the occupation of our country.

...

However, we have yet to reach the stage of being able to maintain our own security and therefore the people of Iraq need and request the assistance of the multinational force to work closely with Iraqi forces to stabilize the situation. I stress that any premature departure of international troops would lead to chaos and the real possibility of civil war in Iraq. This would cause a humanitarian crisis and provide a foothold for terrorists to launch their evil campaign in our country and beyond our borders. The continued presence of the multinational force will help preserve Iraq's unity, prevent regional intervention in our affairs and protect our borders at this critical stage of our reconstruction."

34. On 5 June 2004, the Prime Minister of the Interim Government of Iraq, Dr Allawi, and the United States Secretary of State, Mr Powell, wrote to the President of the Security Council, as follows:

"Republic of Iraq,

Prime Minister Office.

Excellency:

On my appointment as Prime Minister of the Interim Government of Iraq, I am writing to express the commitment of the people of Iraq to complete the political transition process to establish a free, and democratic Iraq and to be a partner in preventing and combating terrorism. As we enter a critical new stage, regain full sovereignty and move towards elections, we will need the assistance of the international community.

The Interim Government of Iraq will make every effort to ensure that these elections are fully democratic, free and fair. Security and stability continue to be essential to our political transition. There continue, however, to be forces in Iraq, including foreign elements, that are opposed to our transition to peace, democracy, and security. The Government is determined to overcome these forces, and to develop security forces capable of providing adequate security for the Iraqi people.

Until we are able to provide security for ourselves, including the defence of Iraq's land, sea and air space, we ask for the support of the Security Council and the international community in this endeavour. We seek a new resolution on the Multinational Force (MNF) mandate to contribute to maintaining security in Iraq, including through the tasks and arrangements set out in the letter from Secretary of State Colin Powell to the President of the United Nations Security Council. ...

...

We are ready to take sovereign responsibility for governing Iraq by June 30. We are well aware of the difficulties facing us, and of our responsibilities to the Iraqi people. The stakes are great, and we need the support of the international community to succeed. We ask the Security Council to help us by acting now to adopt a Security Council resolution giving us necessary support.

I understand that the Co-sponsors intend to annex this letter to the resolution on Iraq under consideration. In the meantime, I request that you provide copies of this letter to members of the Council as quickly as possible.

(Signed) Dr. Ayad Allawi"

"The Secretary of State,

Washington.

Excellency:

Recognizing the request of the government of Iraq for the continued presence of the Multi-National Force (MNF) in Iraq, and following consultations with Prime Minister Ayad Allawi of the Iraqi Interim Government, I am writing to confirm that the MNF under unified command is prepared to continue to contribute to the maintenance of security in Iraq, including by preventing and deterring terrorism and protecting the

territory of Iraq. The goal of the MNF will be to help the Iraqi people to complete the political transition and will permit the United Nations and the international community to work to facilitate Iraq's reconstruction.

...

Under the agreed arrangement, the MNF stands ready to continue to undertake a broad range of tasks to contribute to the maintenance of security and to ensure force protection. These include activities necessary to counter ongoing security threats posed by forces seeking to influence Iraq's political future through violence. This will include combat operations against members of these groups, internment where this is necessary for imperative reasons of security, and the continued search for and securing of weapons that threaten Iraq's security. ...

...

In order to continue to contribute to security, the MNF must continue to function under a framework that affords the force and its personnel the status that they need to accomplish their mission, and in which the contributing states have responsibility for exercising jurisdiction over their personnel and which will ensure arrangements for, and use of assets by, the MNF. The existing framework governing these matters is sufficient for these purposes. In addition, the forces that make up the MNF are and will remain committed at all times to act consistently with their obligations under the law of armed conflict, including the Geneva Conventions.

The MNF is prepared to continue to pursue its current efforts to assist in providing a secure environment in which the broader international community is able to fulfil its important role in facilitating Iraq's reconstruction. In meeting these responsibilities in the period ahead, we will act in full recognition of and respect for Iraqi sovereignty.

We look to other member states and international and regional organizations to assist the people of Iraq and the sovereign Iraqi government in overcoming the challenges that lie ahead to build a democratic, secure and prosperous country.

The co-sponsors intend to annex this letter to the resolution on Iraq under consideration. In the meantime, I request that you provide copies of this letter to members of the Council as quickly as possible.

(Signed) Colin L. Powell"

35. Provision for the new regime was made in United Nations Security Council Resolution 1546, adopted on 8 June 2004. It provided as follows, with the above letters from Dr Allawi and Mr Powell annexed:

"*The Security Council*,

Welcoming the beginning of a new phase in Iraq's transition to a democratically elected government, and looking forward to the end of the occupation and the assumption of full responsibility and authority by a fully sovereign and independent Interim Government of Iraq by 30 June 2004,

Recalling all of its previous relevant resolutions on Iraq,

...

Recalling the establishment of the United Nations Assistance Mission for Iraq (UNAMI) on 14 August 2003, and *affirming* that the United Nations should play a leading role in assisting the Iraqi people and government in the formation of institutions for representative government,

Recognizing that international support for restoration of stability and security is essential to the well-being of the people of Iraq as well as to the ability of all concerned to carry out their work on behalf of the people of Iraq, and *welcoming* Member State contributions in this regard under resolution 1483 (2003) of 22 May 2003 and resolution 1511 (2003),

Recalling the report provided by the United States to the Security Council on 16 April 2004 on the efforts and progress made by the multinational force,

Recognizing the request conveyed in the letter of 5 June 2004 from the Prime Minister of the Interim Government of Iraq to the President of the Council, which is annexed to this resolution, to retain the presence of the multinational force,

...

Welcoming the willingness of the multinational force to continue efforts to contribute to the maintenance of security and stability in Iraq in support of the political transition, especially for upcoming elections, and to provide security for the United Nations presence in Iraq, as described in the letter of 5 June 2004 from the United States Secretary of State to the President of the Council, which is annexed to this resolution,

Noting the commitment of all forces promoting the maintenance of security and stability in Iraq to act in accordance with international law, including obligations under international humanitarian law, and to cooperate with relevant international organizations,

...

Determining that the situation in Iraq continues to constitute a threat to international peace and security,

Acting under Chapter VII of the Charter of the United Nations,

1. *Endorses* the formation of a sovereign Interim Government of Iraq ... which will assume full responsibility and authority by 30 June 2004 for governing Iraq...;

2. *Welcomes* that, also by 30 June 2004, the occupation will end and the Coalition Provisional Authority will cease to exist, and that Iraq will reassert its full sovereignty;

...

7. *Decides* that in implementing, as circumstances permit, their mandate to assist the Iraqi people and government, the Special Representative of the Secretary-General

and the United Nations Assistance Mission for Iraq (UNAMI), as requested by the Government of Iraq, shall:

(a) play a leading role to:

(i) assist in the convening, during the month of July 2004, of a national conference to select a Consultative Council;

(ii) advise and support the Independent Electoral Commission of Iraq, as well as the Interim Government of Iraq and the Transitional National Assembly, on the process for holding elections;

(iii) promote national dialogue and consensus-building on the drafting of a national constitution by the people of Iraq;

(b) and also:

(i) advise the Government of Iraq in the development of effective civil and social services;

(ii) contribute to the coordination and delivery of reconstruction, development, and humanitarian assistance;

(iii) promote the protection of human rights, national reconciliation, and judicial and legal reform in order to strengthen the rule of law in Iraq; and

(iv) advise and assist the Government of Iraq on initial planning for the eventual conduct of a comprehensive census;

...

9. *Notes* that the presence of the multinational force in Iraq is at the request of the incoming Interim Government of Iraq and therefore *reaffirms* the authorization for the multinational force under unified command established under resolution 1511 (2003), having regard to the letters annexed to this resolution;

10. *Decides* that the multinational force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution expressing, inter alia, the Iraqi request for the continued presence of the multinational force and setting out its tasks, including by preventing and deterring terrorism, so that, inter alia, the United Nations can fulfil its role in assisting the Iraqi people as outlined in paragraph seven above and the Iraqi people can implement freely and without intimidation the timetable and programme for the political process and benefit from reconstruction and rehabilitation activities;

...

15. *Requests* Member States and international and regional organizations to contribute assistance to the multinational force, including military forces, as agreed with the Government of Iraq, to help meet the needs of the Iraqi people for security

and stability, humanitarian and reconstruction assistance, and to support the efforts of UNAMI;

...

30. *Requests* the Secretary-General to report to the Council within three months from the date of this resolution on UNAMI operations in Iraq, and on a quarterly basis thereafter on the progress made towards national elections and fulfilment of all UNAMI's responsibilities;

31. *Requests* that the United States, on behalf of the multinational force, report to the Council within three months from the date of this resolution on the efforts and progress of this force, and on a quarterly basis thereafter;

32. *Decides* to remain actively seized of the matter."

36. On 18 June 2003 the Coalition Provisional Authority had issued Memorandum No. 3, which set out provisions on criminal detention and security internment by the Coalition Forces. A revised version of Memorandum No. 3 was issued on 27 June 2004. It provided as follows:

"**Section 6: MNF Security Internee Process**

(1) Any person who is detained by a national contingent of the MNF for imperative reasons of security in accordance with the mandate set out in UNSCR 1546 (hereinafter 'security internees') shall, if he is held for a period longer than 72 hours, be entitled to have a review of the decision to intern him.

(2) The review must take place with the least possible delay and in any case must be held no later than 7 days after the date of induction into an internment facility.

(3) Further reviews of the continued detention of any security internee shall be conducted on a regular basis but in any case not later than six months from the date of induction into an internment facility.

(4) The operation, condition and standards of any internment facility established by the MNF shall be in accordance with Section IV of the Fourth Geneva Convention.

(5) Security internees who are placed in internment after 30 June 2004 must in all cases only be held for so long as the imperative reasons of security in relation to the internee exist and in any case must be either released from internment or transferred to the Iraqi criminal jurisdiction no later than 18 months from the date of induction into an MNF internment facility. Any person under the age of 18 interned at any time shall in all cases be released not later than 12 months after the initial date of internment.

(6) Where it is considered that, for continuing imperative reasons of security, a security internee placed in internment after 30th June 2004 who is over the age of 18 should be retained in internment for longer than 18 months, an application shall be made to the Joint Detention Committee (JDC) for approval to continue internment for an additional period. In dealing with the application the members of the JDC will present recommendations to the co-chairs who must jointly agree that the internment may continue and shall specify the additional period of internment. While the application is being processed the security internee may continue to be held in

internment but in any case the application must be finalized not later than two months from the expiration of the initial 18 month internment period.

(7) Access to internees shall be granted to the Ombudsman. Access will only be denied the Ombudsman for reasons of imperative military necessity as an exceptional and temporary measure. The Ombudsman shall be permitted to inspect health, sanitation and living conditions and to interview all internees in private and to record information regarding an internee.

(8) Access to internees shall be granted to official delegates of the ICRC. Access will only be denied the delegates for reasons of imperative military necessity as an exceptional and temporary measure. The ICRC delegates shall be permitted to inspect health, sanitation and living conditions and to interview all internees in private. They shall also be permitted to record information regarding an internee and may pass messages to and from the family of an internee subject to reasonable censorship by the facility authorities. ..."

5. The end of the occupation and subsequent developments

37. On 28 June 2004 full authority was transferred from the Coalition Provisional Authority to the Interim Government, and the Coalition Provisional Authority ceased to exist. Subsequently the Multi-National Force, including the British forces forming part of it, remained in Iraq pursuant to requests by the Iraqi Government and authorisations from the United Nations Security Council.

38. On 19 May 2006 the new Iraqi Constitution was adopted. It provided that any law which contradicted its provisions was deemed to be void. Article 15 of the Constitution required, *inter alia*, that any deprivation of liberty must be based on a decision issued by a competent judicial authority and Article 37 provided that no-one should be kept in custody except according to a judicial decision.

39. The authorisation for the presence of the Multi-National Force in Iraq under United Nations Security Council Resolution 1546 was extended by Resolution 1637 of 8 November 2005 and Resolution 1723 of 28 November 2006 until 31 December 2006 and 31 December 2007 respectively. These resolutions also annexed an exchange of letters between the Prime Minister of Iraq and the United States Secretary of State, Condoleeza Rice, referring back to the original exchange of letters annexed to Resolution 1546.

6. Reports to the Security Council on the internment regime in Iraq

40. On 7 June 2005, as required by Resolution 1546, the Secretary General of the United Nations reported to the Security Council on the situation in Iraq (S/2005/373). Under the heading "Human Rights activities" he stated, *inter alia*:

"70. The volume of reports on human rights violations in Iraq justifies serious concern. Accounts of human rights violations continue to appear in the press, in private security reports and in reports by local human rights groups. Individual accounts provided to UNAMI and admissions by the authorities concerned provide additional indications about this situation. In many cases, the information about violations has been widely publicized. Effective monitoring of the human rights situation remains a challenge, particularly because the current security situation makes it difficult to obtain evidence and further investigate allegations. In most instances, however, the consistency of accounts points to clear patterns.

...

72. ... One of the major human rights challenges remains the detention of thousands of persons without due process. According to the Ministry of Justice, there were approximately 10,000 detainees at the beginning of April, 6,000 of whom were in the custody of the Multinational Force. Despite the release of some detainees, their number continues to grow. Prolonged detention without access to lawyers and courts is prohibited under international law, including during states of emergency."

Similar concerns were repeated in his reports of September and December 2005 (S/2005/585, § 52; S/2005/766, § 47) and March, June, September and December 2006 (S/2006/137, § 54; S/2006/360, § 47; S/2006/706, § 36; S/2006/945, § 45). By the end of 2006 he reported that there were 13,571 detainees in Multi-National Force detention centres. In his report of March 2006 he observed:

"At the same time, the internment of thousands of Iraqis by the Multinational Force and the Iraqi authorities constitutes de facto arbitrary detention. The extent of such practices is not consistent with the provisions of international law governing internment for imperative reasons of security."

In June 2007 he described the increase in the number of detainees and security internees as a pressing human rights concern (S/2007/330, § 31).

41. Similar observations were contained in the reports of the United Nations Assistance Mission for Iraq (UNAMI), which paragraph 7 of United Nations Security Council Resolution 1546 mandated to promote the protection of human rights in Iraq. In its report on the period July-August 2005, UNAMI expressed concern about the high number of persons detained, observing that "Internees should enjoy all the protections envisaged in all the rights guaranteed by international human rights conventions". In its next report (September-October 2005) it repeated this expression of concern and advised "There is an urgent need to provide [a] remedy to lengthy internment for reasons of security without adequate judicial oversight". In July-August 2006 it reported that of the 13,571 detainees in Multi-National Force custody, 85 individuals were under United Kingdom custody while the rest were under United States authority. In the report for September-October 2006 UNAMI expressed concern that there had been no reduction in the number of security internees detained by

the Multi-National Force. In its report for January-March 2007 UNAMI commented:

"71. The practice of indefinite internment of detainees in the custody of the MNF remains an issue of concern to UNAMI. Of the total of 16,931 persons held at the end of February, an unknown number are classified as security internees, held for prolonged periods effectively without charge or trial. ... The current legal arrangements at the detention facilities do not fulfil the requirement to grant detainees due process. ..."

UNAMI returned to this subject in its report for April-June 2007, stating *inter alia*:

"72. In UNAMI's view, the administrative review process followed by the MNF through the Combined Review and Release Board (CRRB) requires improvement to meet basic due process requirements. Over time, the procedures in force have resulted in prolonged detention without trial, with many security internees held for several years with minimal access to the evidence against them and without their defense counsel having access to such evidence. While the current review process is based on procedures contained in the Fourth Geneva Convention, UNAMI notes that, irrespective of the legal qualification of the conflict, both in situations of international and internal armed conflict the Geneva Conventions are not of exclusive application to persons deprived of their liberty in connection with the conflict. Alongside common article 3 to the four Geneva Conventions and customary international law, international human rights law also applies. Accordingly, detainees during an internal armed conflict must be treated in accordance with international human rights law. As such, persons who are deprived of their liberty are entitled to be informed of the reasons for their arrest; to be brought promptly before a judge if held on a criminal charge, and to challenge the lawfulness of their detention."

The report also referred to an exchange of correspondence between the United States' authorities and UNAMI, on the question whether the International Covenant for the Protection of Civil and Political Rights applied in relation to the Multi-National Force's security internment regime. While the United States' authorities maintained that it did not, UNAMI concluded:

"77. There is no separation between human rights and international humanitarian law in Security Council Resolutions adopted under Chapter VII. In fact, the leading resolutions on Iraq, such as Resolution 1546 of June 2004, cite in the preamble: 'Affirming the importance of the rule of law, national reconciliation, respect for human rights including the rights of women, fundamental freedoms, and democracy'. This arguably applies to all forces operating in Iraq. The letter from the Government of Iraq attached to SC res. 1723 also states that 'The forces that make up MNF will remain committed to acting consistently with their obligations and rights under international law, including the law of armed conflict.' International law includes human rights law."

II. RELEVANT INTERNATIONAL LAW MATERIALS

A. Relevant provisions of international humanitarian law

42. Articles 42 and 43 of the Regulations concerning the Laws and Customs of War on Land (The Hague, 18 October 1907: hereafter, "the Hague Regulations") provide as follows:

> "42. Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.
>
> 43. The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

43. The Convention (IV) relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949: hereafter, "the Fourth Geneva Convention") defines "protected persons" as follows:

> "4. Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.
>
> Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are. ..."

It contains the following provisions in relation to security measures and internment:

> "27. Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.
>
> Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.
>
> Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.
>
> However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.

> 41. Should the Power in whose hands protected persons may be consider the measures of control mentioned in the present Convention to be inadequate, it may not have recourse to any other measure of control more severe than that of assigned residence or internment, in accordance with the provisions of Articles 42 and 43.
>
> In applying the provisions of Article 39, second paragraph, to the cases of persons required to leave their usual places of residence by virtue of a decision placing them in assigned residence elsewhere, the Detaining Power shall be guided as closely as possible by the standards of welfare set forth in Part III, Section IV of this Convention.
>
> 42. The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.
>
> If any person, acting through the representatives of the Protecting Power, voluntarily demands internment and if his situation renders this step necessary, he shall be interned by the Power in whose hands he may be.
>
> 43. Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose. If the internment or placing in assigned residence is maintained, the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit.
>
> Unless the protected persons concerned object, the Detaining Power shall, as rapidly as possible, give the Protecting Power the names of any protected persons who have been interned or subjected to assigned residence, or who have been released from internment or assigned residence. The decisions of the courts or boards mentioned in the first paragraph of the present Article shall also, subject to the same conditions, be notified as rapidly as possible to the Protecting Power.
>
> ...
>
> 64. The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention.
>
> Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.
>
> The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

78. If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.

Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power."

Protected persons made subject to assigned residence and thus required to leave their homes shall enjoy the full benefit of Article 39 of the present Convention."

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, provides in Article 75 § 3:

"Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist."

B. Relevant provisions of the United Nations Charter 1945

44. The preamble to the United Nations Charter states, *inter alia*:

"We, the peoples of the United Nations,

Determined

to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and

to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, ..."

Article 1 sets out the purposes of the United Nations, as follows:

"(1) To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

...

(3) To achieve international cooperation in ... promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; ..."

Article 24 provides *inter alia*:

"(1) In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

(2) In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII."

Article 25 of the Charter provides:

"The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

45. Chapter VII of the Charter is entitled "Action with respect to threats to the peace, breaches of the peace and acts of aggression". Article 39 provides:

"The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

46. Articles 41 and 42 read as follows:

"41. The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."

42. Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."

Articles 43-45 provide for the conclusion of agreements between Member States and the Security Council for the former to contribute to the latter land and air forces necessary for the purpose of maintaining international peace and security. No such agreements have been concluded.

Chapter VII continues:

"48. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.

Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.

49. The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council."

Article 103 of the Charter reads as follows:

"In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

C. Relevant provisions of the Vienna Convention on the Law of Treaties 1969

47. Article 30 is entitled "Application of successive treaties relating to the same subject matter" and its first paragraph reads as follows:

"1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs. ..."

D. Relevant case-law of the International Court of Justice

48. The International Court of Justice has held Article 103 of the United Nations Charter to mean that the Charter obligations of United Nations Member States prevail over conflicting obligations from another international treaty, regardless of whether the latter treaty was concluded before or after the United Nations Charter or was only a regional arrangement (*Nicaragua v. United States of America*, ICJ Reports, 1984, p. 392, at § 107). The International Court of Justice has also held that Article 25 of the United Nations Charter means that United Nations Member States' obligations under a Security Council Resolution prevail over obligations arising under any other international agreement: *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America and Libyan Arab Jamahiriya v United Kingdom,* ICJ Reports 1992, vol. 1, p. 16, at § 42, and p. 113 at § 39.

49. In its advisory opinion "*Legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)*", the International Court of Justice observed, in connection with the interpretation of United Nations Security Council resolutions:

"114. It has also been contended that the relevant Security Council resolutions are couched in exhortatory rather than mandatory language and that, therefore, they do not purport to impose any legal duty on any State nor to affect legally any right of any

State. The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council."

50. In its judgment *Armed Activities on the Territory of the Congo (Democratic Republic of Congo (DRC) v. Uganda*), (19 December 2005) the International Court of Justice considered whether, during the relevant period, Uganda was an "Occupying Power" of any part of the territory of the Democratic Republic of Congo, within the meaning of customary international law, as reflected in Article 42 of the Hague Regulations (§§ 172-173). The International Court of Justice found that Ugandan forces were stationed in the province of Ituri and exercised authority there, in the sense that they had substituted their own authority for that of the Congolese Government (§§ 174-176). The International Court of Justice continued:

"178. The Court thus concludes that Uganda was the occupying Power in Ituri at the relevant time. As such it was under an obligation, according to Article 43 of the Hague Regulations of 1907, to take all the measures in its power to restore, and ensure, as far as possible, public order and safety in the occupied area, while respecting, unless absolutely prevented, the laws in force in the DRC. This obligation comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.

179. The Court, having concluded that Uganda was an occupying Power in Ituri at the relevant time, finds that Uganda's responsibility is engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account.

180. The Court notes that Uganda at all times has responsibility for all actions and omissions of its own military forces in the territory of the DRC in breach of its obligations under the rules of international human rights law and international humanitarian law which are relevant and applicable in the specific situation."

E. Relevant case-law of the European Court of Justice

51. Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities (Joined Cases C-402/05 & C-415/05P) concerned a complaint about the freezing of assets under European Community Regulations adopted to reflect United Nations Security Council Resolutions 1267(1999), 1333(2000) and 1390(2002), which dictated ,*inter alia*, that all States were

to take measures to freeze the funds and other financial assets of individuals and entities associated with Osama bin Laden, the al'Qaeda network and the Taliban. Those individuals, including the applicants, were identified by the Sanctions Committee of the United Nations Security Council. The applicants argued that the Regulations were *ultra vires* because the assets freezing procedure violated their fundamental rights to a fair trial and to respect for his property, as protected by the European Community Treaty.

52. The Court of First Instance rejected the applicant's claims and upheld the Regulations, essentially finding that the effect of Article 103 of the United Nations Charter was to give United Nations Security Council Regulations precedence over other international obligations (save *jus cogens*), which included the European Community Treaty. Thus the Court of First Instance concluded that it had no authority to review, even indirectly, United Nations Security Council Resolutions in order to assess their conformity with fundamental rights.

53. Mr Kadi appealed to the European Court of Justice where his case was considered together with another appeal by the Grand Chamber, which gave judgment on 3 September 2008. The European Court of Justice held that European Community law formed a distinct, internal legal order and that it was competent to review the lawfulness of a Community Regulation within that internal legal order, despite the fact that the Regulation had been enacted in response to a United Nations Security Council resolution. It followed that, while it was not for the "Community judicature" to review the lawfulness of United Nations Security Council resolutions, they could review the act of a Member State or Community organ that gave effect to that resolution; doing so "would not entail any challenge to the primacy of the resolution in international law". The European Court of Justice recalled that the European Community was based on the rule of law, that fundamental rights formed an integral part of the general principles of law and that respect for human rights was a condition of the lawfulness of Community acts. The obligations imposed by an international agreement could not have the effect of prejudicing the "constitutional principles of the European Community Treaty", which included the principle that all Community acts had to respect fundamental rights. The Regulations in question, which provided for no right to challenge a freezing order, failed to respect fundamental rights and should be annulled.

F. Relevant case-law of the United States Supreme Court

54. In *Munaf v. Geren* (2008) 128 S.Ct. 2207, the United States Supreme Court examined claims for habeas corpus relief from two American citizens who voluntarily travelled to Iraq and allegedly committed crimes there. They were each arrested in October 2004 by American forces operating as part of the Multi-National Force; given hearings before Multi-National

Force Tribunals composed of American officers, who concluded that they posed threats to Iraq's security; and placed in the custody of the United States military operating as part of the Multi-National Force. It was subsequently decided to transfer the detainees to the custody of the Iraqi authorities to stand trial on criminal charges before the Iraqi courts, and the detainees sought orders from the Federal Courts prohibiting this, on the ground that they risked torture if transferred to Iraqi custody. It was argued on behalf of the United States Government that the Federal Courts lacked jurisdiction over the detainees' petitions because the American forces holding them operated as part of a multinational force. The Supreme Court observed that:

> "The United States acknowledges that Omar and Munaf are American citizens held overseas in the immediate 'physical custody' of American soldiers who answer only to an American chain of command. The MNF-I itself operates subject to a unified American command. '[A]s a practical matter,' the Government concedes, it is 'the President and the Pentagon, the Secretary of Defense, and the American commanders that control what ... American soldiers do,' ... including the soldiers holding Munaf and Omar. In light of these admissions, it is unsurprising that the United States has never argued that it lacks the authority to release Munaf or Omar, or that it requires the consent of other countries to do so."

The Supreme Court concluded that it considered "these concessions the end of the jurisdictional inquiry". It held that American citizens held overseas by American soldiers subject to a United States chain of command were not precluded from filing habeas petitions in the federal courts. However, it further decided that Federal District Courts could not exercise their habeas jurisdiction to enjoin the United States from transferring individuals alleged to have committed crimes and detained within the territory of a foreign sovereign State to that sovereign State for criminal prosecution. The petitioners' allegations that their transfer to Iraqi custody was likely to result in torture were a matter of serious concern but those allegations generally had to be addressed by the political branches, not the judiciary.

G. Relevant materials of the International Law Commission

55. The International Law Commission was established by the United Nations General Assembly in 1948 for the "promotion of the progressive development of international law and its codification." It consists of 34 experts on international law, elected to the Commission by the United Nations' General Assembly from a list of candidates nominated by Governments of Member States.

56. In Article 5 of its draft Articles on the Responsibility of International Organizations (adopted in May 2004), the International Law Commission stated as follows:

"*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."

The International Law Commission further stated, in paragraphs 1 and 6-7 of its commentary on this article:

"1. When an organ of a state is placed at the disposal of an international organization, the organ may be fully seconded to that organization. In this case the organ's conduct would clearly be attributable only to the receiving organization ... Article 5 deals with the different situation in which the lent organ or agent still acts to a certain extent as organ of the lending state or as organ or agent of the lending organization. This occurs for instance in the case of military contingents that a state placed at the disposal of the [UN] for a peacekeeping operation, since the state retains disciplinary powers and criminal jurisdiction over the members of the national contingent. In this situation the problem arises whether a specific conduct of the lent organ or agent has to be attributed to the receiving organization or to the lending state or organization ...

6. Practice relating to peacekeeping forces is particularly significant in the present context because of the control that the contributing state retains over disciplinary matters and criminal affairs. This may have consequences with regard to attribution of conduct ...

Attribution of conduct to the contributing state is clearly linked with the retention of some powers by that state over its national contingent and thus on the control that the state possesses in the relevant respect.

7. As has been held by several scholars, when an organ or agent is placed at the disposal of an international organization, the decisive question in relation to attribution of a given conduct appears to be who has effective control over the conduct in question."

57. The Report of the Study Group of the International Law Commission on "Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law" (April 2006) commented, in respect of Article 103 of the United Nations Charter (footnotes omitted):

"**(a) What are the prevailing obligations?**

331. Article 103 does not say that the Charter prevails, but refers to obligations under the Charter. Apart from the rights and obligations in the Charter itself, this also covers duties based on binding decisions by United Nations bodies. The most important case is that of Article 25 that obliges Member States to accept and carry out resolutions of the Security Council that have been adopted under Chapter VII of the Charter. Even if the primacy of Security Council decisions under Article 103 is not expressly spelled out in the Charter, it has been widely accepted in practice as well as in doctrine. The question has sometimes been raised whether also Council resolutions

adopted *ultra vires* prevail by virtue of Article 103. Since obligations for Member States of the United Nations can only derive out of such resolutions that are taken within the limits of its powers, decisions *ultra vires* do not give rise to any obligations to begin with. Hence no conflict exists. The issue is similar with regard to non-binding resolutions adopted by United Nations organs, including the Security Council. These are not covered by Article 103.

...

(b) What does it mean for an obligation to prevail over another?

333. What happens to the obligation over which Article 103 establishes precedence? Most commentators agree that the question here is not of validity but of priority. The lower-ranking rule is merely set aside to the extent that it conflicts with the obligation under Article 103. This was how Waldock saw the matter during the ILC debates on article 30 [of the Vienna Convention on the Law of Treaties]: '[T]he very language of Article 103 makes it clear that it presumes the priority of the Charter, not the invalidity of treaties conflicting with it.'

334. A small number of authors have received a more extensive view of the effects of Article 103 - namely the invalidity of the conflicting treaty or obligation - on the basis of the view of the Charter as a 'constitution'. A clear-cut answer to this question (priority or invalidity?) cannot be received from the text of Article 103. Yet the word 'prevail' does not grammatically imply that the lower-ranking provision would become automatically null and void, or even suspended. The State is merely prohibited from fulfilling an obligation arising under that other norm. Article 103 says literally that in case of a conflict, the State in question should fulfil its obligation under the Charter and perform its duties under other agreements in as far as compatible with obligations under the Charter. This also accords with the drafting materials of the Charter, which state that:

'it would be enough that the conflict should arise from the carrying out of an obligation under the Charter. It is immaterial whether the conflict arises because of intrinsic inconsistency between the two categories of obligations or as the result of the application of the provisions of the Charter under given circumstances.'"

H. The Copenhagen Process on "The Handling of Detainees in International Military Operations"

58. In 2007 the Danish Government initiated the "Copenhagen Process on Handling Detainees in International Military Operations". The process is aimed at developing a multilateral approach to the treatment of detainees in military situations and it has attracted the involvement of at least 28 States and a number of international organisations, including the United Nations, the European Union, the North Atlantic Treaty Organisation, the African Union and the International Committee of the Red Cross. The "Non-Paper", prepared for the first Copenhagen Conference, 11-12 October 2007, stated by way of introduction:

"The past decade has seen a significant change in the character of international military operations. They have developed from traditional peacekeeping operations under Chapter VI/VI ½ of the UN Charter, through peacemaking operations under Chapter VII, to a new type of operation in which military forces are acting in support of governments that need assistance to stabilise their countries or in support of the international administration of territory. In such operations, military forces may have to perform tasks which would normally be performed by national authorities, including detaining people in the context of both military operations and law enforcement.

At the same time, the countries which are to be assisted frequently have difficulties fulfilling their human rights and humanitarian law obligations due to the internal problems. Normal modus operandi including the transfer of detainees to local authorities may therefore often not be possible as it may contradict the legal and political commitment of the troop-contributing countries. The handling of detainees thereby becomes a challenge in itself. If a sustainable solution to these challenges is not reached, it may have an impact on the ability of the military forces of other States to engage in certain types of operations. States therefore cannot disregard these challenges when contributing to ongoing or future operations of this nature.

The main challenge is a basic one: how do troop-contributing States ensure that they act in accordance with their international obligations when handling detainees, including when transferring detainees to local authorities or to other troop-contributing countries? Solving this challenge is not simple, as it involves addressing a number of complicated and contested legal issues as well as complicated practical and political aspects. ..."

The "Non-Paper" continued, under the heading "The Legal Basis [of Detention]":

"The legal basis for military forces to detain persons typically derives from the mandate of a given operation. The types of operations relevant for this non-paper are typically based on a Chapter VII resolution of the United Nations Security Council. A UNSC resolution may contain or refer to text on detention, and supplementary regulation may be found, for example, in Standard Operating Procedures, Rules of Engagement and Status-of-Forces Agreements, although the latter would also represent an agreement with the territorial State. The wording in these instruments on detention, however, is not always clear, if the issue is addressed at all.

In these circumstances, the mandate to detain is often based on the traditional wording of UNSC resolutions giving a military force the mandate to 'take all necessary measures' in order to fulfil the given task. When a UN resolution is unclear or contains no text on the mandate to detain, the right to self-defence may contain an inherent yet limited right to detain. However, this may leave the question open as to the scope of the mandate, e.g., what type of detention is possible in self-defence and whether it is possible only to detain persons for reasons of security or also to detain e.g. common criminals.

There is therefore a need for the Security Council to address this issue and clearly establish the legal basis for the right of the force to detain in a given operation. A clear mandate on detention will improve the possibilities for soldiers on the ground to take the right decisions on detention matters and to avoid different interpretations on the understanding of an ambiguous SC resolution. This need is further underlined by the

fact that the right to detain might subsequently be challenged in court, and that officials/soldiers of troop contributing states may be subject to prosecution for unlawful confinement under the grave breaches regime of Geneva Convention IV."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

59. The applicant complained that he was held in internment by United Kingdom armed forces in Iraq between 10 October 2004 and 30 December 2007, in breach of Article 5 § 1 of the Convention. He did not pursue before the Court his complaint under Article 5 § 4 of the Convention, concerning the lack of judicial review of the detention, since proceedings on this issue were still pending before the domestic courts at the time the application was lodged (see paragraphs 23-24 above).

60. The Government contended that the internment was attributable to the United Nations and not to the United Kingdom, and that the applicant was not, therefore, within United Kingdom jurisdiction under Article 1 of the Convention. Further and in the alternative they submitted that the internment was carried out pursuant to United Nations Security Council Resolution 1546, which created an obligation on the United Kingdom to detain the applicant which, pursuant to Article 103 of the United Nations Charter, overrode obligations under the Convention.

A. Admissibility

61. The Court considers that the question whether the applicant's detention fell within the jurisdiction of the respondent State is closely linked to the merits of his complaint. It therefore joins this preliminary question to the merits.

62. It notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. The merits

1. Jurisdiction

63. The applicant submitted that he fell within the United Kingdom's jurisdiction under Article 1 of the Convention, which reads as follows:

"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention."

The Government disagreed.

(a) The parties' arguments

(i) The Government

64. The Government denied that the detention of the applicant fell within the United Kingdom's jurisdiction. They submitted that he was detained at a time when United Kingdom forces were operating as part of a Multi-National Force authorised by the United Nations Security Council and subject to the ultimate authority of the United Nations. In detaining the applicant, British troops were not exercising the sovereign authority of the United Kingdom but the international authority of the Multi-National Force, acting pursuant to the binding decision of the United Nations Security Council. The Government emphasised that the above approach to the questions of attribution and jurisdiction followed from the Court's reasoning and decision in *Behrami v. France; Saramati v. France, Germany and Norway* (dec.) [GC], nos. 71412/01 and 78166/01, ECHR 2007-... They submitted that Lord Bingham, with whom Baroness Hale and Lord Carswell agreed (see paragraph 18 above), failed to give proper effect to that decision of the Grand Chamber. Lord Rodger, however, had found the position as regards Iraq to be indistinguishable from that in Kosovo as considered by the Court in *Behrami and Saramati*. The Government agreed with and relied upon his detailed reasoning and conclusion (see paragraph 19 above).

65. The Government emphasised that in *Behrami and Saramati* the Court had held that the effect of United Nations Security Council Resolution 1244 (1999) had been to delegate to willing organisations and United Nations Member States the power to establish an international security presence in Kosovo. The United Nations Security Council had been acting under Chapter VII of the United Nations Charter when it authorised the Kosovo Force (KFOR). Similarly, in the Resolutions authorising the Multi-National Force in Iraq (United Nations Security Council Resolutions 1511 and 1546: see paragraphs 31 and 35 above), the Security Council referred expressly to Chapter VII, made the necessary identification of a threat to international peace and security and, in response to this threat, authorised a multi-national force under unified command to take "all necessary measures to contribute to the maintenance of security and stability of Iraq".

66. The Government continued by pointing out that in *Behrami and Saramati* (cited above), the Court had identified that the "key question" to determine whether the delegation in question was sufficiently limited to meet the requirements of the Charter, and for the acts of the delegate to be attributable to the United Nations, was whether "the [Security Council] retained ultimate authority and control so that operational command only was delegated" (*Behrami and Saramati*, cited above, §§ 132 and 133). The Court had further identified (at § 134) five factors which established that the United Nations had retained "ultimate authority and control" over KFOR. In the Government's submission, the five factors applied equally in respect of the United Nations Security Council's authorisation of the Multi-National Force to use force in Iraq. First, Chapter VII allowed the United Nations Security Council to delegate its powers under Chapter VII to an international security presence made up of forces from willing Member States. Secondly, the relevant power, conferred by Chapter VII, was a delegable power. Thirdly, the delegation to the Multi-National Force was not presumed or implicit, but prior and explicit in United Nations Security Council Resolutions 1511, 1546 and subsequent resolutions. The applicant was detained several months after the adoption of Resolution 1546. Fourthly, Resolution 1546 fixed the mandate with adequate precision, setting out the tasks to be undertaken by the Multi-National Force. Resolution 1546 in fact defined the tasks to be carried out by the authorised international force with greater precision than Resolution 1244. Fifthly, the Multi-National Force, through the United States, was required to report to the Security Council on a quarterly basis. Further, the mandate for the Multi-National Force was subject to review and control by the Security Council by reason of the requirement that the mandate be reviewed by the Security Council after no less than 12 months and that it expire after certain a specified events. The Security Council therefore retained greater control over the Multi-National Force than it did over KFOR under Resolution 1244.

67. A further question which the Court had considered in *Behrami and Saramati* was whether the level of control exercised by the troop contributing nations in detaining Mr Saramati was such as to detach the troops from the international mandate of the Security Council. In the present case, the Government submitted, the applicant's detention was effected and authorised throughout by Multi-National Force personnel acting as such, including United Kingdom forces. The "structural" involvement of the United Kingdom in retaining some authority over its troops, as did all troop contributing nations, was compatible with the effectiveness of the unified command and control exercised over the Multi-National Force. There was no evidence that the United Kingdom interfered with respect to the applicant's detention in such a way that the acts of the United Kingdom troops in detaining him were detached from the Security Council mandate. In the Government's view, no relevant distinction could be drawn between the operational chain of command in the Multi-National Force and that which operated in the case of KFOR (see *Behrami and Saramati*, cited above, § 135). In the Government's submission, the continued detention of the applicant after June 2006 was required to be authorised by the co-chairs

of the Joint Detention Committee, namely the Prime Minister of Iraq and the General Officer Commanding Multi-National Force (a United States General), and was in fact so authorised. That authorisation was in accordance with applicable Iraqi law and the United Nations mandate conferred by Resolution 1546, which recorded that the Multi-National Force was present in Iraq at the request of the Government of Iraq and which expressly referred to arrangements put in place for a "security partnership" between the Iraqi Government and the Multi-National Force. United Kingdom troops played no part in the authorisation.

68. The Government contended that to apply the Convention to the acts of United Kingdom troops, and those of other Contracting States who contributed troops to the Multi-National Force, in the context of the Multi-National Force's multi-national and unified command structure, and in the context of its close co-ordination and co-operation with Iraqi forces, would have introduced serious operational difficulties. It would have impaired the effectiveness of the Multi-National Force in its operations, which ranged from combat operations conducted together with Iraqi forces to the arrest of suspected criminals and terrorists. It would also give rise to intractable issues as to how the Convention would apply to operations conducted jointly by forces from Contracting and non-Contracting States including, for example, questions as to what degree of involvement of personnel in joint actions would be required to engage the responsibility of the Contracting State. Moreover, in addition to United Nations peacekeeping forces (which were subsidiary organs of the United Nations) there were currently seven international military forces which had been authorised by the United Nations Security Council to contribute to the maintenance of security in foreign States, including the International Security Assistance Force in Afghanistan. To conclude that the acts of United Kingdom troops deployed as part of the Multi-National Force in Iraq were attributable to the United Kingdom would introduce real uncertainty about the operation of the Convention to United Nations mandated operations and would risk in future deterring Contracting Parties from contributing troops to forces authorised by the United Nations Security Council, to the detriment of its mission to secure international peace and security.

(ii) The applicant

69. The applicant pointed out that the Government had made an express concession during the domestic proceedings that the applicant was within the Article 1 jurisdiction of the United Kingdom since he was detained in a British-run military prison. However, following the Grand Chamber's decision in *Behrami and Saramati* (cited above), the Government had argued for the first time before the House of Lords that the United Kingdom did not have jurisdiction because the detention was attributable to the United Nations and not the United Kingdom. The applicant underlined that,

until the proceedings before the House of Lords, the Government had never argued in any case that the detention of individuals held in the custody of United Kingdom forces in Iraq was attributable to any entity other than the United Kingdom. The Court should therefore treat with some scepticism the Government's argument that attributing the detention to the United Kingdom would "introduce serious operational difficulties". In any event, the problems adverted to by the Government were far from intractable. In a multi-State operation, responsibility lies where effective command and control is vested and practically exercised. Moreover, multiple and concurrent attribution was possible in respect of conduct deriving from the activity of an international organisation and/or one or more States. The applicant resisted the Government's conclusion that "the Convention was not designed, or intended, to cover this type of multi-national military operation conducted under the overall control of an international organisation such as the UN". On the contrary, the applicant contended that the Court's case-law established that Contracting States could not escape their responsibilities under the Convention by transferring powers to international organisations or creating joint authorities against which Convention rights or an equivalent standard could not be secured.

70. The applicant emphasised that the majority of the House of Lords held that his detention was attributable to the United Kingdom and not the United Nations. He adopted and relied upon their reasoning and conclusions. He submitted that there was no warrant for the Government's suggestion that the United Nations had assumed ultimate, still less effective, authority and control over the United Kingdom forces in Iraq. The position was clearly distinguishable from that considered by the Court in *Behrami and Saramati* (cited above).

71. The invasion of Iraq by the United States-led coalition forces in March 2003 was not a United Nations operation. This was the first, stark contrast with the position in Kosovo, where United Nations Security Council Resolution 1244 was a prior and explicit coercive measure adopted by the United Nations Security Council acting under Chapter VII as the "solution" to the identified threat to international peace and security in Kosovo (see *Behrami and Saramati*, cited above, § 129). The respective roles and responsibilities of the coalition forces and the United Nations in Iraq were defined as early as 8 May 2003, in a letter from the Permanent representatives of the United States and United Kingdom to the President of the Security Council (see paragraph 27 above). The coalition forces would work through the Coalition Provisional Authority, which they had created, to provide for security in Iraq. The role of the United Nations was recognised as being vital in "providing humanitarian relief, in supporting the reconstruction of Iraq, and in helping in the formation of an Iraqi interim authority". Those respective roles and responsibilities were repeated in United Nations Security Council Resolution 1483 (see paragraph 29 above).

The applicant submitted that it was wrong of the Government to underplay the significance of Resolution 1483, which was adopted under Chapter VII and expressly set out the roles of all parties concerned.

72. In the applicant's submission, the language of United Nations Security Council Resolution 1511 did not support the Government's interpretation that, through it, responsibility shifted from the United Kingdom to the United Nations. Paragraph 1 of the Resolution recognised that the Coalition Provisional Authority, and not the United Nations, would continue to exercise authority and control until a representative government could be established. Paragraph 8 resolved that the United Nations would strengthen its vital role, by reference to the tasks outlined in Resolution 1483, namely humanitarian relief, reconstruction, working towards the establishment of a representative government. Had the United Nations intended fundamentally to alter the legal position by assuming ultimate control and authority for the coalition forces in Iraq it was, in the applicant's view, inconceivable that it would not have referred to this when expressly addressing the need to strengthen its role in Iraq. At paragraph 13, where the United Nations Security Council authorised a multinational force under unified command to take all necessary measures to contribute to the maintenance of peace and security, this was a simple authorisation and not a delegation. There was no seizing of effective, or even ultimate, control and authority by the United Nations Security Council. The unified command over the multinational force was, as it had always been, under the control and authority of the United States and the United Kingdom. Similarly, United Nations Security Council Resolution 1546 drew a clear distinction between the respective roles of the United Nations and the Multi-National Force. Moreover, the wording of the letter from the United States Secretary of State to the President of the United Nations Security Council, annexed to Resolution 1546, entirely undermined any suggestion that the Multi-National Force was, or was soon to be, under United Nations authority and control.

(iii) The interveners

73. The interveners (see paragraph 6 above) submitted that, as a matter of law, conduct stemming from the work of an international organisation could be attributable to (a) the international organisation alone; (b) a State or States party to the international organisation and sufficiently involved in the conduct; or (c) both the international organisation and the State or States. Whether the conduct in question fell to be characterised as (a), (b) or (c) would, most often, be essentially a matter of fact and dependent on the specific circumstances of each individual case. In this context, the highly fact-sensitive decision in *Behrami and Saramati* (cited above) needed to be handled with care. Moreover, it would appear that the Court's approach in *Behrami and Saramati* followed from the way in which the case was argued

before it. Since the applicants argued that KFOR was the entity responsible for the relevant acts of detention and demining, the Court did not consider whether the States had effective control over the conduct in their own right as sovereign States.

(b) The Court's assessment

74. Article 1 of the Convention reads as follows:

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention."

As provided by this Article, the engagement undertaken by a Contracting State is confined to "securing" ("*reconnaître*" in the French text) the listed rights and freedoms to persons within its own "jurisdiction" (see *Soering v. the United Kingdom*, 7 July 1989, § 89, Series A no. 161; *Banković,* cited above, § 66). "Jurisdiction" under Article 1 is a threshold criterion. The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention (see *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 311, ECHR 2004-VII).

75. The Court notes that, before the Divisional Court and the Court of Appeal in the first set of domestic proceedings brought by the applicant, the Government accepted that he fell within United Kingdom jurisdiction under Article 1 of the Convention during his detention in a British-run military prison in Basrah, South East Iraq. It was only before the House of Lords that the Government argued, for the first time, that the applicant did not fall within United Kingdom jurisdiction because his detention was attributable to the United Nations rather than to the United Kingdom. The majority of the House of Lords rejected the Government's argument and held that the internment was attributable to British forces (see paragraphs 16-18 above).

76. When examining whether the applicant's detention was attributable to the United Kingdom or, as the Government submit, the United Nations, it is necessary to examine the particular facts of the case. These include the terms of the United Nations Security Council Resolutions which formed the framework for the security regime in Iraq during the period in question. In performing this exercise, the Court is mindful of the fact that it is not its role to seek to define authoritatively the meaning of provisions of the United Nations Charter and other international instruments. It must, nevertheless, examine whether there was a plausible basis in such instruments for the matters impugned before it (see *Behrami and Saramati*, cited above, § 122). The principles underlying the Convention cannot be interpreted and applied in a vacuum and the Court must take into account relevant rules of international law (ibid.). It relies for guidance in this exercise on the statement of the International Court of Justice in § 114 of its advisory

opinion "*Legal consequences for States of the continued presence of South Africa in Namibia*" (see paragraph 49 above), indicating that a Security Council resolution should be interpreted in the light not only of the language used but also the context in which it was adopted.

77. The Court takes as its starting point that, on 20 March 2003, the United Kingdom together with the United States of America and their coalition partners, through their armed forces, entered Iraq with the aim of displacing the Ba'ath regime then in power. At the time of the invasion, there was no United Nations Security Council resolution providing for the allocation of roles in Iraq in the event that the existing regime was displaced. Major combat operations were declared to be complete by 1 May 2003 and the United States and the United Kingdom became Occupying Powers within the meaning of Article 42 of the Hague Regulations (see paragraph 42 above). As explained in the letter dated 8 May 2003 sent jointly by the Permanent Representatives of the United Kingdom and the United States to the President of the United Nations Security Council (see paragraph 27 above), the United States and the United Kingdom, having displaced the previous regime, created the Coalition Provisional Authority "to exercise powers of government temporarily". One of the powers of government specifically referred to in the letter of 8 May 2003 to be exercised by the United States and the United Kingdom through the Coalition Provisional Authority was the provision of security in Iraq. The letter further stated that "The United States, the United Kingdom and Coalition partners, working through the Coalition Provisional Authority, shall *inter alia*, provide for security in and for the provisional administration of Iraq, including by ... assuming immediate control of Iraqi institutions responsible for military and security matters". The letter acknowledged that the United Nations had "a vital role to play in providing humanitarian relief, in supporting the reconstruction of Iraq, and in helping in the formation of an Iraqi interim authority" and stated that the United States, the United Kingdom and Coalition partners were ready to work closely with representatives of the United Nations and its specialized agencies and would also welcome the support and contributions of Member States, international and regional organizations, and other entities, "under appropriate coordination arrangements with the Coalition Provisional Authority". In its first legislative act, CPA Regulation No. 1 of 16 May 2003, the Coalition Provisional Authority declared that it would "exercise powers of government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration, to restore conditions of security and stability..." (see paragraph 28 above).

78. The first Security Council resolution after the invasion was Resolution 1483, adopted on 22 May 2003 (see paragraph 29 above). In the preamble, the Security Council noted the letter of 8 May 2003 from the Permanent Representatives of the United States and the United Kingdom

and recognised that the United States and the United Kingdom were Occupying Powers in Iraq, under unified command (the Coalition Provisional Authority), and that specific authorities, responsibilities, and obligations applied to them under international humanitarian law. The Security Council noted further that other States that were not Occupying Powers were working or might in the future work under the Coalition Provisional Authority, and welcomed the willingness of Member States to contribute to stability and security in Iraq by contributing personnel, equipment, and other resources "under the Authority". Acting under Chapter VII of the United Nations Charter, the Security Council called upon the Occupying Powers, through the Coalition Provisional Authority, "to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability ...". The United Kingdom and United States were encouraged "to inform the Council at regular intervals of their efforts under this resolution". The preamble to Resolution 1483 recognised that the United Nations was to "play a vital role in humanitarian relief, the reconstruction of Iraq and the restoration and establishment of national and local institutions for representative governance". The Secretary-General was requested to appoint a Special Representative for Iraq, whose independent responsibilities were to include, *inter alia*, reporting regularly to the Security Council on his activities under this resolution, coordinating activities of the United Nations in post-conflict processes in Iraq and coordinating among United Nations and international agencies engaged in humanitarian assistance and reconstruction activities in Iraq. Resolution 1483 did not assign any security role to the United Nations. The Government does not contend that, at this stage in the invasion and occupation, the acts of its armed forces were in any way attributable to the United Nations.

79. In Resolution 1511, adopted on 16 October 2003, the United Nations Security Council, again acting under Chapter VII, underscored the temporary nature of the exercise by the Coalition Provisional Authority of the authorities and responsibilities set out in Resolution 1483, which would cease as soon as an internationally recognised, representative Iraqi government could be sworn in. In paragraphs 13 and 14, the Security Council authorised "a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq" and urged Member States "to contribute assistance under this United Nations mandate, including military forces, to the multinational force referred to in paragraph 13" (see paragraph 31 above). The United States, on behalf of the multinational force, was requested periodically to report on the efforts and progress of the force. The Security Council also resolved that the United Nations, acting through the Secretary General, his Special Representative, and the United Nations Assistance Mission in Iraq,

should strengthen its role in Iraq, including by providing humanitarian relief, promoting the economic reconstruction of and conditions for sustainable development in Iraq, and advancing efforts to restore and establish national and local institutions for representative government.

80. The Court does not consider that, as a result of the authorisation contained in Resolution 1511, the acts of soldiers within the Multi-National Force became attributable to the United Nations or – more importantly, for the purposes of this case – ceased to be attributable to the troop-contributing nations. The Multi-National Force had been present in Iraq since the invasion and had been recognised already in Resolution 1483, which welcomed the willingness of Member States to contribute personnel. The unified command structure over the force, established from the start of the invasion by the United States and United Kingdom, was not changed as a result of Resolution 1511. Moreover, the United States and the United Kingdom, through the Coalition Provisional Authority which they had established at the start of the occupation, continued to exercise the powers of government in Iraq. Although the United States was requested to report periodically to the Security Council about the activities of the Multi-National Force, the United Nations did not, thereby, assume any degree of control over either the force or any other of the executive functions of the Coalition Provisional Authority.

81. The final resolution of relevance to the present issue was no. 1546 (see paragraph 35 above). It was adopted on 8 June 2004, twenty days before the transfer of power from the Coalition Provisional Authority to Interim Government and some four months before the applicant was taken into detention. Annexed to the resolution was a letter from the Prime Minister of the Interim Government of Iraq, seeking from the Security Council a new resolution on the Multi-National Force mandate. There was also annexed a letter from the United States Secretary of State to the President of the United Nations Security Council, confirming that "the Multi-National Force [under unified command] is prepared to continue to contribute to the maintenance of security in Iraq" and informing the President of the Security Council of the goals of the Multi-National Force and the steps which its Commander intended to take to achieve those goals. It does not appear from the terms of this letter that the Secretary of State considered that the United Nations controlled the deployment or conduct of the Multi-National Force. In Resolution 1546 the Security Council, acting under Chapter VII, reaffirmed the authorisation for the Multi-National Force established under Resolution 1511. There is no indication in Resolution 1546 that the Security Council intended to assume any greater degree of control or command over the Multi-National Force than it had exercised previously.

82. The Security Council in Resolution 1546 also decided that, in implementing their mandates in Iraq, the Special Representative of the

Secretary General and the United Nations Assistance Mission for Iraq (UNAMI) should play leading roles in assisting in the establishment of democratic institutions, economic development and humanitarian assistance. The Court notes that the Secretary General and UNAMI, both clearly organs of the United Nations, in their quarterly and bi-monthly reports to the Security Council for the period during which the applicant was detained, repeatedly protested about the extent to which security internment was being used by the Multi-National Force (see paragraphs 40 and 41 above). It is difficult to conceive that the applicant's detention was attributable to the United Nations and not to the United Kingdom when United Nations organs, operating under the mandate of Resolution 1546, did not appear to approve of the practice of indefinite internment without trial and, in the case of UNAMI, entered into correspondence with the United States Embassy in an attempt to persuade the Multi-National Force under American command to modify the internment procedure.

83. In the light of the foregoing, the Court agrees with the majority of the House of Lords that the United Nations' role as regards security in Iraq in 2004 was quite different from its role as regards security in Kosovo in 1999. The comparison is relevant, since in the decision in *Behrami and Saramati* (cited above) the Court concluded, *inter alia*, that Mr Saramati's detention was attributable to the United Nations and not to any of the respondent States. It is to be recalled that the international security presence in Kosovo was established by United Nations Security Council Resolution 1244 (10 June 1999) in which, "determined to resolve the grave humanitarian situation in Kosovo", the Security Council "decide[d] on the deployment in Kosovo, under United Nations auspices, of international civil and security presences". The Security Council therefore authorised "Member States and relevant international organizations to establish the international security presence in Kosovo" and directed that there should be "substantial North Atlantic Treaty Organization participation" in the force, which "must be deployed under unified command and control". In addition, United Nations Security Council Resolution 1244 authorised the Secretary General of the United Nations to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo. The United Nations, through a Special Representative appointed by the Secretary General in consultation with the Security Council, was to control the implementation of the international civil presence and coordinate closely with the international security presence (see *Behrami and Saramati*, cited above, §§ 3, 4 and 41). On 12 June 1999, two days after the Resolution was adopted, the first elements of the NATO-led Kosovo Force (KFOR) entered Kosovo.

84. It would appear from the opinion of Lord Bingham in the first set of proceedings brought by the applicant that it was common ground between the parties before the House of Lords that the test to be applied in order to

establish attribution was that set out by the International Law Commission, in Article 5 of its draft Articles on the Responsibility of International Organisations and in its commentary thereon, namely that the conduct of an organ of a State placed at the disposal of an international organisation should be attributable under international law to that organisation if the organisation exercises effective control over that conduct (see paragraphs 18 and 56 above). For the reasons set out above, the Court considers that the United Nations Security Council had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multi-National Force and that the applicant's detention was not, therefore, attributable to the United Nations.

85. The internment took place within a detention facility in Basrah City, controlled exclusively by British forces, and the applicant was therefore within the authority and control of the United Kingdom throughout (see paragraph 10 above; see also *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 136 and *Al-Saadoon and Mufdhi v. the United Kingdom* (dec.), no. 61498/08, § 88, ECHR 2010-...; see also the judgment of the United States Supreme Court in *Munaf v. Geren,* paragraph 54 above). The decision to hold the applicant in internment was made by the British officer in command of the detention facility. Although the decision to continue holding the applicant in internment was, at various points, reviewed by committees including Iraqi officials and non-United Kingdom representatives from the Multi-National Force, the Court does not consider that the existence of these reviews operated to prevent the detention from being attributable to the United Kingdom.

86. In conclusion, the Court agrees with the majority of the House of Lords that the internment of the applicant was attributable to the United Kingdom and that during his internment the applicant fell within the jurisdiction of the United Kingdom for the purposes of Article 1 of the Convention.

2. Alleged breach of Article 5 § 1 of the Convention

(a) The parties' arguments

(i) The Government

87. The Government contended that the United Kingdom was under an obligation to detain the applicant, pursuant to United Nations Security Council Resolution 1546. They emphasised that between 22 May 2003 and 28 June 2004, British forces operated in Iraq under a legal regime derived from the law of belligerent occupation, as modified by the United Nations Security Council in Resolutions 1483 and 1511 (see paragraphs 29 and 31 above). Thus, the preamble to Resolution 1483 in terms recognised the

"specific authorities, responsibilities and obligations" of the Occupying Powers, including those under the Geneva Conventions of 1949. In the Government's submission, customary international law, as reflected in Article 43 of the Hague Regulations (see paragraph 42 above), required the Occupying Power to "take all the measures in his power to restore and ensure, as far as possible, public order and safety" in the occupied territory. The International Court of Justice in *Democratic Republic of Congo v. Uganda* described this as including a duty "to protect the inhabitants of the occupied territory against acts of violence and not to tolerate such violence by any third party" (see paragraph 50 above). In addition, Article 27 of the Fourth Geneva Convention placed a responsibility on the Occupying Power to take steps to protect the civilian population "against all acts of violence or threats thereof" and Article 64 referred to a general obligation to ensure the "orderly government" of the occupied territory (see paragraph 43 above). The Occupying Power could also protect its forces and administration from acts of violence. It had broad powers of compulsion and restraint over the population of occupied territory. Article 78 of the Fourth Geneva Convention recognised the power to detain where "the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons". In the Government's submission, the "specific authorities, responsibilities and obligations" of an Occupying Power, as recognised in United Nations Security Council Resolution 1483, included the power to detain persons in occupied territory on security grounds. This power was derived from the duty of governance imposed upon an occupying power by customary international law. It was also derived from the domestic law of the occupied territory as modified by the Occupying Power (as, for example, in Coalition Provisional Authority Memorandum No. 3 (revised): see paragraph 36 above).

88. The Government further submitted that United Nations Security Council Resolution 1546, like Resolution 1511, recognised in its preamble that international support for the restoration of security and stability was "essential" to the well-being of the people of Iraq. Resolution 1546 reaffirmed the mandate of the Multi-National Force, having regard to the request from the Prime Minister of the Interim Iraqi Government for the Multi-National Force to remain in Iraq after the end of the occupation (see paragraph 35 above). Paragraph 10 of the Resolution specifically provided the Multi-National Force with "authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution ...". It was clear from the text of Resolution 1546 that the annexed letters were integral to it and defined the scope of the powers conferred by the Security Council. The letter from United States Secretary of State Colin Powell expressly referred to internment as one of the tasks which the Multi-National Force was to continue to perform. In the Government's view, therefore, Resolution 1546

could not have been clearer in terms of authorising the Multi-National Force to use preventive detention where "necessary for imperative reasons of security in Iraq". It was also clear from the Resolution and the letters annexed to it that what was authorised by the Security Council was a regime of detention modelled on the "specific authorities, responsibilities and obligations" that had existed during the period of occupation. This was also the view taken by Lord Bingham in the House of Lords when he considered the Resolution (see paragraph 20 above). By participating in the Multi-National Force and thus taking up the authorisation conferred by the Security Council, the United Kingdom agreed to assist in the achievement of the specific objectives to maintain security and stability in Iraq set out in Resolution 1546. As Lord Bingham put it, the United Kingdom was "bound to exercise its power of detention where this was necessary for imperative reasons of security". The facts of the applicant's case, and in particular the findings of the Special Immigration Appeals Commission with regard to the applicant's involvement in attacks against coalition forces (see paragraph 15 above), demonstrated the importance of such an obligation.

89. The Government pointed out that Article 25 of the United Nations Charter created an obligation for United Nations Member States to "accept and carry out decisions of the Security Council". The effect of Article 103 of the Charter was that the obligation under Article 25 had to prevail over obligations under other international treaties (see paragraph 46 above). This was confirmed by the decision of the International Court of Justice in the *Lockerbie* case (see paragraph 48 above). As Lord Bingham pointed out, it was also confirmed by leading commentators such as Judges Simma, Bernhardt and Higgins (see § 35 of the House of Lords judgment: paragraph 20 above). As a matter of principle, the primacy accorded by Article 103 was unsurprising: one of the core objectives of the United Nations was to maintain and restore international peace and security and Article 103 was central to the Security Council's ability to give practical effect to the measures it had decided upon.

90. In the Government's submission, the effect of Article 103 was not confined to decisions of the Security Council obliging States to act in a certain way. It also applied to decisions of the Security Council authorising action. The practice of the Security Council, at least since the early 1990s, had been to seek to achieve its aims, and to discharge its responsibility, in respect of the maintenance of international peace and security by authorising military action by States and organisations such as NATO. As the Court had mentioned in *Behrami and Saramati*, cited above, § 132, no agreements had ever been made under Article 43 of the United Nations Charter by Member States undertaking to make troops available to the United Nations. In the absence of any such agreement, no State could be required to take military action. Unless the Security Council could proceed by authorisation, it would be unable to take military measures at all, thus

frustrating an important part of the Chapter VII machinery. However, if a resolution authorising military action did not engage Article 103 of the Charter, the result would be that any State acting under that authorisation would breach any conflicting treaty obligations, which would fatally undermine the whole system of the Charter for the protection of international peace and security. It was plain that this was not the way that States had regarded the legal position under any of the numerous resolutions issued by the Security Council authorising military action. It had also been the view of the most authoritative commentators; as Lord Bingham observed at § 33 of the House of Lords judgment, there is "a strong and to my mind persuasive body of academic opinion which would treat Article 103 as applicable where conduct is authorised by the Security Council as where it is required."

91. In consequence, it was the Government's case that the application of Article 5 of the Convention was displaced by the legal regime established by United Nations Security Council Resolution 1546 by reason of the operation of Articles 25 and 103 of the United Nations Charter, to the extent that Article 5 was not compatible with that legal regime. The Convention was a part of international law and derived its normative force from international law. It was concluded only five years after the United Nations Charter and if there had been any intention to seek to disapply Article 103 to the provisions of the Convention, this would have been clearly stated. Moreover, the Court had never suggested in its case-law that it considered that Article 103 did not apply to displace obligations under the Convention which were incompatible with an obligation under a Security Council resolution. On the contrary, in *Behrami and Saramati*, cited above, §§ 147 and 149, the Grand Chamber explicitly recognised that the Convention should not be applied in such a way as to undermine or conflict with actions taken under Chapter VII by the Security Council.

92. The Government contended that the applicant's reliance on the judgment of the European Court of Justice in *Kadi* (see paragraph 53 above) was misplaced, since the European Court of Justice did not decide that case on the point of principle currently before this Court. Nor was the Court's judgment in *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, ECHR 2005-VI of assistance to the applicant, since in that case the Court was able to come to the conclusion that there had been no violation of the Convention without having to address any distinct argument based on Article 103 of the United Nations Charter. The Government also rejected the applicant's argument that the Convention recognised a limit to the protection of human rights, applicable in this case, by way of the power of derogation under Article 15 in time of national emergencies. The proposition that it would have been possible for the United Kingdom to derogate under Article 15 in respect of an

international conflict was not supported by *Banković and Others v. Belgium and Others* [GC] (dec.), no. 52207/99, § 62, ECHR 2001-XII.

(ii) The applicant

93. The applicant submitted that United Nations Security Council Resolution 1546 did not require the United Kingdom to hold him in internment in breach of Article 5 of the Convention. In Resolution 1546 the Security Council conferred on the United Kingdom a power, but not an obligation, to intern. As the International Court of Justice stated in the *Namibia* case, "the language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect" (see paragraph 49 above). Where appropriate, the Security Council could require States to take specific action. It did so in the Resolutions under consideration in the *Kadi* and *Bosphorus* cases (cited above), where States were required, "with no autonomous discretion", respectively to freeze the assets of designated persons or to impound aircraft operating from the Federal Republic of Yugoslavia. In contrast, the language of Resolution 1546 and the letters annexed to it made it clear that the Security Council was asked to provide, and did provide, an authorisation to the Multi-National Force to take the measures that it considered necessary to contribute to the maintenance of security and stability in Iraq. It did not require a State to take action incompatible with its human rights obligations, but instead left a discretion to the State as to whether, when and how to contribute to the maintenance of security. Respect for human rights was one of the paramount principles of the United Nations Charter and if the Security Council had intended to impose an obligation on British forces to act in breach of the United Kingdom's international human rights obligations, it would have used clear and unequivocal language. It followed that the rule of priority under Article 103 of the United Nations Charter did not come into effect.

94. The applicant argued that the rationale of the European Court of Justice and the Advocate General in *Kadi* (see paragraph 53 above) applied equally to the Convention. In *Kadi* the European Court of Justice held that European Community measures adopted to give effect to United Nations Security Council Resolutions were subject to review on grounds of compatibility with human rights as protected by Community law. This review concerned the internal lawfulness of such measures under Community law and not the lawfulness of the Security Council resolutions to which they were intended to give effect. The same principles applied in the present case since, in the applicant's submission, Member States acting under United Nations Security Council Resolution 1546 had a "free choice" as to the "procedure applicable", which meant that the procedure had to be lawful. The essence of the judgment in *Kadi* was that obligations arising from United Nations Security Council resolutions do not displace the

requirements of human rights as guaranteed in Community law. It was true that the European Court of Justice examined the validity of a Community regulation and did not examine directly any Member State action implementing Security Council resolutions. But this was a technical point, resulting from the fact that the challenge was brought against a Community measure and not a national one; it did not affect the substance or scope of the European Court of Justice's ruling.

95. In the applicant's view, the Government's argument would result in a principle under which United Nations Security Council resolutions, whatever their content, could entirely displace any and all Convention rights and obligations. It would introduce a general, blanket derogation from all Convention rights. Article 15 permitted a State to derogate from certain Convention rights, including Article 5, but only in times of war or public emergency and under strict conditions, subject to the Court's review. Moreover, it would be clearly incompatible with the principle of effectiveness to exclude *a priori* the application of the Convention in relation to all action undertaken by a Contracting Party pursuant to a United Nations Security Council resolution. If it were accepted that international law obligations displaced substantive provisions of the Convention, the scope of the application of the Convention would be reduced substantially and protection would be denied in some cases where it was most needed. Such a position would be contrary to the principle expressed by the Court in the judgment in *Bosphorus*, cited above.

(iii) The interveners

96. The interveners pointed out that the Court's case-law, particularly the judgment in *Bosphorus*, cited above, supported the view that international law obligations were not, *prima facie*, able to displace substantive obligations under the Convention, although they might be relevant when considering specific components of Convention rights. One way in which the Court had considered them relevant was encapsulated in the presumption of equivalent protection provided by a framework for protection of fundamental rights within an international organisation of which the Contracting State is a member.

(b) The Court's assessment

97. Article 5 § 1 of the Convention provides:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non- compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

98. The applicant was detained in a British military facility for over three years, between 10 October 2004 and 30 December 2007. His continuing internment was authorised and reviewed, initially by British senior military personnel and subsequently also by representatives of the Iraqi and United Kingdom Governments and by non-British military personnel, on the basis of intelligence material which was never disclosed to him. He was able to make written submissions to the reviewing authorities but there was no provision for an oral hearing. The internment was authorised "for imperative reasons of security". At no point during the internment was it intended to bring criminal charges against the applicant (see paragraphs 11-13 above).

99. The Court emphasises at the outset that Article 5 enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty. The text of Article 5 makes it clear that the guarantees it contains apply to "everyone". Sub-paragraphs (a) to (f) of Article 5 § 1 contain an exhaustive list of permissible grounds on which persons may be deprived of their liberty. No deprivation of liberty will be compatible with Article 5 § 1 unless it falls within one of those grounds or unless it is provided for by a lawful derogation under Article 15 of the Convention, which allows for a State "in time of war or other public emergency threatening the life of the nation" to take measures derogating from its obligations under Article 5 "to the extent strictly required by the exigencies of the situation" (see, *inter alia*, *Ireland v. the United Kingdom*, 18 January 1978, § 194, Series A no. 25 and *A. and Others v. the United Kingdom* [GC], no. 3455/05, §§ 162 and 163, ECHR 2009-...).

100. It has long been established that the list of grounds of permissible detention in Article 5 § 1 does not include internment or preventive

detention where there is no intention to bring criminal charges within a reasonable time (see *Lawless v. Ireland* (*no. 3*), 1 July 1961, §§ 13 and 14, Series A no. 3; *Ireland v. the United Kingdom*, cited above, § 196; *Guzzardi v. Italy*, 6 November 1980, § 102, Series A no. 39; *Jėčius v. Lithuania*, no. 34578/97, §§ 47-52, ECHR 2000-IX). The Government do not contend that the detention was justified under any of the exceptions set out in subparagraphs (a) to (f) of Article 5 § 1, nor did they purport to derogate under Article 15. Instead, they argue that there was no violation of Article 5 § 1 because the United Kingdom's duties under that provision were displaced by the obligations created by United Nations Security Council Resolution 1546. They contend that, as a result of the operation of Article 103 of the United Nations Charter (see paragraph 46 above), the obligations under the Security Council Resolution prevailed over those under the Convention.

101. Article 103 of the United Nations Charter provides that the obligations of the Members of the United Nations under the Charter shall prevail in the event of a conflict with obligations under any other international agreement. Before it can consider whether Article 103 had any application in the present case, the Court must determine whether there was a conflict between the United Kingdom's obligations under United Nations Security Council Resolution 1546 and its obligations under Article 5 § 1 of the Convention. In other words, the key question is whether Resolution 1546 placed the United Kingdom under an obligation to hold the applicant in internment.

102. In its approach to the interpretation of Resolution 1546, the Court has reference to the considerations set out in paragraph 76 above. In addition, the Court must have regard to the purposes for which the United Nations was created. As well as the purpose of maintaining international peace and security, set out in the first subparagraph of Article 1 of the United Nations Charter, the third subparagraph provides that the United Nations was established to "achieve international cooperation in ... promoting and encouraging respect for human rights and fundamental freedoms". Article 24(2) of the Charter requires the Security Council, in discharging its duties with respect to its primary responsibility for the maintenance of international peace and security, to "act in accordance with the Purposes and Principles of the United Nations". Against this background, the Court considers that, in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the United Nations' important role in promoting and encouraging respect for human rights, it is

to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law.

103. In this respect, the Court notes that Resolution 1546 was preceded by letters to the President of the Security Council from the Prime Minister of the Interim Government of Iraq and the United States Secretary of State (see paragraph 34 above). In his letter, the Iraqi Prime Minister looked forward to the passing back of full sovereignty to the Iraqi authorities. He requested the Security Council, however, to make a new resolution authorising the Multi-National Force to remain on Iraqi territory and to contribute to maintaining security there, "including through the tasks and arrangements" set out in the accompanying letter from the United States Secretary of State. In his letter, the United States Secretary of State recognised the request of the Government of Iraq for the continued presence of the Multi-National Force in Iraq and confirmed that the Multi-National Force under unified command was prepared to continue to contribute to the maintenance of security in Iraq, including by preventing and deterring terrorism. He added that, under the agreed arrangement, the Multi-National Force stood:

> "ready to continue to undertake a broad range of tasks to contribute to the maintenance of security and to ensure force protection. These include activities necessary to counter ongoing security threats posed by forces seeking to influence Iraq's political future through violence. This will include combat operations against members of these groups, internment where this is necessary for imperative reasons of security, and the continued search for and securing of weapons that threaten Iraq's security ...".

104. These letters were annexed to United Nations Security Council Resolution 1546 (see paragraph 35 above). The Preamble to the Resolution looked forward to the end of the occupation and the assumption of full responsibility and authority by a fully sovereign Iraqi Government; recognised the request of the Iraqi Prime Minister in the annexed letter to retain the presence of the Multi-National Force; welcomed the willingness of the Multi-National Force to continue efforts to contribute to the maintenance of security and stability in Iraq and also noted "the commitment of all forces ... to act in accordance with international law, including obligations under international humanitarian law...". In paragraph 9 of the Resolution the Security Council noted that the Multi-National Force remained in Iraq at the request of the incoming Government and reaffirmed the authorisation for the Multi-National Force first established under Resolution 1511, "having regard to letters annexed to this resolution". In paragraph 10 it decided that the Multi-National Force:

> "shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution expressing, *inter alia*, the Iraqi request for the continued presence of the multinational force and setting out its tasks, including by preventing and deterring terrorism ..."

105. The Court does not consider that the language used in this Resolution indicates unambiguously that the Security Council intended to place Member States within the Multi-National Force under an obligation to use measures of indefinite internment without charge and without judicial guarantees, in breach of their undertakings under international human rights instruments including the Convention. Internment is not explicitly referred to in the Resolution. In paragraph 10 the Security Council decides that the Multi-National Force shall have authority "to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed", which *inter alia* set out the Multi-National Force's tasks. Internment is listed in Secretary of State Powell's letter, as an example of the "broad range of tasks" which the Multi-National Force stood ready to undertake. In the Court's view, the terminology of the Resolution appears to leave the choice of the means to achieve this end to the Member States within the Multi-National Force. Moreover, in the Preamble, the commitment of all forces to act in accordance with international law is noted. It is clear that the Convention forms part of international law, as the Court has frequently observed (see, for example, *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI). In the absence of clear provision to the contrary, the presumption must be that the Security Council intended States within the Multi-National Force to contribute towards the maintenance of security in Iraq while complying with their obligations under international human rights law.

106. Furthermore, it is difficult to reconcile the argument that Resolution 1546 placed an obligation on Member States to use internment with the objections repeatedly made by the United Nations Secretary General and the United Nations Assistance Mission for Iraq to the use of internment by the Multi-National Force. Under paragraph 7 of Resolution 1546 both the Secretary General, through his Special Representative, and the United Nations Assistance Mission for Iraq were specifically mandated by the Security Council to "promote the protection of human rights ... in Iraq". In his quarterly reports throughout the period of the applicant's internment the Secretary General repeatedly described the extent to which security internment was being used by the Multi-National Force as a pressing human rights concern. The United Nations Assistance Mission for Iraq reported on the human rights situation every few months during the same period. It also repeatedly expressed concern at the large numbers being held in indefinite internment without judicial oversight (see paragraphs 40-41 above).

107. The Court has considered whether, in the absence of express provision in Resolution 1546, there was any other legal basis for the applicant's detention which could operate to disapply the requirements of

Article 5 § 1. The Government have argued that the effect of the authorisations in paragraphs 9 and 10 of Resolution 1546 was that the Multi-National Force continued to exercise the "specific authorities, responsibilities and obligations" that had vested in the United States and the United Kingdom as Occupying Powers under international humanitarian law and that these "obligations" included the obligation to use internment where necessary to protect the inhabitants of the occupied territory against acts of violence. Some support for this submission can be derived from the findings of the domestic courts (see, for example, Lord Bingham at § 32 of the House of Lords judgment: paragraph 20 above). The Court notes in this respect that paragraph 2 of the Resolution clearly stated that the occupation was to end by 30 June 2004. However, even assuming that the effect of Resolution 1546 was to maintain, after the transfer of authority from the Coalition Provisional Authority to the Interim Government of Iraq, the position under international humanitarian law which had previously applied, the Court does not find it established that international humanitarian law places an obligation on an Occupying Power to use indefinite internment without trial. Article 43 of the Hague Regulations requires an Occupying Power to take "all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country" (see paragraph 42 above). While the International Court of Justice in its judgment *Armed Activities on the Territory of the Congo* interpreted this obligation to include the duty to protect the inhabitants of the occupied territory from violence, including violence by third parties, it did not rule that this placed an obligation on the Occupying Power to use internment; indeed, it also found that Uganda, as an Occupying Power, was under a duty to secure respect for the applicable rules of international human rights law, including the provisions of the International Covenant for the Protection of Civil and Political Rights, to which it was a signatory (see paragraph 50 above). In the Court's view it would appear from the provisions of the Fourth Geneva Convention that under international humanitarian law internment is to be viewed not as an obligation on the Occupying Power but as a measure of last resort (see paragraph 43 above).

108. A further legal basis might be provided by the agreement, set out in the letters annexed to Resolution 1546, between the Iraqi Government and the United States Government, on behalf of the other States contributing troops to the Multi-National Force including the United Kingdom, that the Multi-National Force would continue to carry out internment in Iraq where the Multi-National Force considered this necessary for imperative reasons of security (see paragraph 34 above). However, such an agreement could not override the binding obligations under the Convention. In this respect, the Court recalls its case-law to the effect that a Contracting State is considered to retain Convention liability in respect of treaty commitments

and other agreements between States subsequent to the entry into force of the Convention (see, for example, *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, §§ 126-128, ECHR 2010-...).

109. In conclusion, therefore, the Court considers that United Nations Security Council Resolution 1546, in paragraph 10, authorised the United Kingdom to take measures to contribute to the maintenance of security and stability in Iraq. However, neither Resolution 1546 nor any other United Nations Security Council Resolution explicitly or implicitly required the United Kingdom to place an individual whom its authorities considered to constitute a risk to the security of Iraq into indefinite detention without charge. In these circumstances, in the absence of a binding obligation to use internment, there was no conflict between the United Kingdom's obligations under the Charter of the United Nations and its obligations under Article 5 § 1 of the Convention.

110. In these circumstances, where the provisions of Article 5 § 1 were not displaced and none of the grounds for detention set out in sub-paragraphs (a) to (f) applied, the Court finds that the applicant's detention constituted a violation of Article 5 § 1.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

111. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

112. The applicant submitted that his unlawful detention, for a period of three years, two months and 20 days, merited non-pecuniary damages in the region of 115,000 euros (EUR). He relied on awards made by the Court in cases such as *Ječius v. Lithuania*, no. 34578/97, ECHR 2000-IX; *Tsirlis and Kouloumpas v. Greece*, 29 May 1997, *Reports of Judgments and Decisions* 1997-III; and *Assanidze v. Georgia* [GC], no. 71503/01, ECHR 2004-II and also domestic case-law concerning the level of damages for unlawful detention.

113. The Government emphasised that the applicant was detained by British troops, operating as part of the Multi-National Force in Iraq, because he was reasonably believed to pose a grave threat to the security of Iraq. The detention was authorised throughout under the mandate conferred by United Nations Security Council Resolution 1546 and was also in compliance with Iraqi law. Allegations that the applicant was engaged in

terrorist activities in Iraq were subsequently upheld by the Special Immigration Appeals Commission (see paragraph 15 above). In these circumstances, the Government submitted that a finding of violation would be sufficient just satisfaction. In the alternative, a sum of not more than EUR 3,900 should be awarded. This would be commensurate with the awards made to the applicants in *A. and Others v. the United Kingdom* [GC], no. 3455/05, ECHR 2009-..., which also concerned the preventive detention of individuals suspected of terrorism.

114. The Court recalls that it is not its role under Article 41 to function akin to a domestic tort mechanism court in apportioning fault and compensatory damages between civil parties. Its guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred. Its non-pecuniary awards serve to give recognition to the fact that moral damage occurred as a result of a breach of a fundamental human right and reflect in the broadest of terms the severity of the damage (see *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 224, ECHR 2009-... and the cases cited therein). In the present case, the Court has regard to the factors raised by the Government. Nonetheless, it considers that, in view of the very long period of time during which the applicant was detained, monetary compensation should be awarded, in the sum of EUR 25,000.

B. Costs and expenses

115. The applicant, emphasising the complexity and importance of the case, claimed for over 450 hours' legal work by their solicitors and four counsel in respect of the proceedings before the Court, at a total cost of 85,946.32 pounds sterling (GBP).

116. The Government acknowledged that the issues were complex, but nonetheless submitted that the claim was excessive, given that the applicant's legal advisers were familiar with all aspects of the claim since they had acted for the applicant in the domestic legal proceedings, which had been publicly funded. Furthermore, the hourly rates claimed by the applicant's counsel, ranging between GBP 500 and GBP 235, and the hourly rates claimed by the applicant's solicitors (GBP 180 and GBP 130) were unreasonably high. Nor had it been necessary to engage two Queen's Counsel and two junior counsel to assist.

117. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 40,000 for the proceedings before the Court.

C. Default interest

118. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Joins* to the merits the questions whether the applicant's detention was attributable to the respondent State and whether he fell within the respondent State's jurisdiction unanimously;

2. *Declares* the application admissible unanimously;

3. *Holds* unanimously that the detention was attributable to the respondent State and that the applicant fell within the respondent State's jurisdiction;

4. *Holds* by sixteen votes to one that there has been a violation of Article 5 § 1 of the Convention;

5. *Holds* by sixteen votes to one
   (a) that the respondent State is to pay the applicant, within three months, EUR 25,000 (twenty-five thousand euros), plus any tax that may be chargeable on this sum, in respect of non-pecuniary damage;
   (b) that the respondent State is to pay the applicant, within three months, EUR 40,000 (forty thousand euros), plus any tax that may be chargeable to the applicant on this sum, in respect of costs and expenses, to be converted into pounds sterling at the rate applicable at the date of settlement;
   (c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English and French, and delivered at a public hearing on 7 July 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'Boyle	Jean-Paul Costa
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following partially dissenting opinion of Judge Poalelungi is annexed to this judgment.

J.-P.C.
M.O.B.

PARTIALLY DISSENTING OPINION OF JUDGE POALELUNGI

I agree with the majority that the detention was attributable to the United Kingdom and that the applicant fell within the United Kingdom's jurisdiction. However, I do not agree that there has been a violation of Article 5 § 1 in the present case.

Article 103 of the United Nations Charter provides that the Member States' obligations under the Charter must prevail over any other obligations they may have under international law. This provision reflects, and is essential for, the United Nations' primary role within the world order of maintaining international peace and security.

On 8 June 2004, in paragraph 10 of Resolution 1546, the Security Council decided that the multinational force should "have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution ...". One of the letters annexed was from United States Secretary of State Colin Powell, confirming that the Multi-National Force stood ready to continue to undertake a broad range of tasks, including internment where necessary for imperative reasons of security.

It is true that paragraph 10 of Resolution 1546 uses the language of authorisation rather than obligation. However, as is explained in the extract from Lord Bingham's opinion set out in paragraph 20 of the present judgment, the Security Council cannot use the language of obligation in respect of international military or security operations, since the United Nations has no standing forces at its disposal and has concluded no agreements under Article 43 of the Charter which would entitle it to call on Member States to provide them. The Security Council can, therefore, only authorise States to use military force. As Lord Bingham also concluded, the primacy clause in Article 103 of the Charter must also apply where a Member State chooses to take up such an authorisation and contribute to an international peace-keeping operation under a Security Council mandate. To conclude otherwise would seriously undermine the effectiveness of the United Nations' role in securing world peace and would also run contrary to State practice. Indeed, I do not understand the majority of the Grand Chamber in the present case to disagree with this analysis.

The point at which the majority part ways with the domestic courts is in finding that the language used in Resolution 1546 did not indicate sufficiently clearly that the Security Council authorised Member States to use internment. I regret that I find the judgment of the House of Lords more persuasive on this issue. I consider that it is unrealistic to expect the Security Council to spell out in advance, in detail, every measure which a military force might be required to use to contribute to peace and security under its mandate. Internment is a frequently used measure in conflict

situations, well established under international humanitarian law, and was, moreover, expressly referred to in the letter of Colin Powell annexed to Resolution 1546. I consider that it is clear from the text of the Resolution, and from the context where the Multi-National Force was already present and using internment in Iraq, that Member States were authorised to continue interning individuals where necessary.

It follows that I also agree with the House of Lords that the United Kingdom's obligation to intern the applicant, pursuant to the Security Council authorisation, took precedence over its obligations under Article 5 § 1 of the Convention.