

RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

[Agenda item 2]

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Second report on responsibility of international organizations, by Mr. Giorgio Gaja, Special Rapporteur

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	<i>Source</i>
Agreement between the World Health Organization and the Pan American Sanitary Organization (Washington, D.C., 24 May 1949)	United Nations, <i>Treaty Series</i> , vol. 32, No. 178, p. 387.
Treaty establishing the European Atomic Energy Community (EURATOM) (Rome, 25 March 1957)	<i>Ibid.</i> , vol. 298, No. 4301, p. 167.
Exchange of letters between the United Nations and Belgium constituting an agreement relating to the settlement of claims filed against the United Nations in the Congo by Belgian nationals (New York, 20 February 1965)	<i>Ibid.</i> , vol. 535, No. 7780, p. 197.
Exchange of letters between the United Nations and Switzerland constituting an agreement relating to the settlement of claims filed against the United Nations in the Congo by Swiss nationals (New York, 3 June 1966)	<i>Ibid.</i> , vol. 564, No. 621, p. 193.
Exchange of letters between the United Nations and Greece constituting an agreement relating to the settlement of claims filed against the United Nations in the Congo by Greek nationals (New York, 20 June 1966)	<i>Ibid.</i> , vol. 565, No. 8230, p. 3.
Exchange of letters between the United Nations and Luxembourg constituting an agreement relating to the settlement of claims filed against the United Nations in the Congo by Luxembourg nationals (New York, 20 December 1966)	<i>Ibid.</i> , vol. 585, No. 8487, p. 147.

Exchange of letters between the United Nations and Italy constituting an agreement relating to the settlement of claims filed against the United Nations in the Congo by Italian nationals (New York, 18 January 1967)	<i>Ibid.</i> , vol. 588, No. 8525, p. 197.
Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington, D.C., 3 March 1973)	<i>Ibid.</i> , vol. 993, No. 14537, p. 243.
Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975)	A/CONF.67/16.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	United Nations, <i>Treaty Series</i> , vol. 1833, No. 31363, p. 3.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15.
Fourth ACP-EEC Convention (Lomé, 15 December 1989)	United Nations, <i>Treaty Series</i> , vol. 1924, No. 32847, p. 3.

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Introduction*

1. The International Law Commission adopted in 2003 the first three draft articles on the topic “Responsibility of international organizations”.¹ Several comments were

made on those articles in the Sixth Committee of the General Assembly during the examination of the Commission’s report.² The wording of the definition of international organizations in draft article 2 was the main object

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¹ *Yearbook ... 2003*, vol. II (Part Two), p. 18, para. 53.

² Especially in the meetings held between 27 October and 4 November 2003 (*Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 14th–21st meetings). Only comments that relate to questions of attribution of conduct will be analysed in the present report.

of that exchange of views. In my opinion, all those comments should be considered by the Commission before the end of the first reading. The Commission may then decide whether to revise the draft articles as they were provisionally adopted or to postpone their revision to the second reading.

2. On the basis of a recommendation made by the Commission during its 2002 session,³ the Legal Counsel of the United Nations requested a number of international organizations to provide comments and “materials, especially on questions of attribution [of conduct to international organizations] and of responsibility of member States for conduct that is attributed to an international organization”. With a few noteworthy exceptions, the replies hereto given by international organizations have added little to already published materials. It is the Special Rapporteur’s hope that the continuing discussion in the Commission will prompt international organizations to send further contributions, so that the Commission’s

³ *Yearbook ... 2002*, vol. II (Part Two), p. 93, paras. 464 and 488. The following quotation comes from the latter paragraph.

study may more adequately relate to practice and thus become more useful.

3. In that context it is to be noted that the General Assembly, in paragraph 5 of its resolution 58/77 of 9 December 2003, requested:

the Secretary-General to invite States and international organizations to submit information concerning their practice relevant to the topic “Responsibility of international organizations”, including cases in which States members of an international organization may be regarded as responsible for acts of the organization.

4. Under the heading “General principles” draft article 3 on responsibility of international organizations stated:

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.⁴

The present report will discuss issues relating to attribution of conduct to international organizations.

⁴ *Yearbook ... 2003* (see footnote 1 above).

CHAPTER I

Relations between attribution of conduct to an international organization and attribution of conduct to a State

5. The articles adopted by the Commission on responsibility of States for internationally wrongful acts contain a number of provisions on attribution of conduct to a State (arts. 4–11).⁵ While these articles are not immediately relevant to international organizations, they have to be fully taken into account when discussing issues relating to attribution to international organizations that are parallel to those concerning States. The need for coherency in the Commission’s work requires that a change, in respect of international organizations, in the approach and even the wording of what has been said with regard to States needs, be justified by differences in the relevant practice or in objective distinctions in nature.

6. Should one assume that conduct cannot be simultaneously attributed to a State and an international organization, the positive criteria for attributing conduct to a State would imply corresponding negative criteria with regard to attribution of the same conduct to an international organization. In many cases the question will in practice be whether a certain conduct should be attributed to one or, alternatively, to another subject of international law. However, conduct does not necessarily have to be attributed exclusively to one subject only. Thus, for instance, two States may establish a joint organ, whose conduct will generally have to be attributed to both States. Similarly, cases can be envisaged in which conduct should be simultaneously attributed to an international organization and one or more of its members.

⁵ *Yearbook ... 2001*, vol. II (Part Two), p. 26, para. 76.

7. A paradigmatic example is offered by the bombing in 1999 of the territory of the Federal Republic of Yugoslavia. That military action gave rise to much discussion on the point whether conduct had to be attributed to an international organization or to some or all of its members. In relation to the bombing, several members of NATO were sued before ICJ in the cases on *Legality of Use of Force*⁶ and before the European Court of Human Rights in the *Banković* case.⁷ In both venues some of the respondent States argued that conduct was to be attributed to NATO and not to themselves, as the claimants contended.⁸ While

⁶ While by two orders of 2 June 1999 ICJ removed two cases (*Legality of Use of Force (Yugoslavia v. Spain)*, *Provisional Measures, Order of 2 June 1999*, I.C.J. Reports 1999, p. 761, and *ibid. (Yugoslavia v. United States of America)*, p. 916) from the Court’s list, the other eight cases are still pending (*ibid. (Yugoslavia v. Belgium)*, p. 124; *ibid. (Yugoslavia v. Canada)*, p. 259; *ibid. (Yugoslavia v. France)*, p. 363; *ibid. (Yugoslavia v. Germany)*, p. 422; *ibid. (Yugoslavia v. Italy)*, p. 481; *ibid. (Yugoslavia v. Netherlands)*, p. 542; *ibid. (Yugoslavia v. Portugal)*, p. 656; *ibid. (Yugoslavia v. United Kingdom)*, p. 826. The Court is due to examine shortly the objections to its jurisdiction raised by the defendant States.

⁷ *Banković and Others v. Belgium and Others*, European Court of Human Rights, Grand Chamber, 2001, Application No. 52207/99. This application was declared inadmissible by the Grand Chamber by a decision of 12 December 2001. The text of the decision is reproduced in *Rivista di diritto internazionale*, vol. 85 (2002), p. 193.

⁸ Reference may be made, for instance, to the oral pleading of the agent for the Government of Canada, Mr. Kirsch, on 12 May 1999 (*Legality of Use of Force (Yugoslavia v. Canada)* (see footnote 6 above); the relevant passage was reproduced by Higgins, “The responsibility of States members for the defaults of international organizations: continuing the dialogue”, p. 447), and to the memorial of the French Government in the *Banković* case (see the passage quoted by Weckel, “Chronique de jurisprudence internationale”, p. 446, with a critical comment). The view that conduct of NATO forces could be attributed only to NATO was held by Pellet, “L’imputabilité d’éventuels

a discussion of this question would not be appropriate here, one may argue that attribution of conduct to an international organization does not necessarily exclude attribution of the same conduct to a State, nor does, vice versa, attribution to a State rule out attribution to an international organization.⁹ Thus, one envisageable solution would be for the relevant conduct to be attributed both to NATO and to one or more of its member States, for instance because those States contributed to planning the military action or to carrying it out.¹⁰

8. Dual attribution of conduct normally leads to joint, or joint and several, responsibility. However, joint, or joint and several, responsibility does not necessarily depend on dual attribution. One can take as an example the so-called mixed agreements, to which both the European Community (EC) and its member States are parties. In case of an infringement of a mixed agreement that does not distinguish between the respective obligations of the EC and its member States—either directly, or by referring to their respective competencies—responsibility would be joint towards the non-member State party to the agreement. As the European Court of Justice said in case C-316/91, *European Parliament v. Council of the European Union*, with regard to the Fourth ACP-EEC Convention:

[I]n the absence of derogations expressly laid down in the Convention, the Community and its Member States as partners of the ACP States [States of Africa, the Caribbean and the Pacific] are jointly liable to those latter States for the fulfilment of every obligation arising from the commitments undertaken.¹¹

actes illicites: responsabilité de l'OTAN ou des États membres", p. 199. Stein, "Kosovo and the international community—the attribution of possible internationally wrongful acts: responsibility of NATO or of its member States?", pp. 189–190, accepted attribution of conduct of NATO forces to NATO, but excluded NATO responsibility because it was "as such ... not recognized by the possible claimant (Yugoslavia)" (*ibid.*, p. 192). Verhoeven, *Droit international public*, p. 613, denied the legal personality of NATO. Cohen-Jonathan, "Cour européenne des droits de l'homme et droit international général (2000)", p. 632, stressed the autonomy of NATO member States when they act within the NATO system.

⁹ This point had already been made, albeit with reference to damage (*dommage*), by Ritter, "La protection diplomatique à l'égard d'une organisation internationale", pp. 444–445. The Committee on Accountability of International Organisations of the International Law Association suggested stating that "[t]he responsibility of an IO [international organization] does not preclude any separate or concurrent responsibility of a State or of another IO which participated in the performance of the wrongful act" (International Law Association, *Report of the Seventieth Conference held in New Delhi, 2–6 April 2002*, p. 797).

¹⁰ As was said by the Minister for Foreign Affairs of the Netherlands with regard to the military operations in question:

"[T]he Netherlands was fully involved in the decision-making process regarding all aspects of the aerial operation: the formulation of the political objectives of the aerial campaign, the establishment of the operational plan on which the campaign was based, the decision concerning the beginning and the end of the operation and the decision concerning the beginning of the various stages."

(Declaration made on 18 May 2000 in a debate in the Lower House, reproduced in Tange, "Netherlands State practice for the parliamentary year 1999–2000", p. 196)

Most member States were also involved in the implementation of decisions. It is noteworthy in this context that the claim of the Government of China in relation to the bombing of China's embassy in Belgrade on 7 May 1999 was settled through a bilateral agreement between China and the United States of America (United States Department of State, *Digest of United States Practice in International Law 2000* (Washington, D.C., International Law Institute) (<http://www.state.gov>).

¹¹ Judgement of 2 March 1994, *Reports of Cases before the Court of Justice and the Court of First Instance* (1994–3), pp. I-661–662 (recital 29).

In this case attribution of conduct to the EC or a member State does not appear to be relevant when deciding who is responsible. Even if it was ascertained that conduct was attributable only to one of the actors, they would all be jointly responsible.

9. The type of situation examined in the preceding paragraph is not the only one in which responsibility could arise for an international organization for conduct taken by another subject of international law, for instance a State. This may occur under circumstances similar to those considered in part one, chapter IV, of the articles on responsibility of States for internationally wrongful acts.¹² In that chapter, articles 16–18 refer to cases in which a State is responsible because it "aids or assists" or "directs and controls another State in the commission of an internationally wrongful act", or else "coerces another State to commit an act [that] would, but for the coercion, be an internationally wrongful act of the coerced State".¹³ It seems reasonable to envisage that, if an international organization aids or assists, or directs or controls, a State in the commission of a wrongful act, or coerces a State to commit it, the organization should be held responsible under conditions similar to those applying with regard to States. These cases will have to be examined in a chapter corresponding to part one, chapter IV, of the articles on responsibility of States for internationally wrongful acts.

10. What is more relevant in the discussion of questions of attribution is a different case, which was not mentioned in the articles on responsibility of States for internationally wrongful acts and in the respective commentary, possibly because it was held to be marginal. This case deserves consideration with regard to international organizations because of its greater practical importance in that context. Let us assume that certain powers have been transferred to an international organization, which may then conclude an agreement with a non-member State with regard to the use of those powers. As an example, one could take the case of an agreement concluded by the EC in an area in which the EC is exclusively competent, such as common commercial policy. If the implementation of a trade agreement that was concluded by the EC is left, at least in part, to State organs (for instance, customs officials, who are not placed under the organization's control), the organization would have to be responsible in case of an infringement of its obligations under the agreement, but would it be so for its own conduct?

11. Considering this question, the Director-General of the Legal Service of the European Commission explained in the following way the attitude taken by the EC with regard to trade disputes that were brought by the United States of America before a WTO panel against two EC member States:

[Given] the "vertical" structure of the EC system as far as it concerns the authorities of the Member States (customs administration) acting as implementing authorities of EC law in a field of exclusive community competence ... [t]he EC took the view that the actions of these authorities should be attributed to the EC itself and emphasised its readiness to assume responsibility for all measures within the particular field of

¹² *Yearbook ... 2001* (see footnote 5 above), p. 27.

¹³ *Ibid.*

tariff concessions, be they taken at EC level or at that of the Member States.¹⁴

This approach implies that conduct that would have to be attributed to a State according to the articles on responsibility of States for internationally wrongful acts would be instead attributed to the international organization because of its exclusive competence. It cannot be ruled out that special developments may occur with regard to organizations providing for integration. However, there is no need to devise special rules on attribution in order to assert the organization's responsibility in this type of case. Responsibility of an organization does not necessarily have to rest on attribution of conduct to that organization.¹⁵ It may well be that an organization undertakes an obligation in circumstances in which compliance depends on the conduct of its member States. Should member States fail to conduct themselves in the expected manner, the obligation would be infringed and the organization would be responsible. However, attribution of conduct need not be implied. Although generally the organization's responsibility depends on attribution of conduct, a point which is reflected in draft article 3 (see paragraph 4 above), this does not necessarily occur in all circumstances.

12. Annex IX to the United Nations Convention on the Law of the Sea provides an example of an approach which is focused on attribution of responsibility rather than on attribution of conduct. According to article 5, international organizations and their member States are required to declare their respective competence with regard to matters covered by the Convention. Article 6, paragraph 1, states:

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.¹⁶

No reference is here made to attribution of conduct. This is confirmed by practice. For instance, one cannot find a reference to attribution of conduct in the special agreement between Chile and the European Community which established a special chamber of the International Tribunal for the Law of the Sea (ITLOS) in order to ascertain *inter alia*:

whether the European Community has complied with its obligations under the Convention, especially articles 116 to 119 thereof, to ensure conservation of swordfish, in the fishing activities undertaken by ves-

¹⁴ Information note of 7 March 2003, attached to a letter from the Director-General of the Legal Service of the European Commission, Mr. Michel Petite, addressed to the United Nations Legal Counsel, Mr. Hans Corell, p. 2. This view reflects the opinion expressed by Groux and Manin, *The European Communities in the International Order*, p. 144.

¹⁵ In the oral pleadings to the WTO panel in the *European Communities—Customs Classification of Certain Computer Equipment* case, the EC no doubt asserted that responsibility for infringements, if any, was entirely its own and not of the two member States involved. However, this view was not based, at least explicitly, on the argument that conduct of State customs authorities had to be attributed to the EC.

¹⁶ Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States*, p. 165, wrote: "Articles 5 and 6 of Annex IX essentially create a procedural framework within which doubts as to the question of attribution can be addressed". This should be understood as referring to attribution of responsibility, not of conduct.

sels flying the flag of any of its member States in the high seas adjacent to Chile's exclusive economic zone.¹⁷

The alleged omissions include measures that would have had to be taken by the national States of the ships concerned.

13. The fact that a member State may be bound towards an international organization to conduct itself in a certain manner does not imply that under international law conduct should be attributed to the organization and not to the State. This point was clearly made by the European Commission of Human Rights in *M. & Co. v. the Federal Republic of Germany*, a case relating to enforcement by German authorities of a judgement given by the European Court of Justice against a German firm:

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 judgement 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 Convention organs.¹⁸

Likewise, with regard to a claim for damage incurred because of the fruitless search for weapons of a ship in Djibouti, a memorandum of the Office of Legal Affairs of the United Nations stated:

The responsibility for carrying out embargoes imposed by the Security Council rests with Member States, which are accordingly, responsible for meeting the costs of any particular action they deem necessary for ensuring compliance with the embargo.¹⁹

While conduct of State authorities has to be attributed to the State in this set of circumstances, an organization's responsibility could be engaged for the reasons considered above.

¹⁷ *Conservation and Sustainable Exploitation of Swordfish Stocks (Chile/European Community)*, Order of 20 December 2000, ITLOS Reports 2000, pp. 149–150.

¹⁸ Application No. 13258/87, decision of 9 February 1990, *Decisions and Reports*, vol. 64, p. 144. It should be noted that, with regard to non-contractual liability of the EC, the Court of Justice of the European Communities did not express a different view on attribution in *Krohn & Co. v. Commission of the European Communities*, case 175/84, *Reports of Cases before the Court of Justice and the Court of First Instance* (1986–2), p. 768, when it stated that "the unlawful conduct alleged by the applicant in order to establish its claim for compensation is to be attributed not to the Bundesanstalt, which was bound to comply with the Commission's instructions, but to the Commission itself". While the EC was held liable, this was not because the German Bundesanstalt was considered an organ of the EC. The view that State authorities do not act as EC organs was recently reasserted by Scobbie, "International organizations and international relations", p. 892; Cohen-Jonathan, *loc. cit.*, p. 623; and Weckel, *loc. cit.*, p. 447. The question was also discussed by Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens*, pp. 385–386, and Klabbers, *An Introduction to International Institutional Law*, pp. 307–308.

¹⁹ Memorandum of 21 April 1995 to the Assistant Secretary-General, Department of Peacekeeping Operations, *United Nations Juridical Yearbook, 1995* (United Nations publication, Sales No. E.01.V.1), p. 465. The Assistant Secretary-General for Legal Affairs, Mr. Ralph Zacklin, reiterated in a letter of 4 May 1998 relating to the same case that the responsibility for implementing and enforcing mandatory sanctions imposed by the Security Council of the United Nations rested with States.

CHAPTER II

The general rule on attribution of conduct to an international organization

14. According to draft article 4 on responsibility of States for internationally wrongful acts,²⁰ attribution of conduct to a State is basically premised on the characterization as “State organ” of the acting person or entity. Attribution could hardly depend on the use of a particular terminology in the internal law of the State concerned. Thus, what is decisive is not whether an entity is formally defined as an “organ”. As the Commission observed in its commentary:

Where the law of a State characterizes an entity as an organ, no difficulty will arise. On the other hand, it is not sufficient to refer to internal law for the status of State organs. In some systems the status and functions of various entities are determined not only by law but also by practice, and reference exclusively to internal law would be misleading. The internal law of a State may not classify, exhaustively or at all, which entities have the status of “organs”. In such cases, while the powers of an entity and its relation to other bodies under internal law will be relevant to its classification as an “organ”, internal law will not itself perform the task of classification.²¹

A similar reasoning could be made with regard to the corresponding system of law relating to international organizations.

15. It is noteworthy that, while some provisions of the Charter of the United Nations use the term “organs”,²² ICJ, when considering the status of persons acting for the United Nations, gave relevance only to the fact that a person had been conferred functions by an organ of the United Nations. The Court used the term “agents” and did not give relevance to the fact that a person had or did not have an official status. In its advisory opinion on the *Reparation for Injuries* case, 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.²³

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.²⁴

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.²⁵

16. More recently, in its advisory opinion on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, ICJ pointed 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.²⁶

In the same opinion the Court also briefly addressed the question of attribution of conduct, noting 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.²⁷

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.

17. The same view was endorsed by several scholars, who premised attribution of conduct on the existence of a functional link between the agent and the organization, generally through one of its organs, which are established, directly or indirectly, on the basis of the constituent instrument of the organization.²⁸

²⁵ *Ibid.*, para. 47.

²⁶ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999*, p. 88, para. 66.

²⁷ *Ibid.*, pp. 88–89, para. 66.

²⁸ Eagleton, “International organization and the law of responsibility”, p. 387, held that “the United Nations may be expected to assume responsibility for acts of [its] agents injurious to others”. Butkiewicz, “The premises of international responsibility of inter-governmental organizations”, p. 123, considered “behaviour of persons remaining with [the organization] in a functional relationship (the organs of the organization, the persons employed by it)”. According to Tomuschat, “The international responsibility of the European Union”, p. 180, “conduct shown by a given individual must be capable of being attributed to the IO [international organization] inasmuch as that individual is authorized to act on behalf of the IO”. Several authors refer to the condition that “control” is exercised over a person entrusted with a function by an organ of the organization. See, for instance, Ritter, *loc. cit.*, p. 441; Pérez González, “Les organisations internationales et le droit de la responsabilité”, p. 88; Amerasinghe, *Principles of the Institutional Law of International Organizations*, p. 241; and Sands and Klein, *Bowett’s Law of International Institutions*, p. 520. The existence of control may be taken as implied in the establishment of a formal link, such as the conferral of a mission to a person by an organ of the organization. Klein, *op. cit.*, p. 378, goes a step further by postulating control on the part of the organization as the main criterion for attribution. This view approaches that of Arangio-Ruiz, “State fault and the forms and degrees of international responsibility: questions of attribution and relevance”,

²⁰ See footnote 5 above.

²¹ *Yearbook ... 2001*, vol. II (Part Two), p. 42, para. (11) of the commentary to article 4.

²² Article 7 of the Charter refers to “principal organs” and to “subsidiary organs”. This latter term also appears in articles 22 and 29.

²³ *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 177.

²⁴ *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989*, p. 194, para. 48.

18. What was stated by ICJ 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 organization's functions are entrusted. As was stated in a decision of the Swiss Federal Council of 30 October 1996:

As a rule, one may attribute to an international organization acts and omissions of its organs of all rank and nature and of its agents in the exercise of their competencies.²⁹

19. In order to establish the existence of a link between an organ or an agent and an international organization, it would be inappropriate to refer to the organization's "internal law" in attempting to model the reference to the one expressed in draft article 4 on responsibility of States for internationally wrongful acts (see paragraph 14 above). As was noted by the Commission on a previous occasion:

There would [have been] problems in referring to the "internal law" of an organization, for while it has an internal aspect, this law also has in other respects an international aspect.³⁰

20. The term that is generally used with regard to international organizations is "rules of the organization". In article 2, paragraph 1 (j), of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter the 1986 Vienna Convention), which is the most recent codification convention that includes a definition of the term, the following text may be found:

"[R]ules of the organization" means, in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization.³¹

(Footnote 28 continued.)

p. 33, who considered that only "factual standards or criteria" were relevant in order to establish a link between an individual and a State. The latter author, while denying the existence of rules on attribution under international law, did not exclude the usefulness of "a few presumptions" like those appearing in articles 4–11 on responsibility of States for internationally wrongful acts (see Arangio-Ruiz, "Dualism revisited: international law and interindividual law", p. 985).

²⁹ This is a translation from the original French, which reads as follows: "En règle générale, sont imputables à une organisation internationale les actes ou omissions de ses organes de tout rang et de toute nature et de ses agents dans l'exercice de leurs compétences." (VPB 61.75, published on the Swiss Federal Council's website)

³⁰ *Yearbook ... 1982*, vol. II (Part Two), p. 21, para. (25).

³¹ A partly different definition may be found in article 1, paragraph 1 (34), of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, which reads:

"[R]ules of the Organization' means, in particular, the constituent instruments, relevant decisions and resolutions, and established practice of the Organization."

The same wording had been proposed by the Commission in draft article 2, paragraph 1 (j), on the question of treaties concluded between one or more States and one or more international organizations, and treaties between international organizations (*Yearbook ... 1982*, vol. II (Part Two), p. 18, para. 63). In article 2 (c) of its resolution on the legal consequences for member States of the non-fulfilment by international organizations of their obligations towards third parties, adopted at its Lisbon session in 1995, the Institute of International Law gave the following definition:

"Rules of the organization' means the constituent instruments of the organization and any amendments thereto, regulations adopted thereunder, binding decisions and resolutions adopted in accordance with such instruments and the established practice of the organization."

(Institute of International Law, *Yearbook*, p. 447)

21. In reply to a question addressed by the Commission in its 2003 report³² several State representatives in the Sixth Committee expressed the view that the draft articles should use the above definition when stating a general rule on attribution of conduct to international organizations.³³ However, a few representatives dissented,³⁴ while some of the representatives who in general favoured retention of the definition also said that the same definition should be further elaborated.³⁵ The Legal Counsel of WHO wrote that the definition would be adequate, at least as a point of departure for a definition more suitable to the specific purpose of the draft articles.³⁶

22. One important feature of the above definition of "rules of the organization" is that it gives considerable weight to practice. The definition appears to provide a balance between the rules enshrined in the constituent instrument and formally accepted by members, on the one hand, and the needs for the organization to develop as an institution.³⁷ As ICJ said in its advisory opinion on the *Reparation for Injuries* case:

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.³⁸

23. Practice is one of the key elements to be taken into consideration when interpreting the constituent

³² *Yearbook ... 2003*, vol. II (Part Two), p. 14, para. 27.

³³ Statements by Denmark, also on behalf of Finland, Iceland, Norway and Sweden, *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 14th meeting (A/C.6/58/SR.14), para. 25; Austria (*ibid.*, para. 33); Japan (*ibid.*, para. 37); Italy (*ibid.*, para. 45); France (*ibid.*, para. 58); Canada, *ibid.*, 15th meeting (A/C.6/58/SR.15), paras. 1–2); Greece (*ibid.*, para. 12); Israel (*ibid.*, para. 20); Portugal (*ibid.*, para. 27); Russian Federation (*ibid.*, para. 30); Spain (*ibid.*, para. 40); Belarus (*ibid.*, para. 42); Egypt, *ibid.*, 16th meeting (A/C.6/58/SR.16), para. 1; Romania, *ibid.*, 19th meeting (A/C.6/58/SR.19), para. 53; Venezuela, *ibid.*, 21st meeting (A/C.6/58/SR.21), para. 21; Sierra Leone (*ibid.*, para. 25); and Mexico (*ibid.*, para. 47).

³⁴ The definition was viewed as "not satisfactory" in the statement of Gabon, *ibid.*, 15th meeting (A/C.6/58/SR.15), para. 4, "since in matters involving responsibility it was desirable to have the widest possible sphere of application". The statement of Argentina (*ibid.*, para. 24) considered that "prima facie it would not be advisable to refer to the definition of the 'rules of the organization' contained in the Vienna Convention".

³⁵ Statements of Japan, *ibid.*, 14th meeting (A/C.6/58/SR.14), para. 37; Italy (*ibid.*, para. 45); France (*ibid.*, para. 58); and Portugal, *ibid.*, 15th meeting (A/C.6/58/SR.15), para. 27. The latter statement suggested that "other components of the rules of the organization might be considered with a view to formulating a more exhaustive definition".

³⁶ Letter from the Legal Counsel of WHO, Mr. Thomas S. R. Topping, addressed on 19 December 2003 to the United Nations Legal Counsel, Mr. Hans Corell. The letter added that what mattered most in that case was the retention of a reference to the established practice of the organization as one category of "rules" of that organization.

³⁷ This point was clearly expressed by Charles de Visscher, "L'interprétation judiciaire des traités d'organisation internationale", p. 187.

³⁸ *I.C.J. Reports 1949* (see footnote 23 above), p. 180. This passage was approvingly quoted in the partial award of 22 November 2002 of the Permanent Court of Arbitration in *Horst Reineccius, et al. v. Bank for International Settlements*. The Court added: "The fact that the Bank has, on a number of occasions, amended its Statutes by the introduction of a new article appears to be probative of the authoritative interpretation of the Statutes in this regard". (UNRIAA, vol. XXIII (Sales No. E/F.04.V.15), p. 224; see also International Council for Commercial Arbitration, *Yearbook: Commercial Arbitration*, vol. XXVIII, 2003, p. 120, para. 43.)

instrument of an international organization. Thus, in its opinion on the *Namibia* case, ICJ interpreted Article 27, paragraph 3, of the Charter of the United Nations in the light of practice:

[T]he proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions ... This procedure followed by the Security Council, which has continued unchanged after the amendment in 1965 of Article 27 of the Charter, has been generally accepted by Members of the United Nations and evidences a general practice of that Organization.³⁹

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

[T]he constituent instruments of international organizations are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals. Such treaties can raise specific problems of interpretation owing, *inter alia*, to their character which is conventional and at the same time institutional; the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret these constituent treaties.⁴⁰

24. The relevance of practice was discussed by ICJ in the passages quoted above first in relation to a provision concerning the Security Council's decision-making process and then the competence of WHO. The definition of the "rules of the organization" quoted above (para. 20) is taken from the 1986 Vienna Convention, in which the term is used with regard to an organization's capacity and competence to conclude a treaty.⁴¹ The question may be raised whether, for the purpose of attribution of conduct in view of international responsibility, practice should not be given a wider significance than when the organization's capacity or competence is discussed. It may be held that, when practice develops in a way that is not consistent with the constituent instrument, the organization should not necessarily be exempt from responsibility in case of conduct that stretches beyond the organization's competence. However, the possibility of attribution of conduct in this case may be taken into account when considering *ultra vires* acts of the organization and need not affect the general rule on attribution.

25. The above definition of "rules of the organization" (para. 20) seems capable of improvement in two ways. First, the reference to "decisions and resolutions"

is imprecise, because the terms used vary (for instance, resolutions may include decisions) and also because the legal significance of the various acts of an organization are different. Clearly, the definition is intended to give a broad description of what may be relevant. However, it could be framed in a theoretically more appropriate way, which would be both more accurate and more comprehensive. What seems to matter is that the functions are conferred on the organ, official or other person by an act of the organization which is taken in accordance with the constituent instrument. A second possible improvement concerns the term "established practice". This wording puts the stress on the element of time, which is not necessarily relevant, while it expresses less clearly the role of general acceptance, which appears to be more significant.⁴² Thus, it seems preferable to consider alternatives to these two aspects of the current definition. Both the wording of that definition and some possible alternatives are set in brackets in the draft article below (para. 28).

26. A further question would be whether the definition to be given of "rules of the organization" should be included in draft article 4 or placed in draft article 2, which contains the definition of international organizations. The decision may be postponed to the time when it will become clearer whether the term "rules of the organization" appears only in the context of the general rule on attribution of conduct or whether the same term will also be used in other provisions. In the latter case it would be preferable to move to draft article 2 what is currently suggested as draft article 4, paragraph 3.

27. According to draft article 4, paragraph 1, on responsibility of States for internationally wrongful acts, attribution to a State of conduct of an organ takes place "whether the organ 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".⁴³ The latter specification could hardly apply to an international organization. The other elements may be retained, but they could be covered by simpler wording. In particular, there is no need to specify the type of function exercised by the organization, also in view of the fact that, while all States may be held to exert all the functions mentioned, organizations also vary significantly from one another in this regard.

28. On the basis of the foregoing remarks, draft article 4 should be placed at the beginning of a chapter called "Attribution of conduct to an international organization". The following wording is suggested:

"Article 4. General rule on attribution of conduct to an international organization"

"1. The conduct of an organ of an international organization, of one of its officials or another person entrusted with part of the organization's functions shall be

³⁹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 22, para. 22.

⁴⁰ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, I.C.J. Reports 1996, p. 75, para. 19. The Court reiterated that the constituent instrument had to be interpreted "in the light of ... the practice followed by the Organization" (p. 76, para. 21).

⁴¹ The term "rules of the organization" is used in the Convention in a preambular paragraph, in article 6 (Capacity of international organizations to conclude treaties), in article 46 (Provisions of internal law of a State and rules of an international organization regarding competence to conclude treaties), and, with regard to assent on the part of an international organization, in articles 35 (Treaties providing for obligations for third States or third organizations) and 36 (Treaties providing for rights for third States or third organizations).

⁴² The role of "general acceptance" was underlined by ICJ in the first passage quoted above (para. 23). According to Amerasinghe, "Interpretation of texts in open international organizations", p. 200, one should "base the use of subsequent practice in the interpretation of constitutions on agreement or consent". However, he appeared to refer only to acceptance "at the time [a State] became a party to the constituent treaty" (*ibid.*).

⁴³ See footnote 5 above.

considered as an act of that organization under international law, whatever position the organ, official or person holds in the structure of the organization.

“2. Organs, officials and persons referred to in the preceding paragraph are those so characterized under the rules of the organization.

“3. For the purpose of this article, “rules of the organization” means, in particular, the constituent instruments, [decisions and resolutions] [acts of the organization] adopted in accordance with them, and [established] [generally accepted] practice of the organization.”

CHAPTER III

Conduct of organs placed at the disposal of an international organization by a State or another international organization

29. Given the limited resources that international organizations possess for pursuing their objectives, they often have to rely on State organs for assistance. One way in which States assist organizations is by putting some of their own organs at the organizations’ disposal. The case of a State placing one of its organs at an organization’s disposal is certainly more frequent than the reciprocal phenomenon: an organization putting one of its organs at a State’s disposal.

30. The draft articles on State responsibility that were adopted on first reading included in article 9 a reference to the case in which an organ had “been placed at the disposal of a State by ... an international organization”. The same rule was regarded as applicable to this case as the one applying to the case in which an organ was put by a State at another State’s disposal.⁴⁴ The reference to international organizations was removed during the second reading,⁴⁵ together with all similar references that had been included at first reading in the chapter on attribution of conduct. In the second-reading text, article 57 simply contains a without-prejudice clause,⁴⁶ which is designed to leave issues relating to international organizations open for further study. However, the commentary on article 57 briefly considered the converse case of a State placing one of its organs at an organization’s disposal, and said:

[I]f a State second[s] officials to an international organization so that they act as organs or officials of the organization, their conduct will be attributable to the organization, not the sending State.⁴⁷

31. When an organ is placed by a State or an international organization at the disposal of another State or another organization, the issue relating to attribution will generally not be whether conduct of that organ is at all attributable to a State or an organization. The question will rather be to which State or organization conduct is attributable: whether to the lending State or organization or to the borrowing State or organization. Moreover, dual attribution of the same conduct cannot be excluded (see paragraphs 6–7 above).

32. Questions concerning attribution of conduct to the United Nations or a State have sometimes been raised in relation to conduct taken by military forces in the course of interventions recommended or authorized by the Security Council. In this type of case, responsibility of the United Nations, if any, could not be premised on attribution of conduct. It could not be said that authorized forces are placed at the disposal of the United Nations. This is confirmed by practice. During the Korean war, United States forces mistakenly bombed targets on the territory of China and the Soviet Union. With regard to China, the United States Government finally accepted

to assume responsibility for and pay compensation through the United Nations, for damages which an impartial, on-the-spot investigation might show to have been caused by United States planes.⁴⁸

The United States Government also expressed “its regret that American forces under the United Nations Command should have been involved” in the violation of Soviet sovereignty, and declared that it was “prepared to supply funds for payment of any damages determined by a United Nations Commission or other appropriate procedure to have been inflicted upon Soviet property”.⁴⁹

33. When forces operate outside the United Nations chain of command, the United Nations constantly held that conduct had to be attributed to the respective national State. For instance, the Director of the Field Administration and Logistics Division of the Department of Peace-keeping Operations of the United Nations wrote to the Permanent Representative of Belgium to the United Nations about a claim resulting from a car accident in Somalia, saying that Belgian troops in Somalia at the time of the accident, 13 April 1993, had formed part of the Unified Task Force (UNITAF) established by the Security Council in its resolution 794 (1992) and not of the United Nations Operation in Somalia (UNOSOM). He went on to say that in fact, the only Belgian nationals to have formed part of UNOSOM were headquarters staff officers, and that the individual involved in that accident had stated in his interview that he worked as a cook as part of Operation Restore Hope; he could not therefore have

⁴⁴ Article 9 adopted on first reading read as follows:

“The conduct of an organ which has been placed at the disposal of a State by another State or by an international organization shall be considered as an act of the former State under international law, if that organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it has been placed.” (*Yearbook ... 1974*, vol. I, 1278th meeting, p. 154, para. 39)

⁴⁵ *Yearbook ... 1998*, vol. II (Part Two), p. 85, paras. 422–424.

⁴⁶ *Yearbook ... 2001*, vol. II (Part Two), p. 30, para. 76.

⁴⁷ *Ibid.*, p. 142, para. (3) of the commentary to article 57.

⁴⁸ Letter dated 26 September 1950 from the Deputy Representative of the United States to the Secretary-General concerning the bombing by air forces of the territory of China (S/1813). The representative of the United States had denied responsibility with regard to an earlier and similar claim (S/1722), arguing that conduct had to be attributed to “the United Nations in Korea” (S/1727).

⁴⁹ Note of 19 October 1950 from the representative of the United States addressed to the Secretary-General (S/1856).

been considered to have been part of the United Nations operation. He added that UNITAF troops were not under the command of the United Nations and the Organization had consistently declined liability for any claims made in respect of incidents involving those troops.⁵⁰ This approach appears to have been generally accepted by States whose forces were involved in operations authorized by the Security Council.⁵¹

34. Most of the practice concerning attribution of conduct in case of a State organ placed at an organization's disposal relates to peacekeeping forces.⁵² This is the apparent reason why in its 2003 report the Commission expressed the wish to receive the views of Governments on practice relating to the "extent to which the conduct of peacekeeping forces is attributable to the contributing State and the extent to which it is attributable to the United Nations".⁵³ The Commission did not suggest that these replies would help it to draft a specific rule on attribution of conduct of peacekeeping forces. Not only would such an endeavour be at odds with the pattern of the articles on State responsibility that the Commission had declared it intended to follow, stating a specific rule would also be difficult in view of the variety of meanings that is often attributed to the term "peacekeeping force".

35. Peacekeeping forces are regarded as subsidiary organs of the United Nations. However, they are made up of State organs, and therefore the question of attribution of conduct is not clear-cut. The first instance in which the United Nations acknowledged its responsibility for the conduct of national contingents occurred when the Secretary-General settled claims with Belgium and a few other States in relation to damages suffered by their respective nationals in the Congo as the result of harmful acts of United Nations Operations in the Congo (ONUC) personnel. The agreements included the following sentence:

It [the United Nations] has stated that it would not evade responsibility where it was established that United Nations agents had in fact caused unjustifiable damage to innocent parties.⁵⁴

This attitude of the United Nations was reasserted on several occasions. For instance, a memorandum of the Office of Legal Affairs stated with regard to an accident that occurred to a British helicopter which had been put in

⁵⁰ Unpublished letter dated 25 June 1998.

⁵¹ For instance, the Government of Canada paid compensation for the killing of a Somali youth by some members of the Canadian contingent in UNITAF (see Young and Molina, "IHL and peace operations: sharing Canada's lessons learned from Somalia", p. 366).

⁵² As the United Nations Legal Counsel, Mr. Hans Corell, wrote on 3 February 2004 in a memorandum to the Director of the Codification Division, Mr. Václav Mikulka, it is "in connection with peacekeeping operations where principles of international responsibility ... have for the most part been developed in a fifty-year practice of the Organization" (para. 4).

⁵³ *Yearbook ... 2003*, vol. II (Part Two), p. 14, para. 27 (c).

⁵⁴ Exchange of letters constituting an agreement relating to the settlement of claims filed against the United Nations in the Congo by Belgian nationals, p. 199. Similar agreements were concluded with Greece, Italy, Luxembourg and Switzerland. Reference to an agreement with Zambia was made in the *United Nations Juridical Yearbook, 1975* (United Nations publication, Sales No. E.77.V.3), p. 155. As was noted by Paul De Visscher, "Les conditions d'application des lois de la guerre aux opérations militaires des Nations Unies", pp. 54–55, no suggestion was made that the national State of the forces involved would have to be held responsible.

Cyprus at the disposal of the United Nations Peacekeeping Force in Cyprus (UNFICYP):

The crew members of the helicopters are members of the British contingent of UNFICYP and the helicopter flights take place in the context of the operations of UNFICYP. Through the chain of command, the operations in which the helicopters are involved take place under the ultimate authority of the UNFICYP Force Commander and are the responsibility of the United Nations. The circumstances under which the British-owned helicopters are put at the disposal of UNFICYP thus lead to the conclusion that these helicopters should be considered as United Nations aircraft.

As the carrier, it is the United Nations that could and normally would be held liable by third parties in case of accidents involving UNFICYP helicopters and causing damage or injuries to these parties; therefore third-party claims should normally be expected to be addressed to the United Nations.⁵⁵

36. The Secretary-General summed up as follows the current position concerning responsibility of the United Nations for the conduct of peacekeeping forces:

In recognition of its international responsibility for the activities of its forces, the United Nations has, since the inception of peacekeeping operations, assumed its liability for damage caused by members of its forces in the performance of their duties ...

The undertaking to settle disputes of a private law nature submitted against it and the practice of actual settlement of such third-party claims ... evidence the recognition on the part of the United Nations that liability for damage caused by members of United Nations forces is attributable to the Organization.⁵⁶

While reference is made here and in other instances to private law claims, it is implied that the same principle concerning attribution of conduct would apply in relation to responsibility under international law. This transition was clearly made in the following passage of a recent statement of the United Nations Legal Counsel:

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. The fact that any such act may have been performed by members of a national military contingent forming part of the peacekeeping operation does not affect the international responsibility of the United Nations vis-à-vis third States or individuals.⁵⁷

37. The question of attribution of conduct of a member of a national contingent was similarly solved by the Superior Provincial Court (Oberlandesgericht) of Vienna in a judgement of 26 February 1979 (*N. K. v. Austria*). The claim had been brought against the Austrian State because the member of an Austrian contingent in the United Nations Disengagement Observer Force had caused damage to property in the barracks. The Court found:

[W]hat is decisive is not whose organ (from the organizational standpoint) the person alleged to have caused the damage actually was, but rather in whose name and for whom (from the functional standpoint) that person was acting at the moment when the act occurred. What is decisive is therefore the sphere in which the organ in question was acting at the relevant time.⁵⁸

⁵⁵ *United Nations Juridical Yearbook, 1980* (United Nations publication, Sales No. E.83.V.1), pp. 184–185.

⁵⁶ Report of the Secretary-General on financing of United Nations peacekeeping operations (A/51/389), p. 4, paras. 7–8.

⁵⁷ Memorandum (see footnote 52 above), para. 7.

⁵⁸ This passage is taken from the English translation reproduced in *International Law Reports*, vol. 77, p. 472. The original text of the judgement may be read in *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht*, vol. 31, Nos. 3–4 (1980), p. 310.

38. However, attribution of conduct of national contingents should also take into account the fact that the respective State retains control over disciplinary matters and has exclusive jurisdiction in criminal affairs.⁵⁹ This is generally specified in the agreements that the United Nations concludes with the contributing States.⁶⁰ Thus the national contingent is not fully placed at the disposal of the United Nations and 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:

Since the Convention [on International Trade in Endangered Species of Wild Fauna and Flora] 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.⁶¹

39. Although not directly relevant in the case, the retention of disciplinary power and criminal jurisdiction on the part of the contributing State was an important element that led the House of Lords to find in *Attorney General v. Nissan* that the Government of the United Kingdom had to pay compensation for the temporary occupation of a building by British forces which were part of UNFICYP.⁶² This was particularly clear in the opinion of Lord Morris of Borth-y-Gest:

[T]hough national contingents were under the authority of the United Nations and subject to the instructions of the commander, the troops as members of the force remained in their national service. The British forces continued, therefore, to be soldiers of Her Majesty. Members of the United Nations force were subject to the exclusive jurisdiction of their respective national states in respect of any criminal offences committed by them in Cyprus.⁶³

40. It would be going too far to consider that the existence of disciplinary power and criminal jurisdiction on the part of the contributing State totally excludes forces being considered to be placed at the disposal of the United Nations. As has been held by several scholars,⁶⁴

⁵⁹ As was stated in a memorandum of the Legal Bureau of the Department of Foreign Affairs of Canada:

“[U]ltimately any prosecution for acts contrary to the ROE [rules of engagement] (or contrary to international or domestic law) will be done by the national authorities of the troop-contributing states. This is a standard practice of all armed forces involved in peacekeeping activities.” (Kirsch, “Canadian practice in international law”, p. 388)

⁶⁰ See, for example, with reference to “disciplinary authority” and to “jurisdiction with respect to any crime or offence”, the agreements concerning service with UNFICYP, *United Nations Juridical Yearbook, 1966* (United Nations publication, Sales No. E.68.V.6), pp. 42–43. More generally on these clauses, see the report of the Secretary-General on command and control of United Nations peacekeeping operations (A/49/681), para. 6.

⁶¹ *United Nations Juridical Yearbook, 1994* (United Nations publication, Sales No. E.00.V.8), p. 450.

⁶² *The All England Law Reports* (1969), vol. 1, p. 639. The House of Lords reversed the decision of the Court of Appeal, *ibid.* (1967), vol. 2, in which Lord Denning had held that the British troops that were part of UNFICYP “were acting as agents of the United Nations” (p. 1244).

⁶³ *Ibid.* (1969), vol. 1, p. 646.

⁶⁴ Ritter, *loc. cit.*, p. 442; Simmonds, *Legal Problems Arising from the United Nations Military Operations in the Congo*, p. 229; Amrallah, “The international responsibility of the United Nations for activities carried out by U.N. peace-keeping forces”, pp. 62–63 and 73–79; Butkiewicz, *loc. cit.*, pp. 123–125 and 134–135; Pérez González, *loc. cit.*, p. 83; Hirsch, *The Responsibility of International Organizations toward Third Parties: Some Basic Principles*, pp. 64–67; Amerasinghe, *op. cit.*,

the decisive question in relation to attribution of a given conduct appears to be who had 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.⁶⁵

41. The Secretary-General held that the criterion of the “degree of effective control” was decisive with regard to joint operations:

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.⁶⁶

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.

42. With regard to infringements of international humanitarian law, the United Nations Secretary-General referred to “concurrent responsibility”⁶⁷ of the United Nations and the contributing State, without clarifying the basis of

pp. 241–243; Klein, *op. cit.*, pp. 379–380; Scobbie, *loc. cit.*, p. 891; Pitschas, *Die völkerrechtliche Verantwortlichkeit der Europäischen Gemeinschaft und ihrer Mitgliedstaaten*, p. 52; Sorel, “La responsabilité des Nations Unies dans les opérations de maintien de la paix”, p. 129. Some authors refer to “effective control”, some others to “operational control”. The latter concept was also used by Bothe, *Streitkräfte internationaler Organisationen*, p. 87. Difficulties in drawing a line between operational and organizational control were underlined by Condorelli, “Le statut des forces de l’ONU et le droit international humanitaire”, pp. 887–888. The draft suggested by the Committee on Accountability of International Organisations of the International Law Association referred to a criterion of “effective control (operational command and control)” (International Law Association, *op. cit.*, p. 797).

⁶⁵ Note by the Secretary-General (S/1994/653), p. 45, paras. 243–244.

⁶⁶ Report of the Secretary-General (A/51/389), p. 6, paras. 17–18.

⁶⁷ *Ibid.*, p. 11, para. 44. The Secretary-General’s Bulletin on observance by United Nations forces of international humanitarian law (ST/SGB/1999/13), p. 1, does not address the question.

responsibility. This would depend on the circumstances of the infringement. One may have to conclude for joint attribution of the same conduct; however, one could also consider that the infringing acts are attributed to either the State or the United Nations, while omission, if any, of the required preventive measures is attributed to the other subject.⁶⁸ Similar conclusions may be reached with regard to infringements by members of peacekeeping forces that affect other areas of the protection of human rights.⁶⁹

43. Arrangements that are concluded between the United Nations and the contributing State only concern the parties and do not affect the question of attribution of conduct under general international law. In any case, the model contribution agreement asserts the liability of the United Nations towards third parties and only provides for a right of recovery of the United Nations under circumstances such as “loss, damage, death or injury [arising] from gross negligence or wilful misconduct of the personnel provided by the Government”.⁷⁰

44. In reply to a question put by the Commission in its 2003 report,⁷¹ several State delegates held in the Sixth Committee of the General Assembly that conduct of peacekeeping forces had to be generally attributed to the United Nations.⁷² However, some delegates also found that in certain cases attribution had to be made

concurrently,⁷³ or even exclusively,⁷⁴ to the contributing State. Some statements stressed the importance of the criterion of control in order to determine to whom conduct had to be attributed.⁷⁵

45. The principles applicable to peacekeeping forces may be extended to other State organs put at the disposal of the United Nations, such as disaster relief units, about which the 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).⁷⁶

46. Similar conclusions would have to be reached in the rarer case in which an international organization would place 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 WHO and the Pan American Sanitary Organization (now 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”.⁷⁷ 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.⁷⁸

47. Draft article 6 on the responsibility of States for internationally wrongful acts considers that the decisive criterion for attribution to a State of conduct of an organ placed at its disposal by another State is the fact that “the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed”.⁷⁹ Reference to governmental authority would not be appropriate with regard to international organizations, which only rarely exercise that type of authority. Reference should be made more generally to the exercise of an organization’s functions.

⁶⁸ Condorelli, “Le azioni dell’ONU e l’applicazione del diritto internazionale umanitario: il ‘bollettino’ del Segretario generale del 6 agosto 1999”, p. 1053, and Benvenuti, “Le respect du droit international humanitaire par les forces des Nations Unies: la circulaire du Secrétaire général”, p. 370, held that the United Nations are under an obligation to ensure that the contributing State exercises criminal jurisdiction in case of infringements of international humanitarian law.

⁶⁹ This prompted the United Nations Office of Internal Oversight Services to conduct investigations on charges of sexual exploitation in various countries. See United States House of Representatives, *The U.N. and the Sex Slave Trade in Bosnia: Isolated Case or Larger Problem in the U.N. System? Hearing before the Subcommittee on International Operations and Human Rights of the Committee on International Relations*. For a critical survey, see Murray, “Who will police the peace-builders? The failure to establish accountability for the participation of United Nations civilian police in the trafficking of women in post-conflict Bosnia and Herzegovina”, especially pp. 518 et seq.

⁷⁰ Contribution Agreement between the United Nations and participating States contributing resources to United Nations peace-keeping operations (A/50/995, annex, art. 9, p. 5); and Model Memorandum of Understanding between the United Nations and participating States contributing resources to United Nations peacekeeping operations (A/51/967, annex, art. 9, pp. 6–7). While the text says that “the Government will be liable for such claims”, a right of recourse appears to be intended. A later report by the Secretary-General (A/51/389, pp. 10–11, para. 43) referred to this text under the heading “Recovery from States contributing contingents: concurrent responsibility”. A similar text is contained in the memorandum of agreement used by the United Nations to obtain gratis personnel (ST/AI/1999/6, annex).

⁷¹ See paragraph 34 of the present report.

⁷² Statements by Denmark, also on behalf of Finland, Iceland, Norway and Sweden, *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 14th meeting (A/C.6/58/SR.14), para. 27; Austria (*ibid.*, para. 33); Italy (*ibid.*, para. 46); Canada, *ibid.*, 15th meeting (A/C.6/58/SR.15), para. 3; Gabon (*ibid.*, para. 5); Greece (*ibid.*, para. 13); Israel (*ibid.*, para. 21); Russian Federation (*ibid.*, para. 31); Spain (*ibid.*, para. 41); Belarus (*ibid.*, para. 43); Egypt, *ibid.*, 16th meeting (A/C.6/58/SR.16), para. 2; and Mexico, *ibid.*, 21st meeting (A/C.6/58/SR.21), para. 48.

⁷³ Statements by Denmark, also on behalf of Finland, Iceland, Norway and Sweden, *ibid.*, 14th meeting (A/C.6/58/SR.14), para. 28; Greece, *ibid.*, 15th meeting (A/C.6/58/SR.15), para. 13; and Israel (*ibid.*, para. 21).

⁷⁴ Statements by Austria, *ibid.*, 14th meeting (A/C.6/58/SR.14), para. 33; Italy (*ibid.*, para. 46); Canada, *ibid.*, 15th meeting (A/C.6/58/SR.15), para. 3; Gabon (*ibid.*, para. 5); Israel (*ibid.*, para. 21); Russian Federation (*ibid.*, para. 31); Belarus (*ibid.*, para. 43); and Egypt, *ibid.*, 16th meeting (A/C.6/58/SR.16), para. 2.

⁷⁵ Statements by Italy, *ibid.*, 14th meeting (A/C.6/58/SR.14), para. 46; Canada, *ibid.*, 15th meeting (A/C.6/58/SR.15), para. 3; Israel (*ibid.*, para. 21); Russian Federation (*ibid.*, para. 31); Spain (*ibid.*, para. 41); Belarus (*ibid.*, para. 43); and Mexico, *ibid.*, 21st meeting (A/C.6/58/SR.21), para. 48. The statement by Greece, *ibid.*, 15th meeting (A/C.6/58/SR.15), para. 13, referred to “authority and command” as the criterion for attributing conduct of peacekeeping forces to the United Nations.

⁷⁶ *United Nations Juridical Yearbook, 1971* (United Nations publication, Sales No. E.73.V.1), p. 187.

⁷⁷ Art. 2 of the Agreement concerning the integration of the Pan American Sanitary Organization with the World Health Organization.

⁷⁸ Letter from the Legal Counsel of WHO, Mr. Thomas S. R. Topping, addressed on 19 December 2003 to the United Nations Legal Counsel, Mr. Hans Corell.

⁷⁹ See footnote 5 above.

48. Draft article 6 on the responsibility of States for internationally wrongful acts does not provide any elements in order to identify when a certain organ is placed at the “disposal” of another State. However, some kind of control on the part of the beneficiary State is implied. The relevant commentary specifies that:

[I]n performing the functions entrusted to it by the beneficiary State, the organ must also act in conjunction with the machinery of that State and under its exclusive direction and control, rather than on instructions from the sending State.⁸⁰

This point could be made more explicitly in the text, in order to provide guidance in relation to questions of attribution arising when national contingents are placed at an organization’s disposal and in similar cases. It should also be indicated that what matters is not exclusiveness of control, which for instance the United Nations never has over national contingents, but the extent of effective control. This would also leave the way open for dual attribution of certain conducts.

⁸⁰ *Yearbook ... 2001*, vol. II (Part Two), p. 44, para. (2) of the commentary to article 6.

49. With regard to attribution of conduct to international organizations, draft article 4 (see paragraph 28 above) distinguishes between organs, officials and other persons entrusted with part of the organization’s functions. It does not seem necessary to repeat these specifications, which would render the text cumbersome, if it is understood that what applies to organs of an international organization is also applicable to officials and other persons referred to in draft article 4.

50. The following wording is suggested:

“Article 5. Conduct of organs 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 international organization that is placed at the disposal of another international organization for the exercise of one of that organization’s functions shall be considered under international law an act of the latter organization to the extent that the organization exercises effective control over the conduct of the organ.”

CHAPTER IV

The question of the attribution of *ultra vires* conduct

51. *Ultra vires* conduct of an international organization could be either conduct beyond the powers conferred on the organization or conduct exceeding the powers of a specific organ. In its advisory opinion on *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, ICJ stated that

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.⁸¹

This statement does not imply that conduct which exceeds an international organization’s function could never be attributed to that organization.

52. Clearly, an act which is *ultra vires* for an organization is also *ultra vires* for any of its organs. An organ may also exceed its powers because it impinges on those that are exclusively given to another organ or because it uses powers that have not been given to any organ. The possibility of attributing to an international organization acts that an organ takes *ultra vires* has been admitted by ICJ 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 and 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.⁸²

53. The fact that ICJ considered that the United Nations may have to bear expenses deriving from *ultra vires* acts of an organ reflects policy considerations that appear even stronger in relation to wrongful conduct, because denying attribution of conduct may deprive third parties of all redress, unless conduct could be attributed to a State or another organization.⁸³ The need to protect third parties requires an extension of attribution of conduct for the same reason that underpins the validity of treaties concluded by an international organization, notwithstanding minor infringements of rules concerning competence to conclude treaties.⁸⁴ While in that context it may be argued that protection of third parties should be limited to those that relied in good faith on the organ’s or official’s conduct,⁸⁵ the same rationale does not apply in most cases of responsibility for unlawful conduct.

⁸² *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, I.C.J. Reports 1962, p. 168.

⁸³ Dorigo, “Attribution and international responsibility for conduct of UN peacekeeping forces”, pp. 933–935, held that if a national contingent acts *ultra vires* because of pressure by the contributing State, conduct should be attributed only to that State.

⁸⁴ Reference is made here to article 46 of the 1986 Vienna Convention.

⁸⁵ For that concern, see Arsanjani, “Claims against international organizations: *quis custodiet ipsos custodes*”, p. 153; and Aramburu, “Responsabilidad de los organismos internacionales y jurisprudencia argentina”, p. 4. Reinisch, *International Organizations before National Courts*, pp. 80–81, appears to link responsibility to the validity of the *ultra vires* act.

⁸¹ I.C.J. Reports 1996 (see footnote 40 above), p. 78, para. 25.

54. A distinction between the conduct of organs and officials, on the one hand, and that of persons entrusted with part of the organization's functions, on the other hand, would find little justification in view of the limited significance that the distinction carries in the practice of international organizations.⁸⁶ ICJ appears to have also asserted the organization's responsibility for *ultra vires* acts 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:

[I]t 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.⁸⁷

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

55. As with State organs, for responsibility to arise there needs to be some connection between the entity's or person's official duties and the conduct in question. 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 peace-keeping 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 peace-keeping mission was acting in a non-official/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 operations.

... [W]ith regard to United Nations legal and financial liability, a member of the Force on a state of alert may none the less assume an off-duty 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 peace-keeping mission is on duty or off duty may depend in part on the particular factors of the case, taking into consideration the opinion of the Force Commander or Chief of Staff.⁸⁸

While the "off-duty" conduct of a member of a national contingent would not be attributed to the organization,⁸⁹

⁸⁶ The Committee on Accountability of International Organisations of the International Law Association suggested the following rule:

"The conduct of organs of an IO [international organization] or of officials or agents of an Organisation shall be considered an act of that Organisation under international law if the organs or official or agent were acting in their official capacity, even if that conduct exceeds the authority granted or contravenes instructions given (*ultra vires*)."

(International Law Association, *op. cit.*, p. 797)

⁸⁷ *I.C.J. Reports 1999* (see footnote 26 above), p. 89, para. 66.

⁸⁸ *United Nations Juridical Yearbook, 1986* (United Nations publication, Sales No. E.94.V.2), p. 300.

⁸⁹ 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*

the "on-duty" conduct may be so attributed, although one would have to consider how any *ultra vires* conduct relates to the functions entrusted to the person concerned.

56. The General Counsel of IMF wrote:

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.⁹⁰

A similar concept, although differently worded, may be found in the judgement given by the Court of Justice of the European Communities in *Sayag v. Leduc*:

By referring at one and the same time to damage caused by the institutions and to that caused by the servants of the Community, article 188 [of the Treaty establishing the European Atomic Energy Community] indicates that the Community is only liable for those acts of its servants which, by virtue of an internal and direct relationship, are the necessary extension of the tasks entrusted to the institutions.⁹¹

57. Draft article 7 on responsibility of States for internationally wrongful acts reads as follows:

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.⁹²

The key wording "in that capacity" refers to a relation that must exist between the *ultra vires* conduct and the functions entrusted to the organ, entity, person or official. The commentary makes this clearer by stating:

Cases where officials acted in their capacity as such, albeit unlawfully or contrary to instructions, must be distinguished from cases where the conduct is so removed from the scope of their official functions that it should be assimilated to that of private individuals, not attributable to the State.⁹³

Although the wording "in that capacity" is rather cryptic and vague,⁹⁴ it seems preferable to keep it. This would show that there is no need to elaborate for international organizations, under this respect, a different rule from that applying to a State.⁹⁵

58. Some minor changes in the wording used in draft article 7 on responsibility of States for internationally

Nations Juridical Yearbook, 1979 (United Nations publication, Sales No. E.82.V.1), p. 205.

⁹⁰ Letter from the General Counsel of IMF, Mr. François Gianviti, dated 7 February 2003 addressed to the Secretary of the Commission.

⁹¹ Judgement of 10 July 1969, case 9/69, *European Court Reports*, vol. XV (1969–1), p. 336 (recital 7). The Court noted that "[a] servant's use of his private car for transport during the performance of his duties does not satisfy the conditions set out above" (*ibid.*, recital 9).

⁹² See footnote 5 above.

⁹³ *Yearbook ... 2001*, vol. II (Part Two), p. 46, para. (7) of the commentary to article 7.

⁹⁴ Brownlie, *System of the Law of Nations: State Responsibility*, p. 147, noted that "the Commission formulates a principle in tautologous terms. Whilst wishing to avoid a basis for avoidance of responsibility, refuge is taken in imprecision". For examples of the variety of interpretations of the term "in that capacity" in this context, see Condorelli, "L'imputation à l'Etat d'un fait internationalement illicite: solutions classiques et nouvelles tendances", p. 94, and Fischer, *La responsabilité internationale de l'Etat pour les comportements ultra vires de ses organes*, pp. 234–235.

⁹⁵ Identity of solutions for States and international organizations was advocated by Klein, *op. cit.*, p. 390; Pitschas, *op. cit.*, pp. 56 and 60; and Daillier and Pellet, *Droit international public*, p. 782.

wrongful acts are, however, required. First of all, the term “elements of the governmental authority” is appropriate for States, but applies only in very limited cases to international organizations. The reference to organs, persons or entities could be aligned on the language used in draft article 4. The possessive “its” in the last line of draft article 7 is ambiguous and may be dropped.

59. The following wording is suggested:

“Article 6. Excess of authority or contravention of instructions

“The conduct of an organ, an official or another person entrusted with part of the organization’s functions shall be considered an act of the organization under international law if the organ, official or person acts in that capacity, even though the conduct exceeds authority or contravenes instructions.”

CHAPTER V

Conduct acknowledged and adopted by an international organization as its own

60. The relevance of acknowledgement and adoption of conduct after it has taken place may be viewed as reflecting a “principle ... of agency or ratification”.⁹⁶ It could also be viewed as the result of a procedural rule, relating to evidence. Whatever view is taken, it would seem unreasonable for the Commission to take a different approach from the one that led it to adopt article 11 on responsibility of States for internationally wrongful acts.⁹⁷ Nor is there any reason for establishing for international organizations a different rule from the one which has been adopted with regard to States.

61. Moreover, there are a few recent examples of practice relating to acknowledgement or adoption on the part of international organizations. One is to some extent doubtful because it relates to adoption of responsibility rather than specifically to attribution of conduct.⁹⁸ In the oral pleadings before a WTO panel in the *European Communities—Customs Classification of Certain Computer Equipment* case, confronted with claims brought by the United States against Ireland and the United Kingdom, 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 had been taken at the EC level or at the level of member States.⁹⁹

62. A clearer case is given by a decision of Trial Chamber II of the International Tribunal for the Former Yugoslavia, which in *Prosecutor v. Dragan Nikolić* considered the question of the attribution to the Stabilization Force (SFOR) of the accused’s arrest. The Chamber first noted that the Commission’s draft articles on responsibility of States for internationally wrongful acts were “not binding on States”.¹⁰⁰ It then referred to draft article 57 and observed that the articles were “primarily directed at the

responsibilities of States and not at those of international organisations or entities”.¹⁰¹ 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”.¹⁰² This led the Chamber to quote extensively draft article 11 and the related commentary.¹⁰³ 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 [International Law Commission]. 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”.¹⁰⁴

The Chamber concluded that the conduct of SFOR did not “amount to an ‘adoption’ or ‘acknowledgement’ of the illegal conduct ‘as their own’”.¹⁰⁵

63. The text to be suggested may be perfectly parallel to draft article 11 on responsibility of States for internationally wrongful acts. It would read as follows:

“Article 7. Conduct acknowledged and adopted by an international organization as its own

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

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*, para. 61.

¹⁰³ *Ibid.*, paras. 62–63.

¹⁰⁴ *Ibid.*, para. 64.

¹⁰⁵ *Ibid.*, para. 66. 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 cases of abductions carried out by private individuals whose actions, unless instigated, acknowledged or condoned by a State, or an international organisation, or other entity, do not necessarily in themselves violate State sovereignty” (“Decision on interlocutory appeal concerning legality of arrest”, case No. IT-94-2-AR73 (5 June 2003), para. 26.

⁹⁶ Brownlie, *op. cit.*, p. 158.

⁹⁷ See footnote 5 above.

⁹⁸ See footnote 15 above.

⁹⁹ *Ibid.*

¹⁰⁰ “Decision on defence motion challenging the exercise of jurisdiction by the Tribunal”, case No. IT-94-2-PT, para. 60.

CHAPTER VI

Other cases of attribution of conduct to an international organization

64. The chapter on attribution of conduct to a State in the draft articles on responsibility of States for internationally wrongful acts¹⁰⁶ contains four other provisions which seem to be of limited interest with regard to international organizations. This suggests that one should refrain from writing parallel texts and leave open the possibility of an application by analogy of the rules established for States in the rare cases in which a problem of attribution that is covered by one of these articles may arise.

65. Draft article 5 on responsibility of States for internationally wrongful acts concerns “Conduct of persons or entities exercising elements of governmental authority”. As already noted, the term “governmental authority” cannot be appropriately used with regard to international organizations. Moreover, the definition suggested in draft article 4 as a general rule on attribution covers all cases in which a person is entrusted with part of the organization’s functions. Insofar as entities are concerned, the General Counsel of IMF stated:

[S]tate responsibility rules on attribution that deal with acts of external entities are of limited, if any, relevance to international organizations. We know of no case in which the act of an external entity has been attributed to the IMF and, in our view, no act of an entity external to the

IMF could be attributable to the IMF unless an appropriate organ of the IMF ratified or expressly assumed responsibility for that act.¹⁰⁷

While this statement mainly relates to IMF, entities that are entrusted with some of the organizations’ functions tend to be located inside the structure of the organization.

66. The wide definition in draft article 4 on responsibility of States for internationally wrongful acts gives little scope for an additional rule modelled on draft article 8 (Conduct directed or controlled by a State). This is all the more so as the reference to practice in draft article 4 allows one to take into account situations of factual control, which characterize draft article 8 and may be harder to comprise in draft article 4.

67. Draft article 9 (Conduct carried out in the absence or default of the official authorities”) and draft article 10 (Conduct of an insurrectional or other movement) on responsibility of States for internationally wrongful acts presuppose control of territory. Despite a few recent developments, this is a rare event for an international organization. A parallel case to that envisaged for a State in draft article 10—which would involve an insurrectional movement becoming a “new Government” (art. 10, para. 1)—would be particularly unlikely.

¹⁰⁶ See footnote 5 above.

¹⁰⁷ See footnote 90 above.