RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

[Agenda item 3]

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Comments and observations received from international organizations

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CONTENTS

Multilateral intruments cited in the present report

	Source
Articles of Agreement of the International Monetary Fund (Washington, 27 December 1945)	United Nations, *Treaty Series*, vol. 2, No. 20, p. 39.
Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950)	*Ibid*., vol. 213, No. 2889, p. 221.
Treaty establishing the European Economic Community (Treaty of Rome) (Rome, 25 March 1957)	*Treaties establishing the European Communities* (Luxembourg, Office for Official Publications of the European Communities, 1987), p. 207.
International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966)	United Nations, *Treaty Series*, vol. 993, No. 14531, p. 3.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	*Ibid*., vol. 1833, No. 31363, p. 3.

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Introduction

1. At its fifty-fifth session, in 2003, the International Law Commission asked the Secretariat to circulate, on an annual basis, the portions of its report relevant to the topic "Responsibility of international organizations" to international organizations for their comments.[1] Pursuant to that request, selected international organizations were invited to submit their comments on the relevant portions of the Commission's 2003 to 2006 reports.[2] Most recently, the Commission sought comments on chapter VII of its 2006 report[3] and on the issues of particular interest to it noted in paragraphs 27–28 of that report.[4]

2. As at 30 April 2007, written comments had been received from the following three international organizations (dates of submission in parentheses): European Commission (18 December 2006); IMF(12 March 2007); OPCW (8 January 2007). Those comments are reproduced below, in a topic-by-topic manner.

[1] *Yearbook ... 2003*, vol. II (Part Two), p. 18, para. 52.

[2] The written comments of international organizations received prior to 12 May 2006 are contained in *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/545, *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/556 and *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/568 and Add.1.

[3] *Yearbook ... 2006*, vol. II (Part Two).

[4] Paragraphs 27–28 of *Yearbook ... 2006*, vol. II (Part Two) read as follows:

"27. The Commission would welcome comments and observations from Governments and international organizations on draft articles 17 to 30, in particular on those relating to responsibility in case of provision of competence to an international organization (draft article 28) and to responsibility of a State member of an international organization for the internationally wrongful act of that organization (draft article 29).

"28. The Commission would also welcome views from Governments and international organizations on the two following questions, due to be addressed in the next report:

"(*a*) Do members of an international organization that are not responsible for an internationally wrongful act of that organization have an obligation to provide compensation to the injured party, should the organization not be in a position to do so?

"(*b*) According to article 41, paragraph 1, on responsibility of States for internationally wrongful acts, when a State commits a serious breach of an obligation under a peremptory norm of general international law, the other States are under an obligation to cooperate to bring the breach to an end through lawful means. Should an international organization commit a similar breach, are States and also other international organizations under an obligation to cooperate to bring the breach to an end?"

Comments and observations received from international organizations

A. General remarks

European Commission

The European Commission largely supports draft articles 17–24 on circumstances precluding wrongfulness, but it has some concerns as regards certain details of the new draft articles 28–29 in the chapter on responsibility of a State in connection with the acts of international organizations. The European Commission hopes that the International Law Commission will take good note of these concerns.

International Monetary Fund

Before addressing the specific articles, IMF would like to reiterate some of the general points that it had made on earlier occasions regarding the Commission's approach to this topic.

First, IMF does not believe that it is appropriate to rely on the rules applicable to State responsibility when analysing the international responsibility of international organizations. As has been recognized by ICJ, international organizations, unlike States, do not possess general competence. An international organization is established by the agreement of its membership for the specific purposes set out in its constituent agreement. Unless that agreement itself is inconsistent with international law (in which case the wrongfulness of the agreement should be attributed to the member States rather than to the organization), the responsibility of the organization should be assessed by reference to whether it has acted in accordance with that agreement, i.e. whether it has acted *ultra vires*. In addition, and consistent with the above, while States are organizationally and functionally similar to each other, the powers and functions of international organizations will vary, depending on the terms of their charters. These distinctions must be taken into consideration when assessing the international responsibility arising from acts of different organizations.

Secondly, when an organization acts in accordance with the terms of its constituent charter, such acts can only be wrongful in relation to another norm of international law if the other norm in question is either a "peremptory norm" (*jus cogens*) or arises from a specific obligation that has been incurred by the organization in the course of its activities (e.g. by entering into a separate treaty with another subject of international law). However, *vis-à-vis* all other norms of international law, both the charter and the internal rules of the organization would be *lex specialis* as far as the organization's responsibility is concerned and, accordingly, cannot be overridden by *lex generalis*, which would include the provisions of the draft articles.

Finally, IMF continues to be uncertain as to the basis for the proposed norms that are being developed. It recognizes that article I of the Commission's statute provides that the "Commission shall have for its object the promotion of the progressive development of international law and its codification".[1] The Commission has not indicated whether the draft provisions under consideration represent a codification of existing principles, or alternatively, are intended for the progressive development of the law. If the former provides the basis for the current work, it would be helpful if the Commission identified the practice that is being codified in each instance. If, however, the latter approach is being followed, IMF thinks it important that the study elaborate on the policy bases for the recommendations.

[1] General Assembly resolution 174 (II) of 21 November 1947, annex, para. 1.

IMF recognizes that these points have been made by the Fund on earlier occasions. Nevertheless, from its review of the Commission's responses to the comments it made on earlier occasions, it appears the Commission has not yet responded to these general—and fundamental—issues. IMF would be very grateful if it could do so.

Before commenting on draft articles 17–30, IMF takes this opportunity to comment on certain previously adopted draft articles, in the expectation that these comments will be considered in future readings of these draft articles by the Commission. Moreover, the comments on these previous draft articles would also be relevant to draft articles 25–30, on which comments have now been sought.

Organization for the Prohibition of Chemical Weapons

The draft articles under consideration could be roughly divided into two groups: (*a*) adaptations of the articles on responsibility of States for internationally wrongful acts[1] (draft arts. 17–27 and 30); and (*b*) articles that are unique to the present draft (draft arts. 28–29). The comments below are arranged accordingly.

For the most part, the text of draft articles 17–27 and 30 differs from that of the respective Commission articles on responsibility of States for internationally wrongful acts insofar as the term "State" is replaced with the term "international organization" (or "organization") since, as far as the above articles are concerned, the position of international organizations does not significantly differ from that of States. Sometimes other adjustments are made, which do not raise any apparent difficulties, and a great deal of case law is quoted in support of the draft provisions. Where there is no or little State practice cited, there does not appear, in the view of OPCW, to be any controversy regarding the subject matter of a given draft article.

As has already been mentioned before, articles 28–29 are unique to the draft articles on responsibility of international organizations for internationally wrongful acts, which would largely explain the vagueness, at times bordering on elusiveness. Of course, it is very likely that the ambiguity is intentional, but it certainly should not result in incomprehensibility. Inclusiveness should not come at the expense of clarity.

[1] *Yearbook ... 2001*, vol. II (Part Two), p. 26.

B. Draft article 3. General principles*

International Monetary Fund

Paragraphs 8–10 of the Special Rapporteur's third report[1] suggest that conduct mandated by the lawful exercise of an organization's decision-making process could give rise to a breach of the organization's obligations.[2] This suggestion is based on the Special Rapporteur's view that "difficulties with compliance due to the political decision-making process are not the prerogative of international organizations".[3]

IMF cannot agree. The decision-making processes of international organizations are legal imperatives in their own right; they are typically established in the organizations' charters. Whatever politics may be involved in reaching particular decisions, compliance with the decision-making process is not a political choice. Unlike a State, an international organization is not sovereign in this regard; it is an instrument of its charter.

The Special Rapporteur's reliance upon United Nations activities in Rwanda and Srebrenica appear misplaced. For example, the cited report on Rwanda seems to address the "responsibility" of the United Nations in a moral sense only. Nowhere in that report is there any suggestion that the United Nations had legal responsibility under international law. Moreover, these examples highlight the reservations previously expressed by IMF, i.e. that the Commission should not attempt to use practice from peacekeeping or use of force to develop principles that would apply to other activities of international organizations, such as developmental and financial activities.[4]

IMF wishes to emphasize again that the fundamental parameters within which all of an international organization's obligations must be contained are established in the constituent agreement of the organization, since the outer limits of what the members have agreed to are set out in that charter. International organizations are limited in their capacity and their obligations are inherently limited by the same capacity—those capacity limitations are established by the organization's charter. This issue is also discussed in a paper presented by the former General Counsel of IMF to the United Nations Committee on Economic, Social and Cultural Rights in 2001, and IMF invites the Commission's particular attention to this paper.[5]

[4] See, for example, *Yearbook ... 2004* (footnote 2 of the Introduction above), paras. 6–8, for some prior comments of IMF in this regard.

[5] Gianviti, "Economic, social and cultural human rights and the International Monetary Fund" (discussing the extent to which provisions of the International Covenant on Economic, Social and Cultural Rights have legal effect on IMF, the extent to which IMF is obligated to contribute to the achievement of the objectives of the covenant and the extent to which IMF may contribute to these objectives under its Articles of Agreement).

C. Draft article 8. Existence of a breach of an international obligation*

International Monetary Fund

IMF has two comments on this draft article.

First, critical issues arise from the relationship between (*a*) the treatment in the draft articles of the breach of an international obligation by an international organization and (*b*) the treatment of the same act under the rules of the organization.

The commentary to the draft articles asserts, in this regard, that the rules of an organization "do not necessarily prevail over principles set out in the present draft [articles]".[1] IMF sees no legal basis for this assertion.

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

[1] *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/553, chap. I.

[2] See, for example, *Yearbook ... 2004* (footnote 2 of the Introduction above), sect. A.2, for some of the IMF concerns in this regard.

[3] *Yearbook ... 2005* (see footnote 1 above), para. 9.

* *Yearbook ... 2005*, vol. II (Part Two), para. 205.

[1] *Yearbook ... 2005*, vol. II (Part Two), para. 206, para. (7) of the commentary to article 8.

Nothing in these draft articles suggests that they contain peremptory norms or even principles that are now part of general or customary international law.

To the extent that the Commission seeks to contribute to the progressive development of international law, it is difficult to see how the quoted assertion achieves this aim. The report itself demonstrates considerable divergence of views on this question among members of the Commission, and the assertion would only create uncertainty, where there currently is none, among organizations as to the content and applicability of rules governing their actions. As noted above, and in its comments of 1 April 2005,[2] IMF is of the opinion that a far better view is that the rules of an organization are not just part of international law, but are *lex specialis* under international law in determining the obligations of the international organization. Moreover, international agreements between an organization's members, and other rules of the organization address the exclusive application of the laws governing their relations. Clearly, then, the general principles contained in the draft articles (as *lex generalis*, to the extent that they reflect obligations binding on all international organizations), would not prevail over the rules of the organization, as *lex specialis*.

For the above-mentioned reasons, IMF reiterates its general comment that the issue of whether there is a breach of an international obligation by an international organization can only be determined by reference to the rules of the organization (save in exceptional cases involving peremptory norms of general international law).

Secondly, and without prejudice to the foregoing, it would be useful to clarify why draft article 8, paragraph 2, is needed. The commentary states that paragraph 2 "intends to say that, to the extent that an obligation arising from the rules of the organization has to be regarded as an obligation under international law, the principles expressed in the present draft apply".[3] However, by its language, draft article 8, paragraph 1, is sufficient, since it applies to international obligations regardless of their origin and character. Therefore, to the extent an obligation arising from the rules of an organization has to be regarded as an obligation under international law, it would already be covered by draft article 8, paragraph 1. If this is correct, draft article 8, paragraph 2, can be deleted, as it adds little. Issues associated with the application of draft article 8 to the rules of the organization can be sufficiently addressed in the commentary to the draft articles.

[2] *Ibid.*, vol. II (Part One), document A/CN.4/556, sect. L.3.

[3] *Ibid.*, vol. II (Part Two), para. 206, para. (6).

D. Draft article 11. Breach consisting of a composite act*

INTERNATIONAL MONETARY FUND

Draft article 15 of the articles on responsibility of States for internationally wrongful acts, on which article 11 is based, deals with composite acts. These are "acts … which concern some aggregate of conduct and not individual acts as such" and which "give rise to continuing breaches, which extend in time from the first of the actions or omissions in the series of acts making up the wrongful conduct".[1]

Given the limited capacity of international organizations, it is not readily evident that all international organizations would be subject to obligations that could be breached by composite acts. It would therefore be useful if the Commission could provide examples of specific composite acts and related obligations contemplated with regard to international organizations.

[1] *Yearbook … 2001*, vol. II (Part Two), p. 62, paras. (1)–(2) of the commentary to article 15.

E. Responsibility of an international organization in connection with the act of a State or another international organization: general considerations

INTERNATIONAL MONETARY FUND

IMF is unable to concur with the assumptions underlying this chapter of the draft articles. These assumptions are encapsulated in the following statement drawn from the commentary to the draft articles:

> For the purposes of international responsibility, there would be no reason for distinguishing the case of an international organization aiding or assisting a State or another international organization from that of a State aiding or assisting another State.[1]

First, in its comments of 1 April 2005, IMF had outlined its reasons for the view that an international organization's role in conduct by a State or another organization is inherently different from one State's role in the conduct of another State.[2] As explained in the preceding general comments, States and international organizations are fundamentally different in this respect. IMF again draws the Commission's attention to these general observations and to those set out in paragraphs 13–17 of its comments of 1 April 2005.[3]

Secondly, as explained in the Fund's general comments above, the effects of and responsibility for an international organization's role in conduct by a member State are both generally and exclusively governed by the rules of each international organization. The relevant rules applicable to each international organization are varied in substance. To the extent an attempt is being made to progressively develop general principles in this area, this should primarily be based on the specific rules of the various international organizations, before relying on provisions that were drawn up from, and were intended to apply exclusively to, relations between States.

[1] *Yearbook … 2005*, vol. II (Part Two), para. 206, p. 44, para. (1) of the commentary to chapter IV.

[2] *Ibid.*, vol. II (Part One), document A/CN.4/556, sect. N.3.

[3] *Ibid.* Among other things, IMF noted in those comments that States and international organizations seldom have identical or even similar obligations. Thus, the situations envisaged in draft articles 12, 13 and 15 will seldom, if ever, arise. By way of example, the respective obligations of IMF and of States Members of the United Nations as regards decisions of the Security Council under Chapter VII of the Charter of the United Nations are very different. While Member States are obliged to carry out such decisions under the Charter, the United Nations has recognized and agreed with IMF that the Fund's only obligation is to "have due regard for" such decisions, as discussed (see section U.2 below).

* *Yearbook … 2005*, vol. II (Part Two), para. 205.

Thirdly, the principle that *lex specialis* prevails over *lex generalis* would also apply to such general principles. Therefore, the specific rules of an organization governing relations with member States would prevail over any general principles on the responsibility of international organizations for aid or assistance provided to States generally.

Finally, it is useful to note that the statement that there would be "no reason" for distinguishing such cases appears to be contradicted by the Commission's admission later in the commentary, i.e. that the consequences of the ability of international organizations to influence State conduct through non-binding acts "does not have a parallel in the relations between States".[4]

[4] *Ibid.*, vol. II (Part Two), para. 206, p. 44, para. (3) of the commentary to chapter IV.

F. Draft article 12. Aid or assistance in the commission of an internationally wrongful act*

INTERNATIONAL MONETARY FUND

For the reasons stated in the above paragraphs, IMF is unable to concur with the proposition that the application of article 16 of the draft articles on responsibility of States for internationally wrongful acts to international organizations "is not problematic",[1] and it cannot agree with the blanket application of article 16 of the draft articles on State responsibility to international organizations.

In addition, it should be emphasized, in line with the commentary to article 16 of the draft articles on responsibility of States for internationally wrongful acts, that "aid or assistance"[2] as used in those draft articles entails knowingly and intentionally providing a facility or financing that is essential or contributed significantly to the wrongful conduct in question. Given the fungible nature of financial assistance, such references in the case of financial assistance can only mean assistance that is earmarked for the wrongful conduct. This should be distinguished from the aid and assistance, as those words are used colloquially, which international organizations regularly provide to their members.

For example, IMF was established, *inter alia*, to provide financial assistance to its members to assist in addressing their balance of payment problems. Consistent with its charter, IMF regularly provides such financial assistance.

That said, a member receiving financial assistance from IMF may still engage in wrongful conduct. Neither IMF itself, nor the provision of financial assistance by IMF, is capable of precluding such conduct or contributing significantly to it. First, IMF cannot preclude such conduct because, as explained in its comments to draft article 14 below, a member always has an effective choice not to follow the conditions on which IMF assistance is provided. Secondly, IMF cannot contribute significantly to such conduct because IMF financing is not targeted to particular conduct; it is provided to support a member's economic programme that addresses its balance of payment problems. The financial resources utilized by the member to engage in particular conduct can be, and typically are, obtained from a variety of sources—domestic taxpayers, domestic and international creditors and international donors. The fungible character of financial resources also means that IMF financial assistance can never be essential, or contribute significantly, to particular wrongful conduct of a member State, for purposes of this draft article 12.[3]

[3] The Special Rapporteur also acknowledges this view in his third report (*Yearbook ... 2005*, vol. II (Part One), document A/CN.4/553) by reference in footnote 41, to the article by Shihata, "Human rights, development and international financial institutions", p. 35.

G. Draft article 13. Direction and control exercised over the commission of an internationally wrongful act*

INTERNATIONAL MONETARY FUND

While recognizing the relevance to international organizations of the principle in article 17 of the draft articles on responsibility of States for internationally wrongful acts, IMF has great difficulty with the broad expansion of that principle found in the commentary to the present draft article 13. The adoption of a decision by an international organization that is legally binding upon its member States is not the same as direction or control by the organization, any more than the invocation of a binding contractual commitment would as a general matter constitute direction or control over a contractual counterparty. The international organization's decision is legally binding only because of the bound State's prior consent to the legal regime under the organization's charter. This circumstance simply cannot be equated to direction and control of a dependent State by a dominant State. This principle of direction and control would therefore clearly not apply to organizations, such as international financial institutions, that are incapable of the threat or use of force. This issue is further explained in the Fund's comments on draft article 15 below, and the Commission's attention is drawn to those comments as well.

* *Yearbook ... 2005*, vol. II (Part Two), para. 205.

H. Draft article 14. Coercion of a State or another international organization*

INTERNATIONAL MONETARY FUND

Again, IMF is compelled to take exception to the expansion of a principle on State responsibility in the commentary to draft article 14. A binding decision of an international organization cannot constitute coercion, which is defined in the commentary to article 18 on responsibility of States for internationally wrongful acts as "[n]othing less than conduct which forces the will …giving [the coerced State] no effective choice but to comply".[1] Because of member States' acceptance of and

* *Yearbook ... 2005*, vol. II (Part Two), para. 205.

[1] *Yearbook ... 2001*, vol. II (Part Two), p. 69, para. (2) of the commentary to article 18.

* *Yearbook ... 2005*, vol. II (Part Two), para. 205.

[1] *Yearbook ... 2005*, vol. II (Part Two), para. 206, commentary to article 12.

[2] *Yearbook ... 2001*, vol. II (Part Two), para. 66, para. (5) of the commentary to article 16.

participation in the decision-making processes, IMF does not see how the Commission could conclude that binding decisions of an international organization could be equated with coercion in the above sense. This issue is further explained in the Fund's comments on draft article 15, and the Commission's attention is drawn to those comments.

Furthermore, IMF disagrees with the suggestion, in the Special Rapporteur's third report,[2] at paragraph 28, that an international financial institution's conditions for providing financial assistance to a member State could ever constitute coercion. The Special Rapporteur's reference to the reported filing of a lawsuit against IMF in Romania is inapposite; that failed attempt to bring a case against IMF stands for nothing in the law and is only a reminder of the perennial creativity of plaintiff lawyers. IMF welcomes the Commission's omission of that discussion from its own report, but nevertheless takes this opportunity to emphasize that a member State always has an effective choice between following the conditions of IMF financing, having recourse to other sources of external financing, or not accepting any external financing.

Two points are worth highlighting in this regard. First, as has been explained in various publications, including the rules of the Fund, the provision of IMF financing does not entail the establishment of contractual relations between IMF and the member obtaining financial assistance.[3] Therefore, a member's inability to or desire not to comply with a condition for the provision of such financing does not result in a breach of obligation by the member. Secondly, while IMF is fully responsible to its membership for the establishment and monitoring of conditions attached to the use of its resources, in responding to members' requests to use these resources and in setting these conditions, IMF is "guided by the principle that the member has primary responsibility for the selection, design and implementation of its economic and financial policies".[4]

[2] *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/553.

[3] See, for example, IMF Guidelines on Conditionality, decision No. 12864–(02/1020) of 25 September 2002, as amended by decision No. 13814–(06/98) of 15 November 2006, *Selected Decisions and Selected Documents of the International Monetary Fund*, 31st issue (Washington, D.C., 31 December 2006), p. 250. See also Gold, *Financial Assistance by the International Monetary Fund: Law and Practice*, pp. 17–19.

[4] IMF Guidelines on Conditionality (see footnote 3 above).

I. Draft article 15. Decisions, recommendations and authorizations addressed to member States and international organizations*

International Monetary Fund

IMF wishes to echo and endorse the concerns and reservations that were expressed by INTERPOL and WHO and reproduced in the report of the Special Rapporteur, regarding draft article 15, which purports to hold an international organization responsible for an act by a member State or another international organization, committed not with the aid or assistance, direction or control of the first organization, but merely in reliance upon a binding or non-binding decision, authorization or recommendation of that organization.[1]

Furthermore, for the reasons set out below, IMF believes this draft article should be deleted in its entirety.

As stated in its comments of 1 April 2005,[2] this draft article appears to be based on a contradiction manifesting a fundamental misconception of an international organization's capacity to act inconsistently with its international obligations.

When conduct is "authorized" under the rules of an international organization, the fact that the organization can lawfully "authorize" that conduct necessarily implies that the conduct is not a violation of the organization's charter. If the conduct does not violate the organization's charter, the only question that remains is whether the conduct is consistent with the organization's other international obligations. Because an international organization is created by, and therefore primarily subject to, its charter, the international organization's other obligations are required to be consistent with the charter. It follows, as indicated in the general comments above, that this situation could only arise where the other obligation derives from a peremptory norm or a specific bilateral obligation entered into between the organization and another subject of international law.

The contradiction contained in this draft article 15 is also manifest in the commentary to the draft article. For instance, the commentary states that since compliance with an international organization's binding decisions is to be expected, it appears preferable to hold the organization responsible even before any act implementing such decisions has been committed.[3] This proposition suggests that the act of taking a binding decision alone constitutes wrongful conduct, as this act gives rise to the breach of an obligation. Since the act of taking a binding decision must necessarily be consistent with the organization's charter, that act by itself cannot amount to wrongful conduct which gives rise to the breach of an obligation of that international organization. As such, this proposition is inconsistent with the fundamental principle that there must be conduct constituting a breach of an international obligation for responsibility to arise.[4]

IMF is also unable to agree with the assertion in the commentary to this draft article 15 that where a decision of an international organization allows "the member State or [other] international organization some discretion to take an alternative course which does not imply circumvention, responsibility would arise for the international organization that has taken the decision only if circumvention actually occurs".[5]

* *Yearbook ... 2005*, vol. II (Part Two), para. 205.

[1] *Yearbook … 2006*, vol. II (Part One), document A/CN.4/568 and Add.1, sect. I.

[2] *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/556, sect. N.3.

[3] *Ibid.*, vol. II (Part Two), para. 206, para. (5) of the commentary to article 15.

[4] See article 2 of the draft articles on responsibility of States for internationally wrongful acts (*Yearbook ... 2001*, vol. II (Part Two), p. 26) and article 3 of the present draft articles on the responsibility of international organizations (*Yearbook ... 2005*, vol. II (Part Two), para. 205).

[5] *Yearbook ... 2005*, vol. II (Part Two), para. 206, para. (7) of the commentary to article 15.

States are independent actors. The mere recommendation or specification of a certain objective by an international organization, which a State (or other international organization) decides to then achieve in a manner of its own determination, cannot result in international responsibility for the organization that authorizes, recommends or specifies the objective. For the same reason, reliance on such authorization or recommendation cannot be a sufficient basis to attribute responsibility to the international organization.

As expressed in its comments of 1 April 2005, an international organization cannot be responsible for the manner in which its membership, or non-member States, or other international organizations, choose to implement, or not, the organization's decisions, authorizations or recommendations.[6] Likewise, INTERPOL had explained previously that action by a country pursuant to an authorization by, or cooperation with, an international organization does not engage the responsibility of the international organization merely by reason of such authorization or cooperation.[7]

The Special Rapporteur, in his third report, recognized that there are no clear examples in practice of an international organization being responsible for acts of its member States taken under a binding decision or an authorization of the organization where such acts would have been internationally wrongful if taken by the organization itself.[8]

In view of the above, the assertion, as in paragraph (8) of the commentary to draft article 15, that an organization's authorizations and recommendations are "susceptible of influencing the conduct of member States"[9] or others is insufficient to establish the responsibility of the international organization. Mere susceptibility to influence the conduct of another is not a recognized test for legal responsibility. If it were, there would be no need for the qualifications and limitations upon responsibility for aid or assistance, direction or control, or coercion of another, that are incorporated in articles 16–18 on responsibility of States for internationally wrongful acts,[10] and their counterparts at draft articles 12–14, and 25–27 of the current project. Draft article 15 and its analogue draft article 28, discussed below, potentially erase all of those qualifications and limitations. IMF sees no basis or rationale for the Commission to suggest that the inclusion of this provision represents either the codification or the progressive development of international law in this area.

[6] *Ibid.*, vol. II (Part One), document A/CN.4/556, sect. N.3.

[7] *Ibid.*, sect. N.2.

[8] *Ibid.*, document A/CN.4/553, paras. 27–28.

[9] *Ibid.*, vol. II (Part Two), para. 206, para. (8) of the commentary to article 15.

[10] *Yearbook ... 2001*, vol. II (Part Two), p. 27.

J. Circumstances precluding wrongfulness: general considerations

European Commission

Draft articles 17–24 follow very closely the model of the relevant articles on responsibility of States for internationally wrongful acts. In most cases this may be acceptable, but in others it is not.

The European Community recalls the diversity of the structures, forms and functions of international organizations and the fact that some of the concepts applying to States are not relevant in this context. This is most important for the European Union, given the specific nature of the organization and in the light of the direct applicability of European Community law to member States and its supremacy over national laws.

The European Community is also of the view that a clear distinction must be made between the legal positions of States that are members of international organizations, third States that recognize the organization and third States that explicitly refuse to do so.

K. Draft article 17. Consent*

European Commission

Draft article 17 is vitally important for many of the external relations activities of the European Community/European Union. When discussing draft article 17 on consent, the Special Rapporteur referred to invitations issued from States to the United Nations to verify their election processes. In addition to the Union civil crisis instruments, there is considerable European Community practice in the field. Under two regulations of 1999, the Community provides support for electoral processes, in particular by supporting independent electoral commissions, granting material, technical and legal assistance in preparing for elections, including electoral censuses, taking measures to promote the participation of specific groups, particularly women, in the electoral process and by training observers. Community election observation missions are usually led by a member of the European Parliament upon the invitation of the host Government. Article 17 is therefore of vital importance for the Union's external relations activities, which could otherwise be seen as undue interference in the domestic affairs of third States.

International Monetary Fund

Regarding the issue of consent discussed in draft article 17, an important example that should be included by the Commission in its commentary to the draft articles is the consent that occurs upon a State's accession to an international organization's charter.

The charter of an international organization is agreed to by its members. For example, the very first sentence in the Fund's Articles of Agreement reads: "The Governments on whose behalf the present Agreement is signed *agree** as follows."[1]

* *Yearbook … 2006*, vol. II (Part Two), para. 90.

[1] The preamble to the Charter of the United Nations contains a similar statement, that is: "Accordingly, our respective Governments ... have *agreed** to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations."

To the extent that an organization's conduct is therefore consistent with its charter, such conduct has been agreed to by the organization's members. Therefore, conduct of an organization that is taken consistent with the organization's charter has the consent of the organization's members and the wrongfulness of such conduct would *prima facie* be precluded *vis-à-vis* those members.[2]

This is another reason, additional to those based upon *lex specialis* and advanced in IMF responses to the Commission in its general comments above and in its comments made in prior years, why conduct by an international organization that is authorized by its rules cannot be internationally wrongful conduct *vis-à-vis* the organization's membership.

The preceding observations should not be read to suggest that consent can only arise in the case of dealings between an organization and its member States. The principle of consent precluding the wrongfulness of an organization's conduct would also apply to relations with non-members, to the extent that such consent is express or implied.

[2] It may also be noted that the Fund's Articles of Agreement do not allow any qualifications or reservations to the obligations of membership.

L. Draft article 18. Self-defence*

European Commission

On draft article 18 on self-defence, there is a need for further discussions as to how self-defence would apply in relation to an international organization. Much of the discussion in the International Law Commission commentary is based on the use of self-defence in peacekeeping operations, but that right arose in many cases from the terms of the mandate given to a peacekeeping force. It is difficult to extrapolate from those specific mandates a wider right that would exist in different circumstances.

International Monetary Fund

This draft article highlights the Fund's preceding general comment on the differences between international organizations. As the Commission notes, the issues addressed in draft article 18 (Self-defence) would only be relevant to a small number of organizations, such as those administering territory or deploying an armed force. It is unclear why a provision of such limited relevance is proposed to be included in draft articles that purport a wider applicability, i.e. to all international organizations, not just those engaged in administering territory or deploying an armed force. In contrast, article 21 of the draft articles on responsibility of States for internationally wrongful acts,[1] on which the present article 18 is based, was relevant and applicable to all States.

* *Yearbook … 2006*, vol. II (Part Two), para. 90.

[1] *Yearbook … 2001*, vol. II (Part Two), p. 27.

M. Draft article 19. Countermeasures*

International Monetary Fund

While recognizing the Commission's statement that the provision on countermeasures will be drafted at a later stage, IMF wishes to provide the following observations on the issue of countermeasures in the context of international organizations.

IMF is of the view that the wrongfulness of conduct by an international organization might also be precluded by the principle of countermeasures, i.e. because the conduct was undertaken to procure cessation of wrongful conduct against the organization. This view is based on the fact that in practice international treaties provide organizations with rights to undertake measures that are similar to countermeasures.

For example, under article V, section 5, of the Fund's Articles of Agreement, whenever IMF is of the opinion that a member is using the Fund's general resources in a manner contrary to the organization's purposes, upon issuing a report to the member setting forth those views and prescribing a suitable time for reply, IMF can limit the use of its general resources by such member. If no reply or an unsatisfactory reply is received, it may even declare the member ineligible to use the Fund's general resources. While such limitations on use of resources to which IMF members otherwise may have access involve the exercise of treaty-based rights by IMF, they are similar in effect to countermeasures that another organization might take to procure cessation of wrongful conduct against the organization.

* The text of this draft article will be drafted at a later stage, when the issues relating to countermeasures by an international organization are examined in the context of the implementation of the responsibility of an international organization.

N. Draft article 21. Distress*

European Commission

The European Community would like the International Law Commission to give examples of when distress would apply to an international organization and if it would ever extend to an international organization performing its normal humanitarian functions in respect of persons entrusted to its care.

* *Yearbook … 2006*, vol. II (Part Two), para. 90.

Organization for the Prohibition of Chemical Weapons

The commentary to the draft article quotes the commentary to article 24 on responsibility of States for internationally wrongful acts, particularly the example from practice of a British military ship entering Icelandic territorial waters to seek shelter during a heavy storm. This incident is described as follows: "[T]he author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other

persons entrusted to the author's care".[1] This wording implies that but for distress, the act of a British warship entering the Icelandic territorial sea would have been considered internationally wrongful.

The incident in question occurred in December 1975, at which time perhaps not all maritime powers recognized the right of warships to innocent passage through the territorial sea of a coastal State. The situation has changed now and the right of warships to innocent passage is reflected in the provisions of the United Nations Convention on the Law of the Sea as well as in State practice.[2] Thus, today a similar act would not be internationally wrongful as, under the Convention,[3] it would not be wrongful for reasons of *force majeure* or distress. Owing to developments in the international law of the sea and the current international recognition of the right of innocent passage for warships, the example given in the commentaries to the articles on responsibility of States for internationally wrongful acts may be somewhat outdated. Therefore, in order to avoid confusion, it might be specified that the position in general international law on this specific topic has changed.

[1] *Yearbook ... 2001*, vol. II (Part Two), p. 78, art. 24, para. 1.

[2] See especially the United States/Union of Soviet Socialist Republics joint statement with attached uniform interpretation of rules of international law governing innocent passage (*International Legal Materials*, vol. 28 (1989), p. 1444), and the Secretary-General of the United Nations' annual reports on the law of the sea.

[3] Article 18, paragraph 2, of the Convention on the meaning of passage provides:

> "Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress."

O. Draft article 22. Necessity*

European Commission

As regards draft article 22 on necessity, the Special Rapporteur reports that a majority of statements in the Sixth Committee had been in favour of including such an article among the circumstances precluding wrongfulness.[1] However, some States members of the European Union sounded a note of caution in this respect, citing the lack of relevant practice, the risk of abuse and the need to provide stricter conditions than those applying to States.

The European Commission would recommend further clarification of what is meant by "an essential interest" and when an international organization would have the "function to protect" that interest.

* *Yearbook … 2006*, vol. II (Part Two), para. 90.

[1] *Yearbook … 2006*, vol. II (Part One), document A/CN.4/564 and Add.1–2, para. 39.

International Monetary Fund

IMF would like to supplement its earlier observations on the topic of necessity.

When it addressed necessity in its correspondence to the Commission on 1 April 2005, IMF wondered whether international organizations could claim "essential interests" similar to those of States.[1] Following a very useful discussion of this issue with the Special Rapporteur and the then Chairman of the Drafting Committee, organized by the World Bank, IMF sees strong merit in the view that there could be interests essential to the purposes of an organization, which interests would allow an international organization to invoke the principle of necessity. Analogous principles, i.e. where a predominant interest overrides other stated purposes, are reflected in the rules of organizations.

For example, article VII, section 3, of the Fund's Articles of Agreement authorizes IMF formally to declare a member's currency scarce when it becomes evident that such scarcity "seriously threatens" the Fund's ability to supply such currency.[2] The declaration then operates as an authorization for IMF members, after consultation with IMF, to temporarily impose limitations on the freedom of exchange operations in the scarce currency. Without the "serious threat" referred to in article VII, the effect of such a declaration would be at odds with the Fund's purpose of assisting in the elimination of exchange restrictions.

For the above reasons, IMF urges a broader construction of "essential interest" than is suggested by the Commission's commentary on draft article 22.

[1] *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/556, sect. M.3.

[2] IMF has not to date had occasion to invoke article VII, section 3.

P. Responsibility of a State in connection with the act of an international organization: general considerations*

European Commission

On the one hand, for the reasons given by the Special Rapporteur, draft articles 25–27 and 30, which correspond to articles 16–18 of the draft articles on responsibility of States for internationally wrongful acts, look to be acceptable. However, such direct borrowing from the draft articles on State responsibility deserves careful attention. On the other hand, the new draft articles 28–29 are without precedent and merit close scrutiny. It is on these articles that the special character of the European Community causes particular problems.

* The location of this section will be determined at a later stage (see *Yearbook … 2006*, vol. II (Part Two), footnote 569).

Q. Draft articles 25–26*

International Monetary Fund

IMF concurs with the view that mere participation by a member State in the decision-making process of an international organization could not constitute aid or assistance in, or direction or control over, the commission of an internationally wrongful act by the organization.[1]

* *Yearbook … 2006*, vol. II (Part Two), para. 90.

[1] *Yearbook … 2006*, vol. II (Part Two), commentary to articles 25–26.

However, as indicated in its comments on draft article 12, it should be emphasized in line with the commentary to article 16 of the draft articles on responsibility of States for internationally wrongful acts, that "aid or assistance" entails knowingly and intentionally providing a facility or financing that is essential or contributed significantly to the wrongful conduct in question.[1] Given the fungible nature of financial assistance, such references in the case of financial assistance can only mean assistance that is earmarked for the wrongful conduct. The threshold of the aid or assistance being essential or contributing significantly to the act should be similarly included in draft article 25.

With regard to the suggestion, contained in the commentary to draft articles 25–26, of wrongfulness arising even in the case of conduct taken by the State within the framework of the organizations, IMF again draws the Commission's attention to the preceding general comments and to its comments on draft article 15. Specifically, when conduct is "authorized" under the rules of an international organization, the fact that the organization can lawfully "authorize" that conduct necessarily implies that the conduct is not a violation of the organization's charter. If the conduct does not violate the organization's charter, the only question that remains is whether the conduct is consistent with the organization's other obligations. As indicated above, this situation could only arise where the other obligation derives from a peremptory norm or a specific bilateral obligation entered into between the organization and another subject of international law.

R. Draft article 27. Coercion of an international organization by a State*

International Monetary Fund

IMF similarly concurs with the view that mere participation by a member State in the decisions of an international organization could not constitute coercion.[1] As the term has been used by the Commission, coercion means nothing less than conduct which forces the will, giving no effective choice but to comply.[2] A member State cannot be said to have coerced an international organization through its participation in the decision-making process, including by its exercise of a range of prerogatives a member State may possess pursuant to provisions contained in the charters of international organizations, including its withdrawal from the organization.

Also, based on the commentary to the draft articles on responsibility of States for internationally wrongful acts, IMF would note that serious financial pressure upon an international organization by a member State could only constitute coercion if it is such as to deprive the organization of any possibility of conforming with the obligation breached.[3]

This is not to say that there never could be situations of member States coercing international organizations, or *vice versa*, such as through the illegal use of force or illegal threat of force by one against another. But IMF cannot envisage any circumstance in which coercion could arise from those financial dealings between an international organization and member States which are contemplated under and carried out in accordance with the organization's charter and rules.

S. Draft article 28. International responsibility in case of provision of competence to an international organization*

European Commission

Draft article 28 puts forward the new idea that a State member of an international organization may be held responsible for bestowing competence on it. Paragraph 1 requires that a State "circumvents one of its international obligations by providing the organization with competence in relation to that obligation, and the organization commits an act that, if committed by that State, would have constituted a breach of that obligation". Paragraph 2 explains that State responsibility is triggered in such a situation irrespective of the question whether the act is internationally wrongful for the international organization itself. In other words, a State may be liable for the mere fact of transferring competence to an international organization, even if the organization acts lawfully, if and insofar as the State thereby "circumvents one of its international obligations".

From the point of view of the European Community/European Union, this approach is difficult to understand. Would member States face responsibility because they entrusted (by concluding the Treaty of Rome) the European Community, and in particular the European Commission, with the power to take antitrust decisions, because those decisions may or may not infringe certain procedural rights guaranteed under human rights law binding on the member States or be contrary to customary rules on the limits to jurisdiction? The Special Rapporteur's explanations are not particularly illuminating in this regard. His example "of a State that is a party to a treaty which forbids the development of certain weapons and that indirectly acquires control of those weapons by making use of an international organization which is not bound by the treaty"[1] seems to be a bit far-fetched.

But also the more relevant examples relating to the jurisprudence of the European Court of Human Rights (*Waite and Kennedy, Bosphorus*, and *Senator Lines* cases)[2] do not support the broad language of draft article 28. While the European Court emphasized that States

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* *Yearbook … 2006*, vol. II (Part Two), para. 90.

[1] *Yearbook … 2006*, vol. II (Part Two), para. (2) of the commentary to article 27.

[2] *Yearbook … 2001*, vol. II (Part Two), p. 69, para. (2) of the commentary to article 18.

[3] *Ibid.*, p. 70, para. (3).

* *Yearbook … 2006*, vol. II (Part Two), para. 90.

[1] *Yearbook … 2006*, vol. II (Part One), document A/CN.4/564 and Add.1–2, para. 66.

[2] *Waite and Kennedy* v. *Germany*, judgment of 18 February 1999, *Reports of Judgments and Decisions 1999–I*, p. 393; *Bosphorus Hara Yollari Turizm ve Ticaret Anonim Şirketi* v. *Ireland*, judgment of 30 June 2005, *ibid.*, *2005–VI*, p. 107; *Senator Lines GmbH* v. *Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom*, decision of 10 March 2004, *ibid.*, *2004–IV*, p. 331.

parties to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) may not evade their obligations by transferring powers to an international organization, it also underlined that State responsibility for an act of that organization does not arise where the organization offers a level of protection equivalent to that to which member States are held by international law, in this case the European Convention. This criterion of equivalence is simply missing in draft article 28. As the vague term "circumvention" does not require intent to escape from one's obligations, the draft seems overinclusive. At the very least, it would have to be clarified that there is no "circumvention" if a State transfers powers to an international organization which is not bound by the State's own treaty obligations, but whose legal system offers a comparable level of guarantees. Otherwise this draft article may be very difficult to accept for the European Community.

International Monetary Fund

IMF has serious concerns and reservations about this draft article. The Commission's commentary points out that this provision is analogous to draft article 15, another very troubling proposal that IMF has commented on above. IMF again draws the Commission's attention to those comments on draft article 15.

For the reasons set out below, it urges the Commission to delete this provision from the draft articles.

The provision envisages two theoretical scenarios: (*a*) the act is wrongful for the State but not wrongful for the organization; and (*b*) the act is wrongful for both the State and the organization.

In the former scenario, where the act is wrongful for the State, but is not wrongful for the organization, the issue of State responsibility should be determined solely by reference to the rules on State responsibility. A provision dealing with such a situation has no place in draft articles that concern the responsibility of international organizations.

The latter scenario, where the act is wrongful for both the State and the organization, seems entirely untenable and lacking support in law or practice. The Commission wrote that "[c]ircumvention is more likely to occur when the international organization is not bound by the international obligation".[1] IMF would go further and say that circumvention can only occur if the organization is not bound by the international obligation, because it can foresee no circumstance in which the State could validly grant competence to the international organization to breach their common obligation.

The Commission will find no support for this latter scenario in the line of cases from the European Court of Human Rights, cited in the commentary to draft article 28, concerning the protection of fundamental human rights from circumvention by States parties to the European Convention on Human Rights. As both of the cases cited noted, the obligations under the Convention were obligations of the Contracting Parties to those conventions. They were not obligations that could be readily imputed to all subjects of international law, least of all international organizations that are not parties to those conventions.[2] The decisions cited do not establish the wrongfulness of any conduct by the organizations concerned and therefore they do not bear upon a State's supposed circumvention through an international organization of their common obligation.

In advancing this latter scenario, the commentary also appears to suggest that international organizations can be vested with "competence" by a single member State. IMF does not understand how this could occur. As international organizations are created by treaties and as their competence can only be based on such treaties, it is necessary that the vesting of competence in such organizations necessarily requires action by more than one State. If the obligation in question is only binding on one or some of the States but not others, the Commission by this provision would purport to extend such obligations to the entire membership of an international organization, merely by reason of membership in the organization. This would be at odds with the rule, subsequently recognized by the Commission as a "clear" rule, that "membership does not as such entail for member States international responsibility when the organization commits an internationally wrongful act",[3] and with the numerous judgements on this point cited by the Commission. IMF therefore sees no basis for the extension of such obligations to all member States under international law.

In the event that the Commission sees fit to continue advancing the provision set out in draft article 28, a further material aspect would need to be considered (in addition to the two issues addressed above). The text from the *Bosphorus* case cited by the Commission contains a key temporal element that has not been addressed in the provision nor the commentary.[4] The Court, in that case, stated that the "State is considered to retain Convention liability in respect of treaty commitments *subsequent*[*] to the entry into force of the Convention".[5]

Therefore, the granting of competence to an international organization could only give rise to responsibility by States for an act of the organization if the grant of such competence occurs "subsequent" to entry into force of the obligation that is breached. The entry into force of an obligation of the States would not itself constrain the previously established competence of an international organization in which the States are members.

[1] *Yearbook … 2006*, vol. II (Part Two), para. 91, para. (7) of the commentary to article 28.

[2] See generally Gianviti, *loc. cit.*

[3] *Yearbook … 2006*, vol. II (Part Two), para. 91, para. (2) of the commentary to article 28.

[4] *Ibid.*, para. (2) of the commentary to article 29.

[5] *Bosphorus Hara Yollari Turizm ve Ticaret Anonim Şirketi* v. *Ireland*, *Judgments and Decisions 1999-I*, Judgment of 30 June 2005, p. 158, para. 154.

T. Draft article 29. Responsibility of a State member of an international organization for the internationally wrongful act of that organization[*]

European Commission

A number of questions also arise with respect to draft article 29 on responsibility of a State member of an

[*] *Yearbook … 2006*, vol. II (Part Two), para. 90.

international organization for the internationally wrongful act of that organization. While supporting the principle deduced from *Westland Helicopters* and the *International Tin Council* case law[1] that such responsibility, if any, is presumed to be at best subsidiary (para. 2), the conditions under paragraph 1 are potentially very far-reaching. Under paragraph 1 (*a*), a State is responsible for an internationally wrongful act of an organization of which it is a member if it has accepted responsibility for that act. In this respect, it should be mentioned that in some international organizations, such as the European Community, such explicit acceptance of responsibility is severely curtailed by the "constitutional" law of the organization and hence the freedom States members of the Community may have under draft article 29, paragraph 1 (*a*), in reality does not go very far. For example, if a State member of the Community assumed responsibility for a matter over which the Community enjoyed "exclusive competence", the member State would be liable to face infringement proceedings.

Under paragraph 1 (*b*), a State is also responsible for illegal acts of an international organization to which it is a member if it has led the injured party to rely on its responsibility. This may be problematic as regards mixed agreements of the European Community and its member States with third States. Such agreements are concluded by both the Community and its member States "of the one part" and another State "of the other part". Should this lead the other State to believe that the member States are responsible under international law for the implementation of the whole agreement even though large parts may fall within exclusive Community competence? Again, it may be said that Community law has to find its own solutions to such complications, but the draft of article 29 is not exactly helpful, seen from the Community's perspective.

The European Commission feels a strong need that the European Community be apportioned the responsibility for any breach of its treaties. Otherwise, a third State and a member State might decide on their own about the international responsibility of the Community and hence about the interpretation of the agreement in question and about the external relations powers of the Community.

The European Commission believes that the correct approach would be for the provision to reflect the presumption that a State does not, as a general rule, incur international responsibility for the act of an international organization of which it is a member. In particular, responsibility should not be incurred merely by virtue of membership. This would be more consistent with existing judicial authorities. Carefully defined exceptions could then flow from this modified general rule.

[1] *Ibid.*, paras. (4) and (9) of the commentary to article 29.

Organization for the Prohibition of Chemical Weapons

The concluding sentence of paragraph (10) of the commentary reads: "There is clearly no presumption that a third party should be able to rely on the responsibility of member States."[1] It is not clear why a third party should not be able to rely on the responsibility of member States if such responsibility is established in accordance with article 29, paragraph 1 (*a*)–(*b*). It may be that this statement in paragraph (10) of the commentary is based on draft article 29, paragraph 2, which describes the responsibility of States as being "subsidiary". If so, the draft articles could be more specific in elaborating on the distinction between "primary" and "subsidiary" responsibility.

[1] *Ibid.*, para. (10).

Also, paragraph (12) of the commentary appears to raise many questions, and clarification is required concerning the possibility of "only of certain member States"[2] being responsible.

[2] *Ibid.*, para. (12).

U. Specific issues raised in chapter III.B of the report of the Commission on the work of its fifty-eighth session

1. Obligation of members of an international organization to provide compensation to the injured party

International Monetary Fund

The commentary to draft article 29, on responsibility of international organizations, acknowledges that membership of an international organization does not as such entail for member States international responsibility when the organization commits an internationally wrongful act. IMF observes that this follows from the Commission's previous commentary, on responsibility of States for internationally wrongful acts, that "the general rule is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e. as agents of the State".[1]

However, as IMF has noted in its previous comments, in the specific context of State membership in an international organization, such a general principle would also need to be subject to the rules of the organization. Therefore, if the States members of an international organization have made provision in the rules of the organization for the members' derivative liability for the organization's conduct, those rules of the organization would provide the basis for determining whether a particular member State is liable for particular conduct of the organization.

It follows that members would ordinarily not have an obligation to provide compensation to the injured party, should the organization not be in a position to do so, unless the rules of the organization called for the members to provide such compensation. IMF believes this is the only conclusion that is consistent with the following established principles: (*a*) international organizations have independent legal personalities; (*b*) "attribution" is a necessary requirement for a State to be responsible for a wrongful act; and (*c*) liability to compensate can only be based on State responsibility or another rule that is binding on the State (i.e. in the present case, the rules of the organization).

[1] *Yearbook ... 2001*, vol. II (Part Two), p. 38, para. (2) of the commentary to chapter II.

Organization for the Prohibition of Chemical Weapons

The question itself appears to OPCW somewhat opaque. It would be helpful to have illustrations of circumstances in which some member States are responsible for the acts of an organization while others are not. This appears to OPCW to be the threshold question.

Beyond that, the question posed in paragraph 28 (*a*) of the report of the Commission on the work of its fifty-eighth session[1] is related to draft article 29 (responsibility of a State member of an international organization for the internationally wrongful act of that organization), according to which a member State is responsible for an internationally wrongful act of an international organization if it has either accepted responsibility or has led the injured party to rely on its responsibility. It is presumed that responsibility entails an obligation to provide compensation to the injured party, and it may thus be presumed that if a member State is not responsible, it has no obligation to compensate the injured party.

However, it is essential to bear in mind that liability can exist without responsibility; an obligation to compensate may arise even in the absence of fault (strict liability). Thus, in the final analysis, the answer would depend on the substantive obligation that has been breached, i.e. the standard of conduct required. Some obligations might require fault while others might not.

[1] *Yearbook … 2006*, vol. II (Part Two).

2. *Obligation of cooperation in case of a serious breach by an international organization of an obligation under a peremptory norm of general international law*

International Monetary Fund

As international organizations are bound by peremptory norms of general international law, it follows that States should have the same positive duty to cooperate to bring an end to serious breaches of peremptory norms by international organizations as they do to bring an end to serious breaches by States.

International organizations, for their part, are involved in bringing an end to such breaches of peremptory norms by subjects of international law to the extent that they provide the framework for such State cooperation, or are tasked by their memberships to give aid or assistance in such State cooperation.

However, unlike States, international organizations do not possess a general competence. It follows that international organizations cannot have the identical duty as States to bring an end to serious breaches of peremptory norms. Rather, any such duty of international organizations would need to take into account the limited competence of the organizations as established by their respective charters.

IMF is unaware of any existing practice that would demonstrate the existence of a general obligation on the part of international organizations to cooperate in exactly the same manner as States. Rather, practice would suggest that any obligation of international organizations to cooperate would be subject to, and limited by, provisions of their respective charters.

For instance, in another context, it has been argued erroneously that:

> [T]here are strong legal arguments to support the position that the IMF is obligated in accordance with international law, to take account of human rights considerations. The first is that the IMF is a United Nations body and must therefore be bound by the principles stated in the U.N. Charter. Among those principles and purposes of the organization is the promotion of respect for human rights. It is not therefore a political objective but a legally mandated one.[1]

This argument is based on a number of incorrect assumptions, as has already been noted by Gianviti, the former General Counsel of IMF.[2] In particular, IMF is not a "United Nations body" as asserted. Rather, it is a specialized agency within the meaning of the Charter of the United Nations, which means that it is an intergovernmental agency, not an agency of the United Nations.[3] In accordance with Article 57 of the Charter, the Fund was brought into relationship with the United Nations by a 1947 agreement in which the United Nations recognizes that, "[b]y reason of the nature of its international responsibilities and the terms of its Articles of Agreement, the Fund is, and is required to function as, an independent international organization".[4] Furthermore, article X of the Fund's Articles of Agreement, while requiring the Fund to cooperate "with any general international organization" [i.e. the United Nations], specifies that "[a]ny arrangements for such co-operation which would involve a modification of any provision of [the Articles of] Agreement may be effected only after amendment to [the Articles]". Thus, the relationship established by the Agreement between the United Nations and the International Monetary Fund is not one of "agency"[5] but one of "sovereign equals".[6]

[1] Alston, "The International Monetary Fund and the right to food", p. 479.

[2] See Gianviti, *loc. cit*.

[3] In the French text of the Charter of the United Nations the equivalent references to "specialized agencies" in Articles 57, 63 and 64 are "les diverses institutions spécialisées", "toute institution visée à l'Article 57" and as "les institutions spécialisées", respectively. The "spécialisées" clearly refers to the specialized responsibilities of these organizations, but as the French text demonstrates, the term "agencies" is not used in the English text of the Charter in the sense of denoting a principal-agent relationship; rather it is used in the sense of referring to organizations.

[4] Agreement between the United Nations and the International Monetary Fund, signed in New York on 15 November 1947 (United Nations, *Treaty Series*, vol. 16, No. 108, p. 328), art. I, para. 2.

[5] In order to avoid any ambiguity on this point, a statement was placed in the record of the negotiations stating that "[i]t was understood … that the statement in article I, paragraph 2, that the Bank (Fund) is a Specialized Agency established by agreement among its member governments carries with it no implication that the relationship between the United Nations and the Bank (Fund) is one of principal and agent", Committee on Negotiations with Specialized Agencies, "Report on negotiations with the International Bank for Reconstruction and Development and the International Monetary Fund", quoted in Holder, "The relationship between the International Monetary Fund and the United Nations", p. 18.

[6] Goodrich, Hambro and Simons, *Charter of the United Nations: Commentary and Documents*, p. 421.

Furthermore, article VI, paragraph 1, of the Agreement between the United Nations and the International Monetary Fund provides that:

> The Fund takes note of the obligation assumed, under paragraph 2 of Article 48 of the United Nations Charter, by such of its members as are also Members of the United Nations, to carry out the decisions of the Security Council through their action in the appropriate specialized agencies of which they are members, and will, in the conduct of its activities, have due regard for decisions of the Security Council under Articles 41 and 42 of the United Nations Charter.[7]

As noted by Holder, the former Deputy General Counsel of IMF, this provision presents quite a different balance to that put forward by the United Nations initially, which would have imposed an obligation more directly on the organization.[8] Under this provision of the Agreement between the United Nations and IMF, a Security Council resolution is not binding on IMF itself: the binding obligation stemming from a Council resolution is directed at "members" of the United Nations. The Fund, while a subject of international law, is not a member of the United Nations. Furthermore, the obligation of the Fund under the provision in the Agreement is to "have due regard"[9] to Council resolutions under Articles 41 and 42 of the Charter of the United Nations.

It follows from the above that the Fund's relationship Agreement with the United Nations does not require IMF to give effect to the Charter or resolutions of the United Nations.

Another example of the effect of provisions in an organization's charter that may be relevant to this discussion are the views expressed by Shihata, the former General Counsel of the World Bank, when discussing the treatment of the General Assembly resolutions passed in the 1960s regarding Portugal and South Africa, which called on international financial institutions not to give financial assistance to these countries:

> The Bank took the firm position that by virtue of the Relationship Agreement [between the Bank and the United Nations], it [i.e. the Bank] was under no obligation to implement the UN General Assembly resolutions, not to mention those on which there had been no prior consultation with the Bank. It further argued that it would be improper for it to accept the recommendations of the General Assembly in the cases involved because of the prohibition contained in Article IV, Section 10 of the Bank's Articles of Agreement, which reads: "The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I. "[10]

Shihata went on to note that the controversy over the Portugal and South Africa "resolutions ended with the Bank maintaining its position that it was prohibited under its Articles from interfering in the political affairs of its members but would review the economic conditions and prospects of these two countries 'to take account of the situation as it developed'".[11]

If, notwithstanding the above, the Commission believes that framing such an obligation on the part of international organizations, in the same terms as the obligation applicable to States, would contribute to the progressive development of international law, then the Commission should, in evaluating the possible scope of such an obligation for international organizations, pay due regard to the limited capacity and other constraints that apply, under current international law, to actions by international organizations.

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

In principle, international organizations are legal persons and should be bound to bring an end to violations of peremptory norms, as must be the case with all subjects of the law. However, there are some practical issues to be taken into account. While the legal personality of States is in principle not limited, the legal personality of international organizations is limited by its mandate, its powers, and its rules as set out in its constituent instrument. Thus, it can be argued that the extent of the obligation of any international organization to bring a breach of *jus cogens* to an end, unlike that of States, should also be limited by the same, i.e. it must always act within its mandate and in accordance with its rules.

Finally, as regards the obligation to cooperate to bring the situation to an end, reference may be made to article 41, paragraph 1, of the articles on responsibility of States for internationally wrongful acts regarding the modalities of such cooperation.[1]

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[7] The Agreement, approved by the Board of Governors of IMF on 17 September 1947 and by the General Assembly of the United Nations on 15 November 1947, entered into force on 15 November 1947.

[8] Holder, *loc. cit*., p. 21.

[9] *Ibid.*

[10] Shihata, *The World Bank in a Changing World: Selected Essays*, p. 103.

[11] *Ibid.*, p. 104.

[1] In paragraph (2) of the commentary to article 41, it is stated that "[b]ecause of the diversity of circumstances which could possibly be involved, the provision does not prescribe in detail what form this cooperation should take. Cooperation could be organized in the framework of a competent international organization, in particular the United Nations. However, paragraph 1 also envisages the possibility of non-institutionalized cooperation". Paragraph (3) adds that such "cooperation must be through lawful means, the choice of which will depend on the circumstances of the given situation". Notably, "the obligation to cooperate applies to States whether or not they are individually affected by the serious breach". Most importantly, paragraph (3) stipulates that "in fact such cooperation, *especially in the framework of international organizations*,* is carried out already in response to the gravest breaches of international law and it is *often the only way of providing an effective remedy**" (*Yearbook … 2001*, vol. II (Part Two), p. 114).