

# RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

[Agenda item 3]

DOCUMENT A/CN.4/636 and Add. 1–2

## Comments and observations received from Governments

[Original: English/French/Spanish]  
[14 February, 13 April and 8 August 2011]

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### Multilateral instruments cited in the present report

#### *Source*

Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950)	United Nations, <i>Treaty Series</i> , vol. 213, No. 2889, p. 221.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	<i>Ibid.</i> , vol. 999, No. 14668, p. 171.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	<i>Ibid.</i> , vol. 1155, No. 18232, p. 331.
American Convention on Human Rights: "Pact of San José, Costa Rica" (San José, 22 November 1969)	<i>Ibid.</i> , vol. 1144, No. 17955, p. 123.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	<i>Ibid.</i> , vol. 1833, No. 31363, p. 3.
Convention against torture and other cruel, inhuman or degrading treatment or punishment (New York, 10 December 1984)	<i>Ibid.</i> , vol. 1465, No. 24841, p. 85.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15.
Convention on the protection of the Alps (Alpine Convention) (Salzburg, 7 November 1991)	United Nations, <i>Treaty Series</i> , vol. 1917, No. 32724, p. 135.

### Introduction

1. At its sixty-first session, in 2009, the International Law Commission adopted, on first reading, the draft articles on the responsibility of international organizations.<sup>1</sup> The Commission decided, in accordance with articles 16 to 21 of its statute, to request the Secretary-General to transmit the draft articles to Governments and international organizations<sup>2</sup> for comments and observations, requesting also that such comments and observations be submitted to the Secretary-General by 1 January 2011.<sup>3</sup> In paragraph 5 of

its resolution 64/114, of 16 December 2009, the General Assembly drew the attention of Governments to the importance for the Commission of having their comments and observations on the draft articles. The Secretary-General circulated a note dated 22 January 2010 transmitting the draft articles to Governments.

2. As at 8 August 2011, written replies had been received from Austria (14 December 2010), Belgium (22 February 2011), Chile (9 May 2011), Cuba (5 November 2010), the Czech Republic (1 April 2011), El Salvador (3 November 2010), Germany (23 December 2010), Mexico (2 March 2011), the Netherlands (15 March 2011), Portugal (28 January and 20 December 2010), the Republic of Korea (23 February 2011) and Switzerland (24 February 2011). The comments and observations received from those Governments are reproduced below, organized thematically, starting with general comments and continuing with comments on specific draft articles.

<sup>1</sup> The text of the draft articles adopted on first reading is contained in *Yearbook ... 2009*, vol. II (Part Two), para. 50. The text of the draft articles with commentaries thereto is contained in *ibid.*, para. 51. For its part, the text of the draft articles on responsibility of States for internationally wrongful acts with commentaries (hereinafter "the draft articles on responsibility of States") is contained in *Yearbook ... 2001*, vol. II (Part Two), p. 30, para. 77.

<sup>2</sup> Comments and observations received from international organizations are contained in document A/CN.4/637 and Add.1, contained in the present volume.

<sup>3</sup> *Yearbook ... 2009*, vol. II (Part Two), para. 48.

## Comments and observations received from Governments

### A. General comments

#### AUSTRIA

1. Austria has always emphasized the complexity of this topic, which would require an in-depth analysis of the relations between international organizations and their member States, the relations between international organizations and third States or other international organizations as well as of the diversity of international organizations, including the scope of their competences. It must not be ignored that international organizations differ among themselves substantially in these fields, so that the question arises to what extent international organizations can be subjected to one uniform system of norms regarding their responsibility for internationally wrongful acts. Doctrine and practice have so far been divided on these issues.

2. One reason for these diversities results from the fact that States have founded international organizations for different purposes, so relations between international organizations and their member States vary accordingly. There is a great difference between international organizations established as discussion forums purely for conference purposes and organizations designed for the performance of activities such as peacekeeping operations. In the first case, responsibility would remain mostly with the member States, whereas in the second case the international organization itself would be the author of acts likely to raise the issue of responsibility.

3. The differences between States and international organizations with regard to their legal and political nature and their procedures demand that the utmost care be taken when it comes to elaborating a regime for responsibility. Whereas States are, in principle, independent actors on the international stage, the actions of international organizations are controlled by their member States. In addition, international organizations usually act *vis-à-vis* their member States. Member States may also act on behalf of an international organization. Therefore, questions of responsibility (and also liability) are closely linked to the specific *inter se* relations between organizations and their member States. Disregarding or levelling those specific relations carries the risk of leaving conceptual gaps.

4. Furthermore, a clear distinction could be made between the legal positions of member States, third States that have established relations with the international organization and third States that have explicitly refused to do so. In contrast to the law of State responsibility, this distinction is crucial for the law of international organizations because of their limited mandates and capacities and due to the question of the legal effects of their recognition.

5. Moreover, the need to distinguish between the responsibility of an international organization towards its member States and its responsibility towards third States has to be kept in mind. This leads to the question of the subjective or objective personality of international organizations. In its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ derived

the right of the United Nations to bring claims against a non-member State from the Organization's universal vocation.<sup>1</sup> The question remains whether the same would apply to an organization that is not of a universal character. The commentary to the present draft articles does not reveal whether the Commission is of the view that all international organizations enjoy an objective legal personality so that any organization could invoke responsibility against any State or other organization.

6. Furthermore, it seems that responsibility under international law and responsibility under any other legal order are not always clearly distinguished. The cases quoted in the commentary sometimes deal with responsibility or liability under a domestic legal order such as the *International Tin Council* decision.<sup>2</sup> Whether the arguments derived from these cases can be applied to responsibility under international law must be thoroughly explored before they can be referred to in the present context.

7. Irrespective of these fundamental questions, which require particular consideration, the method of translating the principles contained in the draft articles on responsibility of States to the responsibility of international organizations seems appropriate as a starting point. This approach allows for testing, one by one, whether and how the rules applied to States possessing full legal personality apply to organizations with limited international legal personality and functions that derive more or less directly from the will of members and non-member States. But as work on this topic has progressed, proposals for articles have increasingly raised doubts as to whether the principles of State responsibility apply to organizations without considerable further qualification. As a caveat, one should keep in mind that the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations has still not entered into force, 20 years after its adoption. One of the main reasons is lack of clarity on the scope of international organizations covered by that Convention.

<sup>1</sup> *I.C.J. Reports 1949*, p. 174.

<sup>2</sup> United Kingdom, England (Court of Appeal), *Maclaine Watson & Co. Ltd. v. Department of Trade and Industry; J. H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry and Others*, judgment of 27 April 1988, ILR, vol. 80, p. 109.

#### CHILE

1. International organizations are a key component of the current system of international law, in that they contribute actively to the preservation of international peace and security and have a positive impact in the different spheres in which they operate. For this reason, a body of norms that suitably and coherently regulates their international responsibility seems both necessary and unavoidable.

2. It is appropriate that the draft articles are based, in terms of structure and content, on the draft articles on responsibility of States, and Chile concurs with the decision of the Commission that the distinctive nature of international organizations necessitates the drafting of a separate body of norms that is specific to them.

## CUBA

1. The draft articles on the responsibility of international organizations offer, for the first time, written regulations establishing theoretical proposals for progressive development that will inevitably generate conflicts of interpretation. Those proposals include the clauses relating to the concept of countermeasures, with the conditions and limits thereof; serious breaches of peremptory norms of international law; and the application of different forms of reparation for injury.

2. The text of the draft articles represents in and of itself a major effort to regulate this matter in a uniform manner. Cuba also considers that the draft achieved is fairly exhaustive, bearing in mind the complexity and innovative nature of the issue as well as the diversity of opinions regarding the legal institutions in question.

3. Concerning the settlement of disputes, Cuba recommends taking up once again the settlement procedure that was adopted with respect to the first reading text of the draft articles on responsibility of States for internationally wrongful acts, in 1996. A proposal for a mechanism to settle disputes relating to the interpretation of responsibility constitutes a guarantee of peaceful dispute settlement, essentially for underdeveloped countries, which end up as the victims when conflicts are resolved by the use of force.

## CZECH REPUBLIC

1. One of the legal problems in the draft articles is the dividing line between the responsibility of an international organization and that of a (member) State. In other words, to what extent can international organizations incur responsibility for the acts of States and vice versa? The draft articles on the responsibility of international organizations attempt to answer this question.

2. What is beyond dispute is that an international organization must possess international legal personality distinct from that of its member States. Otherwise it would not be capable of incurring responsibility. However, the nature of the legal personality of international organizations is quite another question. In this context, it is only appropriate to recall the advisory opinion of ICJ on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, in which the Court noted:

International organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the principle of speciality.<sup>1</sup>

<sup>1</sup> *I.C.J. Reports 1996*, p. 78, para. 25.

## GERMANY

Germany considers the present draft articles as adopted on first reading to be largely satisfactory. In mirroring the approach already taken by the Commission in the related field of State responsibility, the present draft puts into writing various important legal provisions on the responsibility of international organizations. Germany agrees that, on account of the peculiarities of international organizations when compared to States, a completely parallel approach to

the one taken by the Commission when addressing the topic of State responsibility was not possible. As a consequence, some entirely new provisions were necessary, while others required some significant redrafting in order to be applied to international organizations. The topic is further complicated by the fact that the law governing the responsibility of international organizations appears to be much harder to pinpoint than the one for States, as international organizations provide less “general” practice, particularly on account of their limited and very different competencies. The subject matter of the Commission’s draft articles received an additional layer of complexity by the decision also to address a *State’s* responsibility in connection with the act of an international organization.

## MEXICO

1. It has been suggested in the doctrine that the secondary rules of the present draft articles would be of little use given that there are insufficient primary rules applicable to international organizations. While the scope of States’ international obligations is much broader than that of international organizations, there are developments in international law that cannot be ignored. For example, international organizations that take decisions with a direct or indirect impact on human rights cannot be exempt from compliance with certain international human rights standards.

2. Given the increasing role of international organizations in the international arena and the growing impact of their activities on a wide range of issues at the global level and, in some cases, on the legal situations of individuals or entities within States, the question of their international responsibility is assuming greater practical importance. Consequently, Mexico considers that the law of responsibility of international organizations, together with that of responsibility of States for internationally wrongful acts, is a key element in strengthening the rule of law at the international level. The current draft represents an important step in that regard and the work of the Commission and the Special Rapporteur deserves Mexico’s recognition and gratitude.

3. It is clear that the current draft and the draft articles on responsibility of States are complementary. It is for this reason that Mexico welcomes the Commission’s approach in being guided, *mutatis mutandis*, by the parameters of the draft articles on responsibility of States. That complementarity, together with the scarcity of practice regarding the attribution of conduct and responsibility of international organizations, means that the draft articles on responsibility of States and the commentaries thereto are a natural guide for the current draft.

4. However, the diversity of types of international organizations and the wide range of their activities pose very specific challenges for international law, and for the topic of responsibility in particular. In general terms, Mexico considers that the Commission has responded well to these specific challenges of international organizations. In some draft articles, however, it would appear that the particular characteristics of international organizations and the way in which they differ from States deserve greater attention, or rather, greater clarity, in the respective commentaries.

## NETHERLANDS

1. Some Governments and academics have questioned the need to have a set of articles on responsibility of international organizations. There is limited practice, as is demonstrated by the reports of the Special Rapporteur and by the comments given by international organizations. There are hundreds of international organizations, but only some 20 of them have sent comments, and these comments are at times extremely brief. So it seems pertinent to ask whether it is really necessary to elaborate rules on responsibility of international organizations.

2. The Netherlands is of the view that it is necessary and that such rules would contribute to the further development of the international legal order. In the 1960s, Roberto Ago, Chairman of the Sub-Committee on State Responsibility of the Commission, stated that it was “questionable whether such organizations had the capacity to commit international wrongful acts” and that “international organizations were too recent a phenomenon and the question of a possible international responsibility by reason of alleged wrongful acts committed by such organizations was not suited to codification”.<sup>1</sup> However, in the twenty-first century this is no longer the case. The number of international organizations has increased considerably; their activities have multiplied and affect both international relations and the daily life of private individuals. Although it is of course true that they do not all commit internationally wrongful acts every day or even every year, at present there is increasing practice in which it is claimed that such acts have been committed by international organizations. It is generally agreed that international organizations have the capacity to act at the international level, within the scope of their powers. However, it cannot be excluded that they act wrongfully. Therefore, it is necessary to have a system in place, a set of general rules for this purpose, even though there is no extensive practice.

3. Alternatively, in the absence of such rules, it is likely that national and international courts that are confronted with claims against international organizations and their members would seek inspiration from the draft articles on responsibility of States, and would use those articles by analogy. They would have to do so in an ad hoc and improvised manner, each court taking its own decision whether and to what extent the articles on responsibility of States can be applied *mutatis mutandis*. Instead, it would be preferable for these courts to be able to benefit from the existence of general rules on responsibility of international organizations, drafted in an open and multilateral process. It is for these reasons that the Netherlands supports the work of the Commission on this topic and does not share the criticism that there is no need for the articles. Moreover, the absence of such articles may impede the future exercise of powers by international organizations, as well as the possible establishment of new international organizations whenever the need arises. The elaboration of rules on responsibility of international organizations is a necessary step in the development of the international legal order, in which an increasing number of activities

are carried out by international organizations. It cannot be excluded that some of these activities amount to internationally wrongful acts, and it is no longer accepted that international organizations cannot be held accountable.

4. The Netherlands is of the opinion that the criticism that the Commission has all too often simply copied the draft articles on responsibility of States is unfounded. The decision of the Commission to take as a starting point the draft articles on responsibility of States deserves full support for three reasons. First, the draft articles on responsibility of States are sufficiently general to be suitable also to other international legal persons. Moreover, it has taken the Commission some decades and five Special Rapporteurs to arrive at a set of draft articles on responsibility of States. The Commission has therefore rightly decided, in preparing draft articles on the responsibility of international organizations, not to reinvent the wheel and to avoid restarting the discussion on complex responsibility issues where there was no need to do so. The third reason is the need to develop a single coherent body of rules on international responsibility. While it has taken the draft articles on responsibility of States as a starting point, the Commission has approached the issue of responsibility of international organizations with an open mind. International organizations have been invited to provide comments and inform it about their practice. The Special Rapporteur has carefully collected and analysed all available practice, as well as doctrine in the field. Often this has not resulted in draft articles that depart from the State responsibility articles. However, this has never happened without extensive prior analysis and discussion. Moreover, on various issues the Commission has concluded that the draft articles on responsibility of States had to be adjusted to fit international organizations, or has introduced new articles. The Commission and its Special Rapporteur have demonstrated that they have not treated the State responsibility articles as sacrosanct.

5. The Netherlands agrees that there is much diversity among international organizations. Some are universal, others have only a few members. Some perform general or political functions, others are very specific or technical. The cooperation in some organizations is of a purely intergovernmental nature, while it is supranational in the EU. Nevertheless, while such differences should not be denied, the Netherlands is of the opinion that they should not prevent the elaboration of general rules on responsibility of international organizations. It should not be forgotten that, while there is one single set of articles on responsibility of States, there exist considerable differences between States. In terms of size of population and territory, political power, economic strength and culture, countries such as China and the United States are fundamentally different from countries such as Andorra and Tuvalu. Furthermore, the draft articles on responsibility of international organizations are sufficiently general to cover the wide variety of existing international organizations. It is wrong to assume that the existing wide variety of international organizations should require a similarly wide variety of responsibility rules. As indicated in the definition of international organizations in draft article 2, the draft articles apply to organizations that possess international legal personality. As international legal persons, they are capable of bearing rights and obligations. To the

<sup>1</sup> *Yearbook ... 1963*, vol. II, annex I, document A/CN.4/152, appendix I, second meeting, p. 229, and fourth meeting, p. 234.

extent that they have obligations under international law, it cannot be excluded that they violate such obligations. If this happens, it must be possible to hold them responsible. This is true for any international organization having international legal personality. At the same time, both the State responsibility articles and the draft articles on the responsibility of international organizations recognize that there can be special regimes (*lex specialis*) of international responsibility rules. These provisions serve as a safety valve in cases where the general articles are felt to be too much of a straitjacket and where, therefore, special responsibility rules should apply.

PORTUGAL

1. There is no doubt that the principles of State responsibility are in general applicable to the responsibility of international organizations as regards the invocation of responsibility. Nevertheless, the draft articles continue to follow too closely those of State responsibility, in a way that may cause the work of the Commission to deviate from what should be its main objective: to deal with the specific problems that the issue of the responsibility of international organizations entails. The ongoing exercise can even give rise to incoherent solutions. Thus, Portugal finds this kind of approach to be unnecessary, repetitive and even counterproductive.

2. Portugal continues to advocate a more focused approach to the specific problems raised by the responsibility of international organizations in connection with State responsibility. The analysis should reflect the differences that exist between States and international organizations and the fact that, unlike with States, the competences and powers of international organizations, as well as the relationships between them and their members, vary considerably from organization to organization.

REPUBLIC OF KOREA

1. The Republic of Korea supports the Commission's desire to establish a comprehensive framework for the law of international responsibility. The adoption of the draft articles on the responsibility of international organizations will enhance legal stability in this area.

2. Given the differences between States and international organizations, a separate set of draft articles is required rather than the wholesale application of the articles on responsibility of States. Such instrument should reflect the characteristics of international organizations.

3. However, it is difficult to understand some of the draft articles, as they are based on the scarce practice of international organizations. They would be easier to understand if the Commission included more information on practice in the commentaries. Article 20, for example, is about the right of self-defence as a circumstance precluding wrongfulness. Under article 21 of the State responsibility articles, wrongful acts of States can be precluded if the acts are taken as a lawful measure of self-defence taken in conformity with the Charter of the United Nations. However, self-defence of international organizations is referred to as self-defence under international law, in abstract terms, which leaves room for abuse.

SWITZERLAND

The phrase "responsibility of an international organization for an internationally wrongful act" is used several times in the text of the draft articles. However, the titles of Part Two, chapter IV, and Part Five refer to the responsibility of an international organization or of a State in connection with the act. Switzerland would prefer for uniform wording to be used throughout the text.

**B. Specific comments on the draft articles**

PART ONE

INTRODUCTION

*Article 1. Scope of the present draft articles*

CHILE

Chile agrees with the general concept expressed in paragraph (5) of the commentary, to the effect that responsibility is linked with a breach of an international obligation.

GERMANY

The clarification included in paragraph (10) of the commentary to draft article 1, according to which the present articles do not address issues relating to the international responsibility which a State may incur towards an international organization, is to be welcomed. This question indeed belongs to the field of State responsibility and therefore lies outside the scope of application of the draft articles on the responsibility of international organizations—irrespective of the fact that the articles developed on the responsibility of States do not address this matter, as they deal solely with inter-State relations. While it might be conceivable to close the gap left by the two sets of articles with respect to scenarios in which a State incurs responsibility towards an international organization by making use of an analogy to the articles on the responsibility of States, as the commentary envisages, this question falls outside the scope of the present draft.

*Article 2. Use of terms*

AUSTRIA

1. Austria supports the approach of the Commission to limit itself to intergovernmental organizations, whether formally based on a treaty or on another expression of common will. It would clearly be unrealistic to attempt to go beyond that and to include NGOs.

2. Although draft article 2 refrains from expressly "defining" international organizations it includes a "use of terms" which provokes some questions:

(a) First, it would be interesting to know whether entities that are created by international treaties but are rather embryonic in nature, such as treaty organs established to monitor the administration of treaties, in particular in the fields of human rights and environmental issues, or secretariats, should also fall under the scope of the draft articles.

If such entities conclude headquarters agreements and fail to comply with them, who should assume responsibility? Among the vast number of pertinent examples, mention can be made of the establishment of a permanent secretariat of the Alpine Convention in Innsbruck (Austria). A general trend has already emerged to regard them, in a practical sense, as international organizations;

(b) Secondly, the separate and additional requirement of “possessing its own international legal personality” appears problematic. Rather than being a precondition for being considered an international organization, “possessing international legal personality” seems to be a legal consequence of being an organization. There are diverging views among scholars on this question. The commentary itself and, in particular, the ICJ cases referred to in paragraphs (8), (9) and (11) of the commentary to draft article 2, however, seem to support the view that international organizations possess international legal personality as a result of being such organizations. If this is the case, the qualifier of possessing international legal personality cannot serve as a limitation on the number of international organizations falling within the purview of these draft articles. This is corroborated by the preamble to the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, which notes that “international organizations possess the capacity to conclude treaties, which is necessary for the exercise of their functions and the fulfilment of their purposes”. For these reasons, this qualifier is redundant;

(c) Thirdly, as host to several international organizations, Austria has closely examined practical examples. The most pertinent is the case of OSCE. The Commission seems to acknowledge the nature of OSCE as an international organization and, consequently, as an international legal entity. Negotiations within OSCE to endow it with legal personality have demonstrated, however, that for the time being it is not an international organization within the scope of draft article 2. The fact that there is no constituent treaty does not necessarily imply that there is another “instrument governed by international law” establishing the international organization. The objections of members of OSCE go so far as to say that there is no constituent instrument whatsoever. Moreover, resolutions of OSCE are not governed by international law. A more pertinent example would be, in the view of Austria, the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization, established by resolution on 19 November 1996, whose international legal personality is not disputed.<sup>1</sup>

3. Draft article 2, subparagraph (c), defines the term “agent” as a person “through whom the organization acts”. However, this wording raises doubts as to whether it is a workable definition in the legal sense. If the conduct of an agent can be attributed to an international organization, the latter is acting “through this person”. In other words, the phrase “through whom the organization acts”

<sup>1</sup> See Austria and the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization, Agreement regarding the seat of the Commission (Vienna, 18 March 1997), United Nations, *Treaty Series*, vol. 1998, No. 34224, p. 3.

identifies the legal consequence or result of the attribution of a conduct, but it does not define the term “agent”. For this reason, subparagraph (c) should be based on the full wording of the relevant definition given by ICJ in its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*.<sup>2</sup> Therefore, this draft article should be based on article 5 of the articles on responsibility of States for internationally wrongful acts, rather than on article 4. The definition could thus be formulated as follows:

“An ‘agent’ or ‘organ’ of an international organization is a person or entity that has been charged by that organization with carrying out, or helping to carry out, one of its functions, provided the agent or organ is acting in that capacity in the particular instance.”

<sup>2</sup> *I.C.J. Reports 1949*, p. 174.

#### BELGIUM

1. At the outset, Belgium notes that the definition of the term “agent” is imprecise and could lead to a proliferation of cases in which the responsibility of an international organization could be invoked for acts performed, for example, by a subcontractor.

2. Belgium also points out that there is no definition of the notion “organ”.

3. Belgium ventures to suggest to the Commission that it either redraft this provision, on the lines of the articles pertaining to the responsibility of States and, more particularly, articles 5 and 8; or that it specifies and limits the notion of “agent” by providing a commentary to the draft article or by amending paragraph (c) as follows:

“‘Agent’ includes officials and other persons or entities through whom the organization acts directly and in accordance with its internal operating rules.”

#### CUBA

1. The definition of “international organization” is not in accordance with the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, or the need for coherence between rules of international law. The Vienna Convention specifies the intergovernmental nature of international organizations, whereas the draft articles broaden the scope of such organizations by including the term “other entities”, which should not form part of this definition.

2. Cuba considers that the definition of international organizations provided in the Vienna Convention should be maintained in order to achieve greater consistency and coherence among the international legal instruments relating to this issue.

#### CZECH REPUBLIC

The Czech Republic considers the “rules of the organization” to be a part of international law. However, the rules of the organization do not play exactly the same role in all draft articles on the responsibility of international

organizations. While in some instances their international nature is obvious (e.g. in the context of draft articles 4 and 9), elsewhere they have a role analogous to that played by internal law in the context of the rules on State responsibility (draft articles 5 and 31).

#### MEXICO

1. Mexico considers that the Commission rightly applied the criterion of “objective” legal personality, following the example of ICJ in its landmark case *Reparation for Injuries Suffered in the Service of the United Nations*.<sup>1</sup> Furthermore, it fully agrees that the organization’s legal personality must be its own, i.e. distinct from that of its members, the corollary of which is that it

does not exclude the possibility of a certain conduct being attributed both to the organization and to one or more of its members or to all its members.<sup>2</sup>

Both objective legal personality and the emphasis on the organization’s own personality are key premises for the functionality and effectiveness of the present articles, with regard to attribution of the conduct and responsibility of the organization and, where appropriate, of its members.

2. The question of international organizations being able to include “other entities”, in addition to States, among their members reflects to a considerable extent the current situation of international organizations by extending the scope of application *ratione personae* of the current draft beyond that of traditional intergovernmental organizations. Mexico considers this to be the right approach. However, it would appear that the draft has not gone far enough in this regard, particularly in the light of the respective commentaries. If the intention is to include hybrid or mixed organizations composed of States, other international organizations and private entities, as mentioned in the commentaries,<sup>3</sup> then the exclusion of organizations established by instruments of internal law would leave outside the scope of application a series of hybrid organizations whose activities are conducted in the transnational arena and whose conduct has clear repercussions for international law. These issues clearly reflect the difficulties raised by the diversity of the existing types of international organizations.

3. That said, it is perfectly evident that the codification and development of rules on the responsibility of hybrid entities which, while established under national private law, operate transnationally, goes beyond the purpose and scope of the present draft. It might therefore be appropriate to consider the possibility of including explicit mention of those hybrid entities in the commentaries, specifically in paragraph (2) of the commentary to article 2, which mentions:

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

<sup>1</sup> Advisory opinion, *I.C.J. Reports 1949*, p. 174.

<sup>2</sup> *Yearbook ... 2009*, vol. II (Part Two), para. (10) of the commentary to art. 2.

<sup>3</sup> *Ibid.*, para. (13).

4. With regard to the statement that international organizations may be established by a treaty “or other instrument governed by international law”, it would be advisable to ask what would happen in the case of international organizations or entities established by resolutions or decisions, including when the entity in question does not consider the said resolution or decision to be a formal agreement and the said instrument is not governed by international law. An interesting case in this context is that of the Financial Action Task Force (FATF). According to its own definition, it is an intergovernmental body with 32 States and two international organizations as members, as well as a number of observer organizations. It is supported by a secretariat housed in the premises of OECD (of which FATF is not a member) and has a rotating presidency. It also has a monitoring mechanism “covering more than 170 jurisdictions”, provides for the suspension of its members in the event that they fail to comply with its recommendations and has even established a set of criteria for the application, by its members, of “countermeasures” against “non-cooperative countries or territories” outside its membership. Nonetheless, unlike some FATF-style regional bodies—such as the South American Financial Action Task Force on Money Laundering (GAFISUD), which was established in 2000 by a constitutive memorandum of understanding signed by 10 countries in the region<sup>4</sup>—FATF was established not by an official instrument governed by international law, but by a declaration of the Group of Seven in 1988.

5. Hence, despite all the above-mentioned characteristics, a body such as FATF would not fall within the scope of the present articles. In view of the number and the growing importance of these types of quasi-official intergovernmental bodies and networks, it would be advisable for the Commission to consider mentioning them in the commentaries. That could be done, as with hybrid or mixed entities established by instruments of domestic private law, in paragraph (2) of the commentary to article 2.

<sup>4</sup> GAFISUD founding Memorandum of Understanding, signed in Cartagena de Indias (Colombia), 8 December 2000.

#### PORTUGAL

Regarding the definition of “agent”, Portugal would prefer the wording proposed by the Special Rapporteur instead of the one adopted, since it is more precise. Moreover, the former is in line with the jurisprudence of ICJ as established in its 1949 advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*, according to which

[t]he 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.<sup>1</sup>

<sup>1</sup> *I.C.J. Reports 1949*, p. 177.

#### SWITZERLAND

Switzerland considers that the definition given for the term “rules of the organization” in article 2 (b) of the draft articles is not sufficiently precise to make its meaning

clear. In view of the importance of this concept to the draft, Switzerland believes that the meaning needs to be clarified.

## PART TWO

### THE INTERNATIONALLY WRONGFUL ACT OF AN INTERNATIONAL ORGANIZATION

#### CHAPTER I

#### GENERAL PRINCIPLES

##### GERMANY

1. Germany would like to direct the Commission's attention to a passage in paragraph (1) of its commentary to the introduction of part two, chapter I, stating:

The statement of general principles is without prejudice to the existence of cases in which an organization's international responsibility may be established for conduct of a State or of another organization.

2. Paragraph (2) of the introductory commentary to Chapter II, by making reference to the passage just quoted, emphasizes:

As was noted in the introductory commentary on Chapter I, the responsibility of an international organization may in certain cases arise also when conduct is not attributable to that international organization. In these cases conduct would be attributed to a State or to another international organization. In the latter case, rules on attribution of conduct to an international organization are also relevant.

3. In this respect, a clarifying remark that highlights the kind of cases the Commission had in mind would be helpful. Is the Commission thinking (solely) of cases in which an international organization has expressly (for example, via a treaty clause) assumed such responsibility, or are there other conceivable scenarios where an international organization will incur international responsibility for conduct which cannot be attributed to it via the present draft articles? An international organization's consent and express normative rules to the contrary, i.e. *lex specialis*, aside, Germany finds it hard to conceive of an international organization being held responsible for conduct which cannot be attributed to it.

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

##### CUBA

The concept of "injury" should be included as an essential element in the definition of an internationally wrongful act of an international organization, since it is this element that determines the obligation of reparation, the cessation of the breach and the offer of guarantees of non-repetition to the injured party. Furthermore, draft article 33 establishes "injury caused" as an essential element in the concept of an obligation of reparation, which is inconsistent with the absence of the element of "injury" in the concept of an internationally wrongful act of an international organization.

#### **Article 4. Elements of an internationally wrongful act of an international organization**

##### CHILE

Chile believes that the actions of international organizations in a territory subject to the jurisdiction of a given State might be characterized as lawful under the law of that territory. As a result, it is still useful to include a provision similar to article 3 of the draft articles on responsibility of States.

##### CUBA

See the comment under draft article 3, above.

#### CHAPTER II

### ATTRIBUTION OF CONDUCT TO AN INTERNATIONAL ORGANIZATION

##### GERMANY

1. Germany would like to underscore the important finding included in paragraph (5) of the Commission's introductory commentary to chapter II, according to which the draft articles, while not expressly addressing this matter,

imply that conduct of military forces of States or international organizations is not attributable to the United Nations when the Security Council authorizes States or international organizations to take necessary measures outside a chain of command linking those forces to the United Nations.

2. Although this negative finding is, strictly speaking, not necessary in explaining the present draft, Germany welcomes the fact that the Commission has expressed its clear opinion on how the draft articles developed by it are to be read in relation to the important question of how to attribute responsibility in connection with military measures taken pursuant to an authorization of the Security Council, with the acting forces operating *outside* a chain of command that would link them to the United Nations.

##### MEXICO

Mexico welcomes the approach taken by the Commission under this heading. Paragraph (4) of the introductory commentary, which clarifies that dual or even multiple attribution of conduct cannot be excluded, is especially important. Although, as the Commission has indicated, it does not occur very frequently in practice, dual or multiple attribution of conduct is essential in order to ensure that attribution is not diluted among the various members of the organization and that the question of international responsibility is not evaded. In the light of potential human rights violations, it is very important to avoid such evasion of responsibility. Dual or multiple attribution is the correct approach in order to combat such evasion.

#### **Article 6. Conduct of organs or agents placed at the disposal of an international organization by a State or another international organization**

##### AUSTRIA

1. Draft article 6 contains, in comparison to article 6 of the draft articles on responsibility of States, a different criterion for the attribution of conduct. The decisive

criterion in article 6 on State responsibility is the exercise of elements of governmental authority of the State at whose disposal the organ is placed. In the present draft article 6, the decisive criterion is only effective control over the conduct. Although the element of control is the basic reason for responsibility, it is nevertheless advisable to add to the criterion of control that of the exercise of functions of the organization in order to exclude situations in which the organization exercises a certain factual control, although the acts are attributable to States. A further justification for this addition is the different formulation of control as results from the practices of different international courts and tribunals. In this respect, it makes an attempt to combine article 6 with article 8 of the draft articles on responsibility of States. But even in article 8 of the articles on responsibility of States, which deals with the attributability of acts of private persons to States, control is not the only criterion, but is accompanied by others such as instruction and direction, terms that shed a certain light on the construction of the term “control”.

2. Furthermore, draft article 6 is limited to organs of a State or organs or agents of another international organization, but does not include private persons. But would the act of a private person acting under the effective control of an organization and exercising functions of the organization *not* entail the latter’s responsibility? What should be the reason to exclude the situation of private persons acting in such a way? If, for instance, a person in the service of an NGO acts under the effective control of the United Nations in the course of a peacekeeping operation and performs acts within the functions of the United Nations, such an act would certainly be attributable to the United Nations. It is difficult to see any distinction between such a case and the situation where a State organ is acting in such a manner. The Commission could consider whether private conduct could be included within the scope of this draft article.

#### BELGIUM

Belgium notes that the Commission, in its commentary to the draft article (paragraph 9), indicated its wish to distance itself from the decision of the European Court of Human Rights in the *Behrami* case<sup>1</sup>, which applies the criterion of “ultimate authority and control”, rather than that of “effective control”, supported by the Commission, in establishing the responsibility of an organization following the conduct of an organ or an agent placed at its disposal by a State or another international organization. Belgium welcomes this position but ventures to suggest to the Commission that it indicate more explicitly in its commentary that it does not intend to follow the reasoning of the European Court of Human Rights on this issue.

<sup>1</sup> Decision (Grand Chamber) of 2 May 2007 on the admissibility of application Nos. 71412/01 and 78166/01, paras. 29–33

#### CZECH REPUBLIC

It would be appropriate to require that in determining who has “effective control”, all factual circumstances of the case should be taken into account.

#### GERMANY

As regards paragraph (9) of the commentary to draft article 6, in which the decision of the European Court of

Human Rights in *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*<sup>1</sup> is addressed, Germany takes note of the fact that the Commission, in explaining its understanding of “effective control” as the decisive criterion in attributing conduct of organs or agents placed at the disposal of an international organization by a State or another international organization, considers that

when applying the criterion of effective control, “operational” control would seem more significant than “ultimate” control, since the latter hardly implies a role in the act in question.

<sup>1</sup> Decision (Grand Chamber) of 2 May 2007 on the admissibility of application Nos. 71412/01 and 78166/01, paras. 29–33.

#### MEXICO

1. At the outset, Mexico expressed its clear preference that the criterion for attribution of the conduct of an organ or agent placed at the disposal of an international organization by a State or another international organization should be effective control over the conduct.

2. As clearly illustrated in the Commission’s commentary to article 6, especially with regard to recent jurisprudence, effective control over conduct should be understood as a factual criterion, in other words, as operational control over the specific conduct in question. The reference in the commentary to article 6 of the draft articles on responsibility of States, specifically to “exclusive direction and control”, is especially important in this context.

3. The current draft reflects new realities and trends in relation to international organizations, which is important and laudable. At the same time, it is striking that draft article 6 does not envisage the scenario of private actors placed at the disposal of an international organization. This is perfectly feasible and is likely to occur ever more frequently in the future. The Commission could consider the inclusion of private actors, both individuals and entities, under draft article 6.

#### SWITZERLAND

Article 6 refers to the notion of “effective control”. Despite the commentary provided by the Commission, which is relatively long and includes a wealth of examples, it would appear that one issue has not been addressed: the actual definition of “effective control”. Since this notion has been a subject of contention between ICJ (the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, 1986,<sup>1</sup> and the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 2007)<sup>2</sup> and the International Criminal Tribunal for the former Yugoslavia (the *Tadić* case<sup>3</sup>), Switzerland would have liked to have some clarification. What are the criteria for presuming that an international organization has effective control over the organs or agents at its disposal? Is this the same reasoning as that defended by ICJ?

<sup>1</sup> *Merits, Judgment, I.C.J. Reports 1986*, p. 14.

<sup>2</sup> *Judgment, I.C.J. Reports 2007*, p. 43.

<sup>3</sup> *Prosecutor v. Duško Tadić*, case No. IT-94-1-A, judgment of 15 July 1999, ILR, vol. 38, pp. 1540–1546.

**Article 7. Excess of authority or contravention of instructions**

CZECH REPUBLIC

Draft article 7 does not clearly point out the qualitative difference between an excess of authority by an organization as such (with regard to the specific nature of its legal personality) and an excess of authority by an individual organ or agent. Despite the present wording of the article, the Commission's commentary tries to extend this attribution rule to both situations. This is highly disputable and the commentary contradicts itself in some instances. The key should be the interpretation of the words "in that capacity". In cases where it must be evident to any entity (a State or an international organization) acting in good faith that certain conduct manifestly exceeds the scope of the legal personality, special and functional, of the international organization concerned, the organ's *ultra vires* conduct should not be attributed to the organization.

SWITZERLAND

In the context of acts committed by an international organization, or by one of its organs or agents, that exceed the authority of the former or the latter, Switzerland considers the element of good faith to be important. Switzerland therefore believes that it would be useful to add to article 38 ("Contribution to the injury") a statement to the effect that where an international organization's conduct is clearly wrongful—that is, where the member States or international organizations are in a position to be aware of it—the latter should so comport themselves as to limit the injury suffered and should not be able to seek reparation for an injury arising from such conduct. Such an addition would be particularly valuable where the international organization adopts a non-binding recommendation.

**Article 8. Conduct acknowledged and adopted by an international organization as its own**

CHILE

Paragraph (5) of the commentary states that the rules of the organization govern the issue of which organ would be competent to acknowledge and adopt a conduct as its own. It is very possible, however, that the rules of the organization will not help in all cases. The rules of the organization will probably identify the functions of each organ and which organs have the power to bind the organization in international instruments, but the organization's constituent instrument probably will not specify which organ is to take responsibility for the conduct of third parties. The rules on the powers of the various organs to conclude agreements or otherwise bind the organization could not be applied by analogy to cases involving the assumption of responsibility for the conduct of third parties. The organ acknowledging such conduct may occupy a middle rank in the organization's hierarchy, and a decision needs to be taken as to whether statements by such organs can bind the organization's responsibility or whether only its management organs can do so.

EL SALVADOR

1. Draft article 8, whose wording is the same as that of article 11 of the draft articles on responsibility of States, regulates the possibility of attributing responsibility to an international organization for an act that may not, for whatever reason, be attributable to it initially. The cases in which an act is not attributable to an organization vary considerably, ranging from the commission of an act by an agent of the organization who has already been dismissed, to wrongful acts that are completely outside the jurisdiction of the organization concerned. It is not feasible, in a draft of this kind, to stipulate detailed provisions covering every possible scenario. El Salvador therefore supports the incorporation of a general rule, as the Commission has done, that covers a wide range of possible situations in which an organization is able to adopt an act as its own, provided that this act cannot be attributed through the ordinary channels.

2. Despite the appropriateness of establishing a general rule, El Salvador also considers it important to include in the commentary, which, being highly illustrative, is very useful for understanding legal norms and is particularly beneficial when conflicts arise as to the interpretation of those norms, an especially pertinent scenario, namely, *de facto* actions. By these, El Salvador means actions carried out by a person not authorized to act on behalf of the organization, in particular a person whose appointment is not lawful either because he or she has been suspended from duty or because the appointment has been terminated.

3. El Salvador notes that the only mention of such a scenario in the draft articles is a reference to the position taken recently by a WTO panel on *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, in which the panel accepted

the European Communities' explanation of what amounts to its *sui generis* domestic constitutional arrangements that Community laws are generally not executed through authorities at Community level but rather through recourse to the authorities of its member States which, in such a situation, "act *de facto* as organs of the Community, for which the Community would be responsible under WTO law and international law in general".<sup>1</sup>

However, this example is not sufficient for dealing with a situation that comes under *lex specialis* rather than the general context of the draft articles. El Salvador believes that the Commission should consider this possibility, since the draft articles make no clear provision for such a scenario and it cannot be left out, given the complex structure of many international organizations.

<sup>1</sup> WTO, WT/DS174/R, 15 March 2005, para. 7.725. See also *Yearbook ... 2009*, vol. II (Part Two), para. (4) of the commentary to art. 63.

MEXICO

1. Mexico agrees with the Commission that the criteria that guided its drafting and adoption of article 11 of the draft articles on responsibility of States are applicable *mutatis mutandis* to international organizations. Given that various international organizations are required, as

part of their functions, to address situations that do not involve their own conduct, the potential practical relevance of this draft article is considerable.

2. In the opinion of Mexico, it would be advisable for the commentary to address the temporal aspect more clearly. The commentary to article 11 of the draft articles on responsibility of States makes it clear that conduct is attributable where it has subsequently been acknowledged and adopted by a State as its own. Such a clarification would also be appropriate in the context of the present articles, particularly in the light of the *ex post facto* acknowledgement or adoption of conduct by international organizations, and would be of great practical relevance in this context.

3. It would also be appropriate to provide more in-depth commentary on the criteria that distinguish an organization's acknowledgement and adoption of conduct as its own from mere support for that conduct.

### CHAPTER III

#### BREACH OF AN INTERNATIONAL OBLIGATION

##### *Article 9. Existence of a breach of an international obligation*

PORTUGAL

Regarding paragraph 2, the wording that has been adopted is clearer than in the previous draft. It is the understanding of Portugal that some of the "rules of the organization", such as internal rules of a merely procedural or administrative nature, or private law rules that may govern the relations between the organization and international law subjects, do not constitute international law. In other words, the assertion that "in principle, rules of the organization are part of international law"<sup>1</sup> is too vague a statement and is not compatible with the accuracy that should characterize the legal discourse.

<sup>1</sup> *Yearbook ... 2009*, vol. II (Part Two), para. 37.

### CHAPTER IV

#### RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION IN CONNECTION WITH THE ACT OF A STATE OR ANOTHER INTERNATIONAL ORGANIZATION

CUBA

1. With regard to the scope of the responsibility of an international organization for providing aid or assistance, or for coercing a State or another international organization, as provided for in draft articles 13 to 15, Cuba notes that such responsibility is limited by three theoretical requirements of progressive development: first, the organization must know the circumstances by virtue of which the conduct of the international organization receiving assistance is internationally wrongful; secondly, the aid or assistance must be provided for the purposes of facilitating the commission of that act and must actually facilitate it; and, thirdly, the act committed must be such as would have been wrongful if

the international organization providing the assistance had committed the act itself. Such requirements make it difficult to attribute responsibility to an international organization for the aid, direction or control that it has provided or exercised in the commission of an internationally wrongful act, which undoubtedly facilitates the proliferation of acts in breach of international law.

2. Cuba considers that a new provision of progressive development, relating to the attribution of responsibility to a State or international organization for its participation in the internationally wrongful act, should be introduced. This new provision should contain a presumption establishing that any State or international organization that aids another in the commission of a wrongful act does so with knowledge of the circumstances of the same.

##### *Article 13. Aid or assistance in the commission of an internationally wrongful act*

CUBA

1. The requirement that the act would be wrongful if committed by the State or international organization providing the aid or assistance should be removed. The progressive development of a rule establishing that States and international organizations are duty-bound not to facilitate the commission of an act in breach of international law is proposed instead.

2. Cuba proposes removing the requirement whereby the aid or assistance must have been provided with the intention of facilitating the commission of the violation and the violation must actually have been committed, or, as another variant, reversing the burden of proof through a presumption establishing that any entity that aids another to commit a wrongful act, knowing that to be the objective, does so in order that the wrongful act may be committed.

SWITZERLAND

While the commentary to article 13 refers to article 16 of the draft articles on responsibility of States, it is clear that the condition of intention is not mentioned in the text of either of those articles; it appears only in the commentary to article 16. Consequently, in view of the overriding importance of this condition, Switzerland believes it would be appropriate to specify, in the commentary to article 13, that the commentary to article 16 of the draft articles on responsibility of States is also applicable.

##### *Article 14. Direction and control exercised over the commission of an internationally wrongful act*

BELGIUM

Belgium supports the text of the draft articles as formulated by the Commission, including its clear determination of the cumulative nature of the conditions of "direction and control", which faithfully reflects article 8 of the draft articles on responsibility of States. At the same time, it would like to draw the Commission's attention to an ambiguity inherent in the wording of paragraph (2) of its commentary to this provision, in which the Commission cites a passage from a French Government paper in the

case *Legality of Use of Force (Yugoslavia v. France)*, which suggests that the direction and control could be exercised by two different international organizations.<sup>1</sup>

<sup>1</sup> *Legality of Use of Force (Yugoslavia v. France)*, Preliminary Objections of the French Republic (5 July 2000), p. 33, para. 46. Available from: [www.icj-cij.org/files/case-related/107/10873.pdf](http://www.icj-cij.org/files/case-related/107/10873.pdf).

#### CUBA

Cuba suggests reversing the burden of proof in the case of participation through direction or control, in such a way that the entity with overall control, not *in situ*, is presumed responsible and has the burden of proving its non-participation.

#### **Article 15. Coercion of a State or another international organization**

##### GERMANY

1. Germany welcomes the Commission's finding in paragraph (2) of its commentary to draft article 15, according to which

[i]n the relations between an international organization and its member States or international organizations, a binding decision by an international organization c[an] give rise to coercion only under exceptional circumstances.

Coercion, in the passage following this paragraph, is, in Germany's opinion, rightly identified as having to amount to conduct which goes as far as to *force* the will of the coerced State. A binding decision *as such* hence does not constitute coercion in the sense of this article. As Germany understands it, this is precisely what the Commission intends to say when it points to "exceptional circumstances" in this context. If so, paragraph (3) of the commentary may, however, give rise to a misunderstanding and could therefore benefit from further clarification.

2. It is worth recalling another important difference between draft article 16, which expressly addresses the scenario of binding decisions being directed by an international organization to a member State, and draft article 15. While draft article 16—just as draft article 14 on "direction and control", which, as the commentary to draft article 14 in paragraphs (3) and (4) identifies, might also be applicable in this context—includes the requirement of the act committed by the State having to be wrongful for the *international organization*, this requirement is *not* included in draft article 15. Draft article 15 focuses only on whether the coerced *State* (but for the coercion) infringes an obligation. If draft articles 14 and 16 hence correctly establish the principle that an international organization is required to focus solely on its own obligations and not to keep the obligations of all of its members in mind when adopting a binding decision, the consequence must be that a binding decision *as such* may not be subsumed under draft article 15 as "coercion". Only where a binding decision is accompanied by additional and illegal action such as the threat or use of force may draft article 15 become applicable. Although this understanding can already be read out of the Commission's commentary and the structure of the draft articles, a further clarifying remark might help in order to fully exclude any misunderstanding in this draft article's area of application.

#### **Article 16. Decisions, authorizations and recommendations addressed to member States and international organizations**

##### AUSTRIA

1. The concept of draft article 16, paragraph 2 (b), should be reconsidered. It is doubtful as to whether this paragraph, in its present form, will contribute to clarifying the relationship between the responsibility of a member State acting wrongfully upon the authorization or recommendation of an organization and the responsibility of the latter organization. This is due to the fact that the concept of the reliance or non-reliance of a member State on the authorization or recommendation of its organization is rather vague. In order for an internationally wrongful act of a member State to create the responsibility of an organization authorizing or recommending it, a very close connection between the authorization or recommendation and the relevant act of the member State is required. This could, for instance, be established through the use of the expressions "in compliance with" or "in conformity with". This wording would make an organization responsible for the above-mentioned non-binding acts only if the wrongfulness of the act committed by the member State was a direct consequence of the authorization or recommendation. Any wrongful act that is as such not necessary for the implementation of a related authorization or recommendation would thus not give rise to the responsibility of the organization.

2. Nevertheless, the question should be asked whether and to what extent an international organization should be held responsible for recommendations and authorizations at all, in particular as compared to binding decisions of the international organization. As to authorizations, could a mere authorization already generate international responsibility of the international organization since, in such a case, the international organization would become responsible for acts that are not attributable to it? The draft articles on responsibility of States do not provide responsibility for incitement, and it could therefore be asked why international organizations should become responsible for recommendations which are similar to incitements as far as their effect is concerned. Although Austria does not rule out such a responsibility, more information on the justification and limits of such a responsibility would be advisable. The commentary could go further in this regard. For instance, problems could arise if the organization recommended that a State perform an act that is contrary to obligations incumbent upon the organization but not on the State. The wording of draft article 16, paragraph 2 (b), would give rise to the responsibility of the organization although no breach of a rule of international law had occurred, since a recommendation alone is unable to commit such a breach. It seems that quite a number of questions have to be answered with regard to this issue before a final decision can be made. The above-mentioned qualification of the relation between the act of the State and the recommendation of the organization would certainly help in this regard.

##### BELGIUM

1. Belgium believes that the claim that the international organization would be circumventing an international obligation if it itself had committed the internationally wrongful

act, as set out at the end of the first paragraph of this provision, introduces an overly strict subjective criterion which, in addition, makes the provision very difficult to apply.

2. Accordingly it proposes that this last section of the sentence, from the words “and would circumvent an international obligation”, should be deleted.

#### CZECH REPUBLIC

The purpose of draft article 16, as it is understood by the Czech Republic, is to ensure that international organizations do not escape responsibility in cases where a member State violates an international obligation while acting in compliance with a request contained in an act of the international organization. The case law of the European Court of Human Rights (in particular in *Bosphorus*<sup>1</sup>) and the European Court of Justice (in particular in *Kadi*<sup>2</sup>) is unequivocal, a fact which is reflected in the Commission’s commentary.

<sup>1</sup> *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi (Bosphorus Airways) v. Ireland* (Grand Chamber), judgment of 30 June 2005, No. 45036/98, *Reports of Judgments and Decisions 2005-VI*.

<sup>2</sup> Joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, 2008.

#### GERMANY

While generally welcoming a provision such as draft article 16, intended to hinder an international organization from evading its responsibility, Germany has considerable doubts as to whether the article is adequately precise in its wording. Draft article 16, in its paragraphs (1) and 2 (a), considers an international organization as having incurred responsibility in scenarios where it “circumvents” an international obligation. The term “circumvents” is, however, not clearly defined, and its precise meaning remains hard to grasp. While Germany would understand and support a reading which interprets an act of circumvention to mean an intentional *misuse* of an organization’s powers in order to evade responsibility, paragraph (4) of the commentary to draft article 16 stipulates:

The existence on the part of the international organization of a specific intention of circumvention is not required. Thus, when an international organization requests its members to carry out a certain conduct, the fact that the organization circumvents one of its international obligations may be inferred from the circumstances.

Were “circumvention” to be interpreted as “misuse” requiring an intentional circumvention, this would by no means render the second sentence of the commentary obsolete. Even where a “specific intention of circumvention” is considered necessary, it would remain fully permissible, and in fact even be necessary, to infer this intention by judging an organization’s conduct from the eyes of a reasonable observer taking full account of the circumstances of the case. The term “circumvent” would, however, in that case be more clearly defined.

#### MEXICO

1. This provision relates both to binding decisions of international organizations (art. 16, para. 1) and authorizations

and recommendations of such organizations (art. 16, para. 2). The first situation is clear. The second offers a scenario that borders on incitement. Mexico is convinced that all possible steps must be taken to prevent and avoid evasion of responsibility, whether by members of the organization or by the organization itself, and that this should be the object and purpose of the present articles. In this regard, Mexico welcomes the rule set out in article 16, paragraph 2.

2. However, since there are no clear rules on incitement as a criterion for the attribution of responsibility except in specific cases established in treaties, such as incitement to genocide,<sup>1</sup> Mexico considers that the responsibility of an organization derived from the conduct of one of its members when acting upon its recommendation or based on its authorization should be attributed on the grounds that the said conduct takes place pursuant to, not simply because of, that authorization or recommendation. The latter would appear to be a very vague criterion that could include incitement in general terms.

<sup>1</sup> *Yearbook ... 2001*, vol. II (Part Two), p. 65, para. (9) of the commentary to chap. IV of the draft articles on responsibility of States.

### CHAPTER V

#### CIRCUMSTANCES PRECLUDING WRONGFULNESS

##### MEXICO

1. Mexico is one of the States that has declared in previous discussions that the chapter on the circumstances precluding wrongfulness was one of the most difficult parts of the current draft because those circumstances are too similar to the corresponding rules in the draft articles on responsibility of States, whereas they are, in fact, very different. For example, the Mexican delegation mentioned during Sixth Committee discussions in 2004 that the Commission should consider that the essential interests of an organization could not, by definition, be equated with the essential interests of a State.<sup>1</sup> Mexico is pleased to note that article 24 has re-established this critical distinction, especially by defining “essential interest” as an interest “of the international community as a whole” (para. 1 (b)). Nonetheless, it could be difficult to identify in specific cases.

2. In general terms, Mexico continues to see practical difficulties with any mention of the circumstances precluding wrongfulness in respect of international organizations, especially in the cases of “necessity” (art. 24), countermeasures (art. 21) and “self-defence” (art. 20).

<sup>1</sup> *Official Records of the General Assembly, Fifty-ninth Session, Sixth Committee*, 23rd meeting (A/C.6/59/SR.23), para. 27.

#### Article 19. Consent

##### AUSTRIA

1. One has to ask when consent given by an international organization to the commission of a given act by another organization constitutes a circumstance precluding wrongfulness of that organization’s conduct. Whereas

valid consent given by a State serves as a circumstance precluding wrongfulness according to the draft articles on responsibility of States, this issue is by no means so clear with respect to international organizations. First of all, the consent given by international organizations is not in all aspects comparable to consent given by States, particularly in view of the limited powers of international organizations as compared to States and the fact that if the rights of an organization are violated the rights of its members may also be affected.

2. In this context, a number of questions arise: does consent or authorization of a general nature provided in a non-binding resolution, such as a General Assembly resolution, amount to consent in the sense of the articles on responsibility of States? The qualification of the consent by the term “valid” does not solve the problem, as it is not clear whether a recommendation alone already constitutes consent. But if so, does such consent indeed override treaty obligations? On the one hand, it can be argued that a non-binding resolution could not constitute consent with the legal effect of precluding wrongfulness according to the articles on responsibility of States. On the other hand, if a resolution expressing consent is of a legally binding character, such consent given by an international organization may constitute not only a circumstance precluding wrongfulness, but also a matter of conflicting norms under international law. Hence, this article needs further clarification concerning the nature and the consequences of consent.

#### *Article 20. Self-defence*

AUSTRIA

It seems that the defence of an international organization's mission that has its legal basis in a relevant international mandate is not included in the present wording of draft article 20. In addition, two further questions remain unanswered: first, is the international organization allowed to rely on (State-like) self-defence if a territory under its control and/or administration is being attacked? The commentary seems to give an affirmative answer. And secondly, is the international organization justified in defending its premises on the territory of the host State, either against attacks by the host State or any other State attacking the host State? Here again, it seems unclear whether the principles of international law embodied in the Charter of the United Nations justify such action. Due to the fact that international organizations usually operate within host States, these questions demand certain clarification, at least in the commentary.

CZECH REPUBLIC

The concept of self-defence, which has been elaborated with regard to States but should be used also with regard to international organizations, seems especially difficult, although it is likely to be relevant only to the acts of a small number of organizations, such as those administering a territory or deploying an armed force. As regards these two examples, one cannot but agree with the former, since in such cases an international organization may exceptionally perform functions similar to that of a State (e.g. the United Nations Transitional Administration in East Timor or the United Nations Interim Administration

Mission in Kosovo). As regards the latter example, the Commission itself puts it in a relative light by stating that the question of the extent to which United Nations forces are entitled to resort to force depends on the primary rules concerning the scope of the mission. However, if the entitlement to resort to force depends only on the primary rules concerning the mandate of the mission, the inclusion of self-defence in the draft articles on the responsibility of international organizations does not make much sense.

REPUBLIC OF KOREA

See the comment under general comments, above.

#### *Article 21. Countermeasures*

AUSTRIA

1. The Commission has stated that

[w]hile the present articles consider the invocation of responsibility by a State or an international organization, they do not address questions relating to the invocation of responsibility of States.<sup>1</sup>

It is clear, therefore, that questions relating to countermeasures by an international organization against a State are not within the scope of the present articles. Nevertheless, paragraph 1 of draft article 21 refers to the preclusion of the “wrongfulness of an act of an international organization not in conformity with an international obligation towards a State”, thereby recognizing that countermeasures by an international organization against a State are conceivable. Furthermore, since the Special Rapporteur is of the view that “countermeasures are more likely to be taken by an international organization against a responsible State”,<sup>2</sup> the question of whether and to what extent international organizations are entitled, generally, to take countermeasures against States should be further explored in the context of the present articles. This is certainly part of the general law on the invocation of responsibility by international organizations, and Austria is concerned that if this point is left open, there will remain a large gap in the work of the Commission on responsibility in international law.

2. Paragraph 2 of draft article 21 seems to refer to countermeasures against members of an international organization, be they States or international organizations. Austria supports the view that members of international organizations are treated differently from third parties, in particular when it comes to countermeasures, and would suggest that it be clarified that the qualifier “member” relates also to international organizations which are members of the organization in question.

<sup>1</sup> Para. (2) of the commentary to Part Four.

<sup>2</sup> Seventh report on responsibility of international organizations, *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/610, para. 62.

CHILE

See the comment under article 51, below.

GERMANY

1. Germany is of the opinion that the question of countermeasures by international organizations against States should be excluded from the scope of the draft articles.

This conviction rests on the consideration that, notwithstanding the considerable EU practice, numerous questions are still unanswered with regard to the relationship between international organizations and non-member States. The relationship between an international organization and its members on the other hand is in the view of Germany by definition governed by the internal rules of the organization. As a general rule, there is hence no room for countermeasures between an international organization and its members. This, in the opinion of Germany, holds true not only for the question of countermeasures taken by member States against an international organization, but is especially valid as regards countermeasures taken by an international organization against its member States. In this respect, measures taken by an international organization against its members in accordance with its internal rules should in the eyes of Germany be clearly distinguished from countermeasures. It is more appropriate to regard them as sanctions governed by a specific set of rules. The latter is also true for sanctions imposed by the Security Council. Germany therefore disagrees with the approach now taken by the Commission in including countermeasures in the draft articles.

2. If they are nevertheless included, Germany, in the light of the aforementioned, considers it necessary for the draft article and its commentary to clearly stipulate that countermeasures adopted by an international organization against its members must remain restricted to very exceptional circumstances. As emphasized above, as a general rule there is no room for such measures. The draft article may hence be commended for the fact that, in paragraph 2, it correctly states that an international organization may *not* take countermeasures against a responsible member. The draft article, however, allows for an exception under two conditions, both of which have to be fulfilled: the countermeasures may not be inconsistent with the rules of the organization, and no appropriate means are available for the international organization to induce compliance with the obligation of the responsible member State (or member international organization). In respect of the first prong of this exception, Germany considers it necessary for the commentary to make it very clear that countermeasures have to be deemed *inconsistent* with the rules of the organization unless there are clear indications that the internal rules of the organization (potentially also including sanctions) were *not* meant to exclusively govern the relationship between the organization and its members.

3. Unlike the relationship between States, which is first and foremost governed by general rules of international law, overridden only by *lex specialis*, where the latter has been specifically agreed upon or has otherwise developed, the relationship between an international organization and its members is created by the latter's wilful act. It is hence for an organization's members to stipulate and precisely define the relationship between them and the newly created international legal entity, including the legal powers an international organization may resort to, should one of its members breach an existing obligation *vis-à-vis* the organization. In this area of *lex specialis* application, there is, in the opinion of Germany, simply no room to resort to general international law, apart from specific indications to the contrary. This should be made very clear either in the draft itself or in the commentary thereto.

#### PORTUGAL

1. If the issue of countermeasures is a controversial one insofar as States are concerned, it becomes even more problematic as regards international organizations. The issue of countermeasures raises, in the context of international organizations, very complex questions and may lead to certain paradoxes. Additionally, the recurrent use by the Special Rapporteur of examples based on the experience of the European Community and of WTO is possibly the least suitable test for the draft articles. This only indicates the existence of lack of practice on this matter and the difficulty in elaborating adequate, general and abstract legal solutions.

2. One should also be careful when distinguishing between countermeasures and similar measures. Whenever a distinction is being drawn between them, the source of the measure, its legal grounds, its nature and its purpose need to be taken into consideration. For instance, Security Council sanctions cannot be regarded as countermeasures. Furthermore, measures taken by an international organization in accordance with its internal rules against one of its members should not be considered as countermeasures.

#### *Article 24. Necessity*

#### AUSTRIA

1. The practice of international organizations makes it clear that the principle of necessity is of high practical relevance, at least in two specific areas: the principle of operational necessity is applied in the context of peacekeeping missions, whereas the principle of military necessity is applied in the context of peace enforcement missions (or military actions within peacekeeping missions). Both States and international organizations apply these principles.

2. Austria agrees that the principle of necessity should not be as widely invocable by international organizations as by States. It is conceivable that the reference to "essential interest of the international community as a whole" is designed to raise the threshold for excluding the wrongfulness of an act by an international organization. But the notion of such essential interest without further qualification lacks the necessary clarity. This problem could, however, be diminished if the principle of necessity were tied to the mandate of the organization.

3. Austria, therefore, would prefer it if the principle of necessity were invocable only if the act in question constitutes the only means for the organization to fulfil its mandate. The organization may then only invoke the principle of necessity *vis-à-vis* those (member) States that have agreed to or are bound by the organization's mandate. It can clearly be argued that the mandate itself is, in both cases, the legal basis of the lawfulness of the action. If an international organization may rely on the operational necessity principle *vis-à-vis* third States, this may, indeed, be accepted if the mandate of the international organization pursues an essential interest of the international community as a whole. In any case, further considerations are necessary on the legal effects generated by the constituent instrument itself towards third States that did not recognize the acting international organization.

4. The international practice of NATO, the United Nations, OAS, *inter alia*, shows that international organizations consider the operational/military necessity principle as a rule based first and foremost on customary law.

## CUBA

Cuba considers that the negative formulation of the draft article should be maintained. The current wording of paragraph 2 should also be retained. However, it believes that there is a need to explain what is meant by “essential interest”. While it should not include minor uses of force or the so-called “responsibility to protect”, it should cover safeguarding the environment and preserving the very existence of the State and its population at a time of public emergency.

## GERMANY

There are good reasons for allowing necessity to be invoked by international organizations only under strict circumstances which take into account the special character of international organizations as compared to States. Against this background, the restriction in draft article 24, paragraph 1 (a), that international organizations may invoke necessity only where it “is the only means for the organization to safeguard against a grave and imminent peril an essential interest of the international community as a whole when the organization has, in accordance with international law, the function to protect that interest” is, as such, understandable. It does, however, go too far, since international organizations are diverse in their respective functions and competencies. Not all organizations are concerned with protecting an essential interest of the international community, but they will usually protect a legitimate and possibly even essential interest of their members. A provision along the lines referred to in paragraph (4) of the commentary to article 24, according to which an international organization may invoke necessity where it is the only means for the organization to safeguard an essential interest of its member States, which the organization has the function to protect against a grave and imminent peril, is therefore to be preferred.

## PART THREE

## CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION

## CHAPTER I

### GENERAL PRINCIPLES

#### *Article 31. Irrelevance of the rules of the organization*

## MEXICO

The irrelevance of the rules of the organization as justification for failure to comply with its obligations under international law is another case in which Mexico considers that the analogy with the corresponding rule for States, i.e. the irrelevance of internal law as justification for non-compliance, is problematic. Many have pointed out that the rules of the organization may be either internal rules

or rules of international law. This normative inconsistency could give rise to serious problems in application of the present article.

## REPUBLIC OF KOREA

Draft article 31 originates from article 27 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations and from article 32 of the draft articles on responsibility of States, which forbids States from relying on their internal law as justification for failure to comply with their obligations. However, unlike States, international organizations act and have limited functional authority based on their constituent instruments and internal rules. The draft article should be reformulated so as to emphasize that international organizations cannot rely on their internal rules for the sole purpose of justifying their failure to comply with their international obligations.

## CHAPTER II

### REPARATION FOR INJURY

#### *Article 39. Ensuring the effective performance of the obligation of reparation*

## AUSTRIA

1. In principle, Austria supports the idea of a provision that ensures that the organization is sufficiently equipped by its member States so as to enable it to compensate an injured party in accordance with chapter II of Part Three of the draft articles. Draft article 39 is obviously designed to serve that purpose in trying to bridge the discrepancy between the creation of an obligation for the collectivity of member States to provide the organization with the means to effectively compensate parties injured by its violation of international law and the interest in avoiding the implication of subsidiary responsibility for member States.

2. But international practice does not seem to support an obligation for member States to bear the financial consequences of an illegal or *ultra vires* act attributed to the international organization.<sup>1</sup> Such an obligation implying the member's responsibility under international law and thus “piercing the corporate veil” is difficult to accept. In Austria's view, a provision such as draft article 39 would dilute the desired legal effects of codification. Furthermore, this provision is inconsistent with the system of the draft articles, as it is limited only to members of a responsible international organization. In case the draft articles are eventually adopted in the form of an international convention, draft article 39 would entail an additional systematic problem: a quasi-universal acceptance, or at least the acceptance by all members of the organization, would be required in order to effectively establish an actual duty of members to provide sufficient financial means for their organization to fulfil its obligations under this chapter.

<sup>1</sup> *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, advisory opinion of 20 July 1962, *I.C.J. Reports 1962*, p. 151 at pp. 162 *et seq.* and p. 167: “The Court agrees that ... if an expenditure were made for a purpose which is not one of the purposes of the United Nations, it could not be considered an ‘expense of the organization’”.

Moreover, the present wording of draft article 39 is placed outside the overall concept of the draft articles on the responsibility of international organizations. According to its wording (“are required to take”), draft article 39 does not clearly establish a legal obligation of member States to provide the responsible international organization with all necessary means to fulfil its obligation defined in draft article 30, that is, to make full reparation for the injury caused by the internationally wrongful act.

3. On the other hand, the member States that enable an international organization to act on the international plane are accepting the risk that this organization may violate international law. This risk cannot be left with the injured party. It is therefore reasonable that the risk has to be borne by the collectivity of the members, while the responsibility to compensate remains entirely with the organization.

4. Accordingly, Austria tends towards supporting the proposal set out in paragraph (4) of the commentary to draft article 39 to state expressly the obligation of the responsible international organization to take all appropriate measures in accordance with its rules in order to ensure that its members provide it with the means for effectively providing full reparation in accordance with draft article 39. The following reasons provide a basis for supporting this proposal:

(a) The proposal avoids the above-mentioned inconsistencies and shortcomings of the present wording of draft article 39;

(b) The *raison d'être* of the proposal is to commit the responsible organization to organize its budget in a manner which secures the satisfaction of an injured party. In other words, the organization would be obliged to make appropriate dispositions in its regular budget (or special accounts linked to the specific operation);

(c) This solution would at the same time oblige the members of an organization, through its organs and according to its internal rules, to provide for the means to meet the financial consequences of illegal activities or *ultra vires* acts to be attributed to their international organization. Thus, the risk that an international organization oversteps its legal framework is borne by the parties that have enabled the international organization to act in that manner, that is, the collectivity of members of the responsible organization. The proposal supports an all-embracing interpretation of the phrase “expenses of the organization”.<sup>1</sup>

5. In the case that the responsible organization is dissolved before the compensatory payment is made, the proposal works towards the proper budgetary liquidation of outstanding liability.

<sup>1</sup> Charter of the United Nations, Article 17, paragraph 2.

#### GERMANY

1. In respect of draft article 39 and the commentary thereto, Germany very much agrees with the Commission's finding, as expressed in paragraph (2) of the

commentary to the article, that no subsidiary obligation of a member of an international organization towards the injured party is considered to arise when the responsible organization is not in a position to make reparation. Germany by no means denies the general desirability of international organizations being able to fulfil their obligations, including secondary obligations such as those arising in connection with reparation for injury. However, regarding the question of whether there is a legal duty flowing from a rule of general international law for members of an international organization to take all appropriate means in order to provide the organization with the means to effectively fulfil its obligation to make reparation, Germany is clearly of the opinion that no such rule exists. As can be taken from paragraph (7) of the commentary to draft article 39, Germany apparently finds itself in good company with the prevailing majority within the Commission. The Commission is therefore to be commended for including an express reference to the rules of the organization within the present draft article, to which the commentary in paragraph (6) correctly points as the (only) basis of the requirement in question.

2. Germany, however, is worried by the article's wording, which, as it stands and despite the commentary's assertions to the contrary could be misunderstood as stipulating a general duty for States to ensure the effective performance of an international organization. The draft article, after all, considers members to be “required” to do so. That this “requirement” must be in line with “the rules of the organization” could be misconstrued as stipulating a general requirement which will merely be altered or abrogated where an international organization should have rules to the contrary. As Germany sees it and reads the commentary, this would clearly be an erroneous conclusion. Germany would therefore welcome a clarification within the draft article's wording highlighting the fact that the “requirement” will *only exist if and as far as provided by the rules or within those rules of the international organization*. In this context, Germany would also like to caution the Commission against simply assuming any such requirement to be generally implied in the rules of international organizations, as the commentary in paragraph (6) appears to be doing, for cases where the rules are silent on the matter. Germany, in this context, considers it pivotal to focus on the actual agreement and the will expressed by the founding States (or other international actors). For example, unless a duty to finance an organization is expressly provided for in the rules of an international organization, a *concrete* obligation for each and every member cannot simply be read into the document.

3. Germany would also like to emphasize the fact, and would welcome a clarifying remark in the Commission's commentary, that the requirement in question is in any event only one which merely concerns the *internal* relationship between an international organization and its members. Third parties cannot benefit from it, even where it is found to exist.

#### PORTUGAL

1. There are no grounds in international law on which members may have a joint liability towards the injured party when the responsible international organization has

no means to achieve full reparation. On the other hand, members are under the obligation to contribute to the international organization's budget in order to bear the expenses incurred in the performance of its duties, in accordance with its constitutive treaty. The expenses incurred in complying with a reparation order are an example.

2. Draft article 39 cannot be read as imposing on members what could seem like an immediate obligation to make an extraordinary contribution in order to cover an expense that may arise following an internationally wrongful act by the international organization. That is not consistent with the autonomy and independence that characterize international organizations. It should be for the international organization's budget to foresee this kind of expense, and it is up to members to ensure that it does so. The focus should be on the international organization itself and not on its members.

3. Thus, draft article 39 embodies a balanced solution when interpreted as imposing a general obligation on members of an international organization to provide it with the means for enabling the effective fulfilment of its obligations, including reparation. Furthermore, even if it merely clarifies the present wording, Portugal would support the proposal by the Special Rapporteur to include a new paragraph 2 in draft article 39.

#### REPUBLIC OF KOREA

Draft article 39 places too great of a burden, mostly financial, on member States. To reduce the unnecessary burden on members and ensure the efficient implementation of the responsibility of an international organization, the present formulation could remain, with an additional specification in the commentary that the responsibility of members is limited only to the respective international organization, and not towards an injured State or an injured international organization.

#### CHAPTER III

### SERIOUS BREACHES OF OBLIGATIONS UNDER PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW

#### *Article 40. Application of this chapter*

#### CZECH REPUBLIC

Perhaps the most difficult and controversial question is whether an international organization can violate *jus cogens* and whether in such case the responsibility is incurred by the organization and/or its member States. The solution adopted by the Commission in draft articles 40 and 41 reflects the provisions of articles 40 and 41 of the articles on responsibility of States. However, the Commission's commentary does not offer any examples of serious breaches of obligations under peremptory norms of general international law committed by international organizations. On the contrary, the only relevant examples of practice concern the duty of international organizations not to recognize as lawful a situation created by a breach of such obligation and the duty to cooperate to bring such breach to an end. These examples are certainly

important; however, one might well question their relevance to the codification of the responsibility of international organizations, since they all concern the response of international organizations to breaches of peremptory norms committed by States.

#### PART FOUR

### THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION

#### CHAPTER I

### INVOCATION OF THE RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION

#### *Article 42. Invocation of responsibility by an injured State or international organization*

#### AUSTRIA

Austria understands that it is the intention of the Commission that the present draft articles deal only with the responsibility of international organizations as such and not with the conditions under which an international organization may invoke the responsibility of another subject of international law. However, it is necessary to point out that there will remain a gap in the regime of responsibility if the conditions for invocation of the responsibility of a State by an international organization are not addressed. In particular, since such situations arise rather frequently, as addressed, for example, by ICJ in its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*<sup>1</sup>, it could happen that the issue of invocation of State responsibility by an international organization may escape any regulation, since it was also not considered in the articles on responsibility of States for internationally wrongful acts.

<sup>1</sup> *I.C.J. Reports 1949*, p. 174.

#### *Article 44. Admissibility of claims*

#### AUSTRIA

The present text leaves open the question of whether an international organization can exercise functional protection on behalf of its officials who were injured by a different organization. In this context, the question arises as to under which preconditions international organizations may bring claims and take countermeasures against States or international organizations if the unlawful act is directed against an official of the respective organization.

#### EL SALVADOR

1. This provision is worded in the same way as article 44 of the draft articles on responsibility of States and is designed to establish the conditions or general requirements that allow a claim for the commission of an internationally wrongful act to be admitted. Given the general nature of the draft articles, it makes sense to establish certain admissibility criteria for international claims in order to avoid unnecessary claims being made that could have been resolved earlier in a different sphere.

2. El Salvador notes that, in this provision, the Commission has opted for two specific admissibility criteria: (a) conformity with applicable rules relating to nationality of claims; and (b) exhaustion of local remedies. As can be seen, the first criterion refers to rules of nationality, which would operate as a general condition for invoking international responsibility. The Commission itself made this clear in the commentary to the corresponding article in the draft articles on responsibility of States, when it said that “the nationality of claims rule is not only relevant to questions of jurisdiction or the admissibility of claims before judicial bodies, but is also a general condition for the invocation of responsibility in those cases *where it is applicable*”.<sup>1</sup>

3. Although draft article 44 of the draft articles on responsibility of international organizations is, as already mentioned, worded in the same way as the equivalent article on responsibility of States, its wording and the corresponding commentary do not leave open the possibility of establishing exceptions to the nationality rule contained therein. This is worrying and has in fact been criticized by some legal theorists, who have said that it creates an obvious internal conflict within the draft articles, since the application of the nationality linkage would invalidate, for the protection of rights of individuals injured abroad, any attempt to invoke responsibility, even though it has already been recognized on other occasions that the invocation of a breach of a peremptory norm must take precedence over diplomatic protection.

4. In other words, El Salvador’s concern here is with the idea of the protection of human rights, and it seems inappropriate to make such protection conditional on fulfilling a nationality requirement, all the more so if one considers *jus cogens* rules, namely, peremptory norms of international law, which have derived from certain essentially human and universal values, the observance and application of which are viewed as absolutely necessary to the life and survival of the community.

5. Likewise, the inclusion of the requirement to comply with nationality rules, which is formulated in restrictive terms, manifestly contradicts draft articles 40 and 41, contained in chapter III of the draft articles, which regulate serious breaches of obligations under peremptory norms of general international law.

6. Given the above considerations, El Salvador proposes that draft article 44, paragraph (1), be reworded to establish that the requirement linked to questions of nationality is not applicable in all cases. This could be done by inserting the words “where appropriate”, or the phrase “when any applicable rule relating to nationality applies to a claim”, along the lines of draft article 44, paragraph (2). This would achieve the necessary internal consistency with other provisions, particularly those concerning peremptory norms of international law.

7. El Salvador fully supports draft article 44, paragraph (2), since, even though it establishes the exhaustion of local remedies as a general admissibility requirement,

it can be deduced from its wording and the corresponding commentary that exceptions may be made to this requirement and that it is not enforceable in all cases. This means that if there are no available remedies or those that are available are not effective, the injured party will not have to fulfil this admissibility requirement.

8. This is precisely the trend followed by international courts. At the regional level, article 46 of the American Convention on Human Rights provides that admission by the Inter-American Commission on Human Rights of a petition or communication shall be subject to the remedies under domestic law having been pursued and exhausted in accordance with generally recognized principles of international law. However, the article also establishes three important exceptions, namely: when the domestic legislation does not afford due process of law for the protection of the right that has allegedly been violated; when the injured party has been denied access to the remedies under domestic law or has been prevented from exhausting them; and when there has been unwarranted delay in rendering a final judgment under the aforementioned remedies. Moreover, the Inter-American Court of Human Rights has also ruled that prevention of the exhaustion of domestic remedies for reasons of indigence or a general fear in the legal community to represent the complainant<sup>2</sup> are additional exceptions to the admissibility requirement.

<sup>2</sup> Inter-American Court of Human Rights, *Exceptions to the Exhaustion of Domestic Remedies*, advisory opinion OC-11/90, 10 August 1990, *Series A*, No. 11, para. 42.

#### **Article 47. Plurality of responsible States or international organizations**

GERMANY

Germany would like to question the validity of the assessment contained in draft article 47, paragraph (2). The commentary to this draft article in its paragraph (3) assumes that

[w]hether responsibility is primary or subsidiary, an injured State or international organization is not required to refrain from addressing a claim to a responsible entity until another entity whose responsibility has been invoked has failed to provide reparation. *Subsidiarity does not imply the need to follow a chronological sequence in addressing a claim*.\*

Germany has trouble understanding the last sentence. How can it be squared with the wording of draft article 47, paragraph (2), according to which “subsidiarity... may be invoked insofar as the invocation of the primary responsibility *has not led*\* to reparation”?

#### **Article 48. Invocation of responsibility by a State or an international organization other than an injured State or international organization**

CZECH REPUBLIC

While most of the rules on the implementation of the international responsibility of international organizations do not pose major problems, draft article 48 is an exception: an organization may invoke responsibility

<sup>1</sup> *Yearbook ... 2001*, vol. II (Part Two), p. 121, para. 77, para. (2) of the commentary to art. 44.

only if the interest of the international community underlying the obligation breached is included among the functions of the international organization. In practice there will presumably be disputes as to whether or not the functions of the given organization will justify a certain entitlement.

GERMANY

Germany would like to stress its appreciation for the solution adopted in the Commission's draft article 48, paragraph 3, according to which an international organization other than an injured organization is entitled to invoke the responsibility of another international organization in the case of a breach of an obligation which is owed to the international community as a whole *only* if safeguarding the interest of the international community underlying the obligation breached is included among the functions of the international organization invoking responsibility. This view is shared by several countries, while others apparently favour a more general entitlement. Germany considers the approach chosen by the Commission favourable to the alternative because despite the impact of obligations *erga omnes* on the international community as a whole, it appears to be too far-reaching to grant an entitlement to all international organizations, regardless of the functions entrusted to them by their members. After all, unlike States, international organizations do not have general legal competence but only functional competencies limited to the performance of their respective mandates and purposes.

CHAPTER II

COUNTERMEASURES

CHILE

Chile is in favour of the inclusion of a chapter on countermeasures, since there is no reason why an international organization which breaches an international obligation should be exempted from the adoption of countermeasures by an injured State or international organization to induce it to comply with its obligations.

**Article 50. Object and limits of countermeasures**

AUSTRIA

1. As already stated with regard to draft article 21, Austria is of the view that the conditions under which an international organization is entitled to resort to countermeasures against States should be further explored. There seems to be an inconsistency in that draft article 21 addresses countermeasures undertaken by international organizations against States, while draft article 50 does not relate to countermeasures by international organizations against States.

2. The distinction between member States and non-member States as well as the scope of the personality of the organization are fundamental in the context of countermeasures. In the view of Austria, it would first be necessary to analyse these aspects in more detail before any conclusion can be drawn. Moreover, in the view of

Austria, an international organization may resort to countermeasures only if such measures are in conformity with its constituent instrument. In other words, international organizations are not competent to take countermeasures merely by virtue of the fact that they enjoy a certain international legal personality. Rather, an international organization must be endowed with the competence to take such measures under its rules.

CHILE

Countermeasures need to be restricted so as not to prejudice the exercise by international organizations of their functional competence. This issue appears to be resolved by draft article 50, paragraph 4. However, defining the restrictions on countermeasures on the basis of such broad, imprecise wording may prove very difficult, rendering the application of countermeasures unworkable in practice.

GERMANY

Despite Germany's doubts as to the inclusion of the topic of countermeasures in the draft (see the comments on draft article 21), the Commission is to be commended for agreeing on the principle contained in paragraph 4 of draft article 50, according to which

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

While countermeasures by definition involve the non-performance by the injured State or international organization of one of its obligations *vis-à-vis* the international organization, it is necessary (also in view of the fact that international organizations enjoy only limited competencies) to limit the permissibility of countermeasures in order for their impact not to reach a level which renders an organization incapable of fulfilling its mandate as a whole. Paragraph 4 of draft article 54 effectively addresses these concerns.

**Article 51. Countermeasures by members of an international organization**

CHILE

1. As to whether an injured member of a responsible international organization may take countermeasures against that organization, Chile believes that this should, in principle, be possible, without prejudice to the application of the rules of the organization as *lex specialis*. Accordingly, it is in agreement with this provision and with the requirements established in draft article 51.

2. When the rules of the organization do not, explicitly or implicitly, regulate the question of countermeasures in relations between an international organization and its members, the general rule should be to permit the imposition of such measures. Accordingly, draft article 51 should be drafted positively in order to state more clearly the general rule applicable in cases where there are no rules of the organization that expressly decide the application of countermeasures. The same comment applies to article 21.

## GERMANY

1. In line with what has been said on draft article 21, which addresses the topic of countermeasures taken by an international organization, Germany would like to express its concern also in respect of draft article 51. Germany is of the opinion that the relationship between an international organization and its members—just as, vice versa, that of a member (State) and the organization—is governed fully by the internal rules of the organization. As a result, there is, as a general rule, no room for countermeasures between a member State and an international organization.

2. Germany is therefore sceptical at best as to whether the draft article adopted by the Commission can be said to adequately reflect the legal relationship between a member State and an organization in respect of countermeasures. To be precise, the draft article is to be commended for its wording, which emphasizes that an injured member “may not take countermeasures against that organization”. It is, in Germany’s view, in addition admissible to turn to an organization’s internal legal structure in order to identify whether there is, as an exception to the rule, any room left for countermeasures, as does draft article 51, paragraph (a). Where Germany might disagree with the Commission is on how to treat cases (probably the vast majority) where the rules of the organization are silent on whether countermeasures are allowed or not. For these scenarios, the commentary in paragraph (3) currently states:

When the rules of the organization do not regulate, explicitly or implicitly, the question of countermeasures in the relations between an international organization and its members, *one cannot assume that countermeasures are totally excluded\** in those relations.

The Commission is hence inclined to allow (at least limited) countermeasures where the organization’s rules are silent. Here, in the eyes of Germany, the Commission might want to be more careful. The legal relationship between a member and its organization must first and foremost be governed by the organization’s rules, which, after all, were carefully carved out and agreed upon precisely for this very task. If this is the case, there is a strong argument to be made that the rules are meant to exclusively govern the legal relations between the newly set up organization and its members. The commentary should hence in Germany’s eyes be altered to make it, at a minimum, very clear that the exception under subparagraph (a), according to which countermeasures may not be inconsistent with the rules of the organization, has to be read as requiring a clear indication that the rules were *not* meant to fully regulate their subject matter, that is, the legal relationship between a member State and the organization. Where such an indication within the rules (or at least their *travaux préparatoires*) is missing, everything militates for the assumption that countermeasures must be deemed inconsistent with the organization’s internal structure as set up by and reflected in its rules.

**Article 52. Obligations not affected by countermeasures**

## EL SALVADOR

1. Countermeasures are actions designed to induce a State or international organization which is responsible

for an internationally wrongful act to comply with its obligations. Generally speaking, both legal theory and international case law confirm their validity, the main case law being the 1928 *Naulilaa*<sup>1</sup> and 1930 *Cysne*<sup>2</sup> arbitrations, while, more recently, countermeasures were recognized by ICJ in its 1997 judgment in the *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)* case.<sup>3</sup> Thus, although practice concerning countermeasures taken against international organizations is scarce, El Salvador believes that the Commission was right to decide to include such measures in the draft articles.

2. Although countermeasures have been strongly criticized, from an objective standpoint they must be recognized as having both positive and negative aspects. Among the former, it must be noted that “countermeasures, or ‘self-help’, are a necessary part of any legal system, like the international system, that lacks strong ‘vertical’ enforcement... instead, States and other actors rely on a combination of other mechanisms such as countermeasures to win respect and compliance for these duties”.<sup>4</sup> Such measures are a form of self-protection, since it is the affected State that must react.

3. As already indicated, however, the use of countermeasures may also have negative aspects and drawbacks, such as abuses in their nature or duration that could have a serious impact on a State’s population and also entail a high risk of retaliation, thereby exacerbating existing conflicts. Unilateral assessment of the wrongfulness of an act is also questionable, as it could easily give rise to the establishment of subjective criteria for the adoption of countermeasures.

4. An evaluation of these positive and negative aspects shows that it is impossible to rule out the use of countermeasures in the international sphere, but also that in order to ensure their oversight and efficacy, definite limits must be set so that their shortcomings can be rectified and their disproportionate use avoided.

5. To respond to this need, draft article 50 envisages a number of exceptional situations in which the use of countermeasures is not allowed, basically because their application would affect obligations that cannot be suspended, and they cannot be adopted in any circumstances, not even as a way of forcing compliance with such an obligation.

6. For all these reasons, El Salvador recognizes the importance of including draft article 52 in its entirety in the draft articles on responsibility of international organizations, thereby permitting the establishment of definite limits to a practice of taking countermeasures that is, at present, far from uniform and, in many cases, excessive.

<sup>1</sup> *Responsabilité de l’Allemagne à raison des dommages causés dans les colonies portugaises du sud de l’Afrique (Naulilaa)* [Responsibility of Germany for the damage caused in the Portuguese colonies of southern Africa], UNRIAA, vol. II (Sales No. 1949.V.1), p. 1011.

<sup>2</sup> *Responsabilité de l’Allemagne en raison des actes commis postérieurement au 31 juillet 1914 et avant que le Portugal ne participât à la guerre (Cysne)* [Responsibility of Germany for acts committed after 31 July 1914 and before Portugal took part in the war], *ibid.*, p. 1052.

<sup>3</sup> *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7.

<sup>4</sup> David J. Bederman, “Counterintuiting Countermeasures”, *AJIL*, vol. 96 (2002), p. 818.

7. The above comments notwithstanding, El Salvador believes that an exhaustive analysis of the scope of paragraph 1 (b) of article 52, under which “obligations for the protection of fundamental human rights” would be a limiting factor on countermeasures, is needed to make its application more effective.

8. Some authors—and likewise the Commission<sup>5</sup>—interpret its scope as relating to a category of rights, within the context of human rights, which cannot be derogated from in any circumstances, even in time of war or public emergency. As already stated, the existence of a public emergency does not authorize States to breach their legal obligations under humanitarian law or international human rights law, for such obligations have binding effect in all kinds of circumstances of time and place.

9. In this connection, it may be noted that many human rights treaties, both universal and regional, have listed essential rights from which no derogation is possible. For instance, article 4, paragraph 2, of the International Covenant on Civil and Political Rights states that no derogation may be made from articles 6 (right to life), 7 (prohibition of torture and cruel, inhuman or degrading treatment or punishment), 8 (paragraphs 1 and 2) (prohibition of slavery or servitude), 11 (imprisonment on the ground of inability to fulfil a contractual obligation), 15 (no punishment without law), 16 (recognition as a person before the law) and 18 (freedom of thought, conscience and religion). Similarly, article 2, paragraph 2, of the Convention against torture and other cruel, inhuman or degrading treatment or punishment establishes that

[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

Article 15 of the European Convention on Human Rights likewise establishes that

[n]o derogation from article 2 [right to life], except in respect of deaths resulting from lawful acts of war, or from articles 3 [prohibition of torture], 4 (paragraph 1) [prohibition of slavery or servitude] and 7 [no punishment without law] shall be made.

The Inter-American system establishes a longer list, in that article 27 of the American Convention on Human Rights includes, among rights from which derogations may not be made, political rights, the rights of the child, the right to protection of the family and the right to a name and nationality.

10. It may thus be concluded that there is no uniformity as to the minimum rights that must be respected in all circumstances. This makes the category of “fundamental human rights” a rather imprecise one, and this imprecision could leave room for discretion in the adoption of countermeasures. This lack of precision, which shows that the term is being applied erroneously, combined with the fact that human rights in general could obviously be excluded, is incompatible with recent advances in the area of human rights, according to which everyone must be able to exercise certain universal and inalienable rights or powers that are inherent in his or her dignity. This recognition of the

centrality of human rights, which, in the words of Augusto Cançado Trindade, currently a judge at ICJ, corresponds to a “new ethos of our times”, presupposes protection of the human person in all circumstances against all manifestations of arbitrary power and concern for his or her living conditions in keeping with the new spirit of our age, in which the process of humanizing international law involves attending more directly to the attainment of higher shared goals and values. It is incongruous to include among those values the private interests of States or international organizations that allow the adoption of countermeasures.

11. In view of the foregoing, El Salvador proposes that the term “fundamental human rights” be replaced by “human rights”. This would permit not only recognition of their basic characteristics and the advances made thus far in this area, but also the adoption of a term whose scope certainly presents fewer difficulties, since it would cover a broader and more homogeneous category of rights as expressed in the various regional and universal human rights instruments.

***Article 56. Measures taken by an entity other than an injured State or international organization***

CUBA

The current formulation should be deleted and replaced by a formulation referring to the collective security system envisaged in the Charter of the United Nations.

CZECH REPUBLIC

The most problematic article in this chapter is draft article 56.

**PART FIVE**

**RESPONSIBILITY OF A STATE IN CONNECTION WITH THE ACT OF AN INTERNATIONAL ORGANIZATION**

***Article 57. Aid or assistance by a State in the commission of an internationally wrongful act by an international organization***

BELGIUM

Belgium supports the draft article as worded by the Commission but considers that, in its commentary, the Commission is only listing extreme cases and is not sufficiently clear on the principles enabling a State to determine with exactitude the moment with effect from which its responsibility may be invoked. Belgium suggests, in particular, that the Commission should specify at an earlier stage in the commentary to draft article 57 the precise reasons why the participation of a State member in a decision-making process which could lead to the commission of an internationally wrongful act does not fall within the purview of draft article 57.

CZECH REPUBLIC

Draft articles 57 to 59 mirror draft articles 13 to 15. Since the commentary offers practically no examples, the provisions were presumably adopted “just in case”.

<sup>5</sup> See the draft articles on responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two), p. 132, para. (6) of the commentary to art. 50.

**Article 58. Direction and control exercised by a State over the commission of an internationally wrongful act by an international organization**

AUSTRIA

The relationship between two States with regard to direction and control exercised by a State over the commission of an internationally wrongful act by an international organization is considerably different from the relationship between a State and an international organization of which it is a member. Does this mean that a State that has the power to prevent an international organization from committing an internationally wrongful act, for instance due to its capacity to block decisions through a *de facto* or *de jure* veto power, incurs responsibility for such act if it fails to prevent it? Here again, the character of an international organization, its function, its powers and its internal rules of decision-making make a decisive difference in clarifying the “repartition” of international responsibility for a wrongful act between a State and an organization.

**Article 59. Coercion of an international organization by a State**

AUSTRIA

The specific nature of international organizations should be taken into account before applying the law of State responsibility. In nearly every field of activity, international organizations are highly dependent on the willingness of their member States to cooperate. A member State may refuse to contribute to the budget; it may withdraw its national contingent or veto a necessary extension of the mandate. These may all be cases of coercion in a broader sense. But do all these cases trigger the member State’s responsibility? International practice does not support this view. In any case, because of the multilayer *inter se* relations between an international organization and its members, these qualifiers and the term “coercion” need some clarification within the legal text. The qualifier “knowledge”, in subparagraph (b), hardly seems sufficient to establish the necessary link in order for the State to become responsible for the act of an international organization. There must be a direct link between the coercive act of the State and the activity of the international organization.

**Article 60. Responsibility of a member State seeking to avoid compliance**

AUSTRIA

This draft article raises the question of how States can become responsible for acts which they did not influence, since the legal effects of a member State’s influence on acts of an international organization are already addressed in draft articles 57 to 59. Moreover, the basic question of how decisions by majority vote where States voting in favour or against a certain decision are not identified (show of hands) can be treated in this regard. Would a State which casts a negative vote in a show-of-hands procedure and which is overruled by the majority (if majority decisions are possible) also be held responsible under these draft articles? Or should these articles apply only to

situations where the voting pattern of individual member States can be clearly identified?

BELGIUM

1. Belgium believes that the principle underpinning this provision is worth following but that the draft text, as currently worded, is not satisfactory since:

– It does not adequately reflect the jurisprudence of the European Court of Human Rights which it claims to be reflecting;

– It includes subjective elements which it is not appropriate to introduce and which could severely impede application of the draft article in question.

Belgium therefore proposes that the Commission either redraft this provision or give a better explanation in its commentary of what it understands by this text. In particular, if the Commission had intended to introduce a (primary) obligation of States members to refrain from circumventing their international obligations through an international organization of which they are members, this should be indicated much more clearly by the provision or by the commentary.

2. Belgium also wonders whether the Commission should not indicate much more clearly that draft article 60 only applies in the event of abuse of a right, abuse of the separate legal personality of an international organization or bad faith.

3. Lastly, Belgium supports the Commission in its reference<sup>1</sup> to the jurisprudence established by the European Court of Human Rights in the *Bosphorus*<sup>2</sup> case but doubts whether the draft text adequately reflects this jurisprudence. In addition, it draws the Commission’s attention to certain decisions in case law subsequent to the *Bosphorus* case which establish the responsibility of the State on the grounds of lacunae in the internal procedures of the international organization. These decisions, in Belgium’s view, go well beyond the mere jurisprudence of the *Bosphorus* case and undermine the principle of the limited responsibility of States members. The European Court of Human Rights appears to have acknowledged that damage may arise from the attribution of an act of an international organization to its States members simply by virtue of their being members of that organization or of their participation in its decision-making processes or in the performance of an act of the organization. At the same time, Belgium believes that it would be very useful for the Commission to indicate clearly its position on these issues.

<sup>1</sup> Para. (4) of the commentary to article 60.

<sup>2</sup> *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi (Bosphorus Airways) v. Ireland* (Grand Chamber), judgment of 30 June 2005, No. 45036/98, *Reports of Judgments and Decisions 2005-VI*.

CZECH REPUBLIC

By establishing an international organization and endowing it with competences and immunities, a State cannot absolve itself of responsibility for a breach of its own obligations.

## GERMANY

1. The Commission is to be commended for incorporating an element of “misuse” into draft article 60 as Germany reads it, according to which a State member of an international organization will incur international responsibility if it

*seeks to avoid\** complying with one of its own international obligations by taking advantage of the fact that the organization has competence in relation to a subject matter of that obligation, thereby prompting the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.

As Germany considers it a legitimate goal to hinder States from evading their responsibility by sidestepping their obligations, draft article 60, as to its underlying aim, is to be supported. However, as States members and an international organization are separate legal entities with their own international personalities and may hence undertake different obligations of their own which, as such, have to be kept apart, and draft article 60 in addition applies “whether or not the act in question is internationally wrongful for the organization”, it is essential to make sure that a State will not be held responsible simply because the organization performs a task which the State may not have been allowed to perform itself. States may not use force in their international affairs, to name an example; they may, however, through the Security Council, support a decision to use force against another State should a threat to the peace exist. It is therefore essential to restrict draft article 60 in its scope of application to cases where a State would “misuse” the organization (as a shield) in order to evade its own responsibility. The present draft acknowledges this concern within the article’s wording when it requires a State having to *seek to avoid* compliance with its own obligation by *taking advantage* of the organization.

2. This being said, Germany is worried about the draft article’s commentary, as it does not provide adequate guidance as to when a State will be taken to have avoided compliance with an international obligation. The commentary, in paragraph (2), provides an interpretation which is hardly in line with the draft article’s wording when it expressly rules out a State’s specific intention of circumvention as a requirement by saying:

As the commentary on article 16 explains, the existence of a specific intention of circumvention is not required. The reference to the fact that a State “seeks to avoid complying with one of its own international obligations” is meant to exclude that international responsibility arises when the act of the international organization, which would constitute a breach of an international obligation if done by the State, has to be regarded as an unwitting result of prompting a competent international organization to commit an act. On the other hand, the present article does not refer only to cases in which the member State may be said to be abusing its rights.

The restriction to scenarios where a State misuses (or abuses) its powers as, in the eyes of Germany, expressed by the present article’s wording is therefore dissolved via its commentary. It is, however, hard to understand how a State may “*seek to avoid* compliance” without thereby acting with a “*specific intention* of circumvention”. That the latter will indeed have to be proved by making reference to the circumstances of the case is true, but touches upon a different point. While the commentary rules out the requirement of a State’s specific intention to evade its

responsibility, at the same time it remains incapable of providing any guidance on how to distinguish between scenarios where a State can be said to evade its responsibility and others where it merely makes adequate use of its powers within the organization. The three conditions listed by the commentary—that is, the organization’s competence in relation to the subject matter of an international obligation of a State, the fact that the act if committed by the State would infringe an obligation, and, finally, that the State prompted the organization to act via a “significant link” (commentary, paragraph (7))—do not solve the above-mentioned problem. In the opinion of Germany, it is essential to restrict draft article 60 to scenarios of misuse, where a State’s action within the organization is taken precisely in order to dodge an existing legal obligation. While such an interpretation is in line with the draft article’s wording, it is therefore rather the present commentary with which Germany has an issue.

## MEXICO

Mexico welcomes this draft article, which it considers to be of great importance and a vital aspect of the object and purpose of the current draft.

**Article 61. Responsibility of a State member of an international organization for the internationally wrongful act of that organization**

## AUSTRIA

It is hard to understand how “subsidiary responsibility” emerges from mere acceptance or conduct inducing reliance since “subsidiary responsibility”, as referred to in paragraph 2, in particular, is an unusual concept in international law that requires a clear indication of its relation to the original responsibility.

## CZECH REPUBLIC

State practice as well as case law shows that member States are not as a rule held responsible for the wrongful acts of international organizations. The first exception (in paragraph 1 (a)), i.e. the case when the State accepts responsibility, is on the whole acceptable. Rather more questionable is the second exception (paragraph 1 (b)), mainly because of the considerable lack of clarity. In this case, the condition for incurring responsibility is not implicit consent, but the existence of circumstances that have led the injured party to rely on the State’s responsibility for the conduct of an international organization. The Commission’s commentary does not throw much light on the issue.

## GERMANY

1. Draft article 61 remains in line with the Commission’s systematic approach of positively identifying cases where a State might incur international responsibility instead of stating a negative and residual rule for cases in which, according to the draft, a State’s responsibility does not arise. While Germany continues to support this approach, it very much welcomes the clear position expressed by the Commission in paragraph (2) of its commentary, according to which

[i]t is, however, clear that such a conclusion is implied and that therefore *membership does not as such entail for member States international responsibility when the organization commits an internationally wrongful act*\*.

Germany would like to expressly underscore this finding, as it is indeed of utmost importance.

2. Turning to paragraph 1 (a) of draft article 61, which considers a member State's responsibility for an act of an international organization to arise where "it has accepted responsibility for that act", Germany would like to highlight an important passage in the Commission's commentary. The latter, in paragraph (7), refers to Lord Ralph Gibson's opinion in the *International Tin Council* case, according to which an acceptance of responsibility might be included in an organization's "constituent document"<sup>1</sup>. Germany very much agrees with the Commission when it emphasizes that

[m]ember States would then incur international responsibility towards a third party *only* if their acceptance produced legal effects in their relations to the third party. It could well be that member States only bind themselves towards the organization or agree to provide the necessary financial resources as an *internal matter*\*.

Any acceptance within the meaning of draft article 61, paragraph 1 (a), will necessarily have to have been expressed *vis-à-vis* the party invoking a State's responsibility. Here, in Germany's view, particular care must be used in order to determine whether an international organization's constituent treaty can really be interpreted as a treaty conferring rights on third States within the meaning of draft article 36 of the Vienna Convention on the Law of Treaties. From Germany's experience, it is true to say that usually this will *not* be the case; an organization's founding States (or other subjects of international law) normally do *not* intend for the organization's constituent document to be invocable *also* by third parties.

3. In respect of paragraph 1 (b), according to which a member State's responsibility for the act of an international organization may be triggered where the State "has led the injured party to rely on its responsibility", Germany proposes the inclusion of at least an additional qualifier within that paragraph. After all, the mere fact that a State has simply led another State to place reliance on the former's responsibility—i.e. that there is a causal link—cannot suffice to hold the former State responsible under international law. Surely responsibility cannot arise unless such reliance is in addition to be termed "legitimate" in the light of the circumstances of the case. Germany would therefore prefer the paragraph to, for example, read at least: "It has led the injured party to *legitimately* rely on its responsibility."

4. While the draft article might thereby be said to address a sensible cause, the legal basis for such an obligation of reparation, even in the scenario of legitimate reliance, is not perfectly clear to Germany. Is the Commission invoking estoppel in this regard? Then the paragraph would have to refer to *detrimental* reliance. Germany would therefore welcome it if the Commission could explain

the underlying dogmatic construction on which draft article 61, paragraph 1 (b), is based, in more detail.

5. Among the relevant "factors" which have been put forward in order to assess whether a State has led the injured party to rely on its responsibility, paragraph (10) of the commentary to draft article 61 mentions the "small size of membership". This "factor", however, is in Germany's eyes highly problematic, as it may not be considered indicative, let alone sufficient to trigger legitimate reliance. The commentary in this respect acknowledges that it is important to refer to "all the pertinent factors" which have to be "considered globally" and correctly emphasizes that there is "clearly no presumption that a third party should be able to rely on the responsibility of member States" (paragraph (10)). In Germany's view, the finding that membership as such does *not* entail responsibility combined with the fact that an international organization enjoys its own international legal personality means that the commentary, does not, however, go far enough: there is not only no presumption of liability, there is even a presumption against such liability. Accordingly, a third party will usually *not* be able to rely on the responsibility of member States. Germany would consider it best to either alter the commentary accordingly or, probably the easiest solution to avoid confusion, to simply strike the reference to the size of membership out of the commentary to draft article 61.

## PART SIX

### GENERAL PROVISIONS

#### Article 63. *Lex specialis*

##### BELGIUM

Belgium is surprised at the very extensive scope of this provision, which, as it stands, could render the draft articles entirely pointless. Belgium is of the view that only a relative effect should be accorded to the particular "domestic" rule adopted by the organization. In particular, the principle set out in draft article 63 should only apply to the rules of an organization pertaining to its external responsibility, and exclude those pertaining to the organization's responsibility towards its own members. Belgium ventures therefore to suggest that the Commission either delete this provision, or explicitly limit its scope, both in the text of the provision and in its commentary, by replacing, for example, the end of the provision, from the words "are governed by special rules of international law" with "are governed by special rules of the organization applicable to the relations between the international organization and its members".

##### CZECH REPUBLIC

Draft article 63 is fully acceptable for the Czech Republic when special rules (including the rules of the organization) are supplementing general rules, especially if they regulate the implementation of responsibility. Such rules may also regulate relations of responsibility between an organization and its member States. However, they should never preclude the responsibility of an international organization, unless it is attributed to a member State. It would also be undesirable for the Czech Republic

<sup>1</sup> United Kingdom, England (Court of Appeal), *Maclaine Watson & Co. Ltd. v. Department of Trade and Industry; J. H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry and Others*, judgment of 27 April 1988, ILR, vol. 80, p. 109.

to allow the setting of double standards—to have different yardsticks for different organizations, or even for a single organization, depending on the dispute settlement body (e.g. WTO, the European Court of Human Rights or the European Court of Justice).

GERMANY

Paragraph (1) of the commentary to draft article 63 refers to the possibility that special rules relating to international responsibility might not only supplement but *replace in full* the more general rules contained in the present draft. As already mentioned, in connection with counter-measures (see the comment on draft article 21), Germany is convinced that the relationship between an international organization and its member States is indeed exclusively governed by the internal rules of that organization. While the draft articles as adopted on first reading fall short of fully reflecting this position, Germany is pleased to note that the Commission has left room for an interpretation on a case-by-case basis by allowing the rules of an international organization (rightly listed in article 63 as a possible source of *lex specialis*) to fully replace the draft's general rules.

MEXICO

1. Given the great diversity in the types and functions of international organizations, the *lex specialis* rule is of

considerable practical importance in the context of the current draft. In this regard, the Commission is invited to consider the possibility of including other examples in the commentary in order to give a broader overview of the specific situations that article 63 seeks to regulate.

2. In this respect, it would be appropriate to mention the system of responsibility of the International Seabed Authority for damage arising out of wrongful acts in the exercise of its powers and functions, established in article 22 of annex III to the United Nations Convention on the Law of the Sea. Article 139 of the Convention, which deals with damage caused by an international organization, is also relevant.

**Article 66. Charter of the United Nations**

PORTUGAL

Portugal would like to convey its doubts on whether to include draft article 66. According to Article 4 of the Charter of the United Nations, international organizations cannot become parties to the Charter. So, the position of international organizations *vis-à-vis* the Charter is not as easy to assess as it is in the case of States. Nonetheless, the inclusion of a provision that reflects the content of article 59 of the articles on responsibility of States deserves further consideration.