

# RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

[Agenda item 3]

DOCUMENT A/CN.4/637 and Add.1

## Comments and observations received from international organizations

[Original: English]  
[14 and 17 February 2011]

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Articles of Agreement of the International Monetary Fund (Washington, D.C., 27 December 1945)	United Nations, <i>Treaty Series</i> , vol. 2, No. 20, p. 39.
Convention on the privileges and immunities of the United Nations (New York, 13 February 1946)	<i>Ibid.</i> , vol. 1, No. 4, p. 15.
Convention on the privileges and immunities of the specialized agencies (New York, 21 November 1947)	<i>Ibid.</i> , vol. 33, No. 521, p. 261.
Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950)	<i>Ibid.</i> , vol. 213, No. 2889, p. 221.
Agreement between the Parties to the North Atlantic Treaty regarding the status of their forces (London, 19 June 1951)	<i>Ibid.</i> , vol. 199, No. 2678, p. 67.
Constitution of the Intergovernmental Committee for European Migration (Constitution of the IOM) (Venice, 19 October 1953)	<i>Ibid.</i> , vol. 207, No. 2807, p. 189.
Treaty establishing the European Economic Community (Rome, 25 March 1957)	<i>Ibid.</i> , vol. 294, No. 4300, p. 3.
Treaty on the Functioning of the European Union (Rome, 25 March 1957)	<i>Official Journal of the European Union</i> , No. C 83/47, 30 March 2010.
Convention on the Grant of European Patents (European Patent Convention) (Munich, 5 October 1973)	United Nations, <i>Treaty Series</i> , vol. 1065, No. 16208, p. 199.
Final Act of the Conference on Security and Cooperation in Europe (Helsinki, 1 August 1975)	ILM, vol. 14 (1975), p. 1292.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	United Nations, <i>Treaty Series</i> , vol. 1833, No. 31363, p. 3.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15.
Fourth ACP-EEC Convention (Lomé, 15 December 1989)	United Nations, <i>Treaty Series</i> , vol. 1924, No. 32847, p. 3.
Charter of Paris for a new Europe (Paris, 21 November 1990)	ILM, vol. 30 (1991), p. 190.
Treaty on European Union (Maastricht Treaty) (Maastricht, 7 February 1992)	United Nations, <i>Treaty Series</i> , vol. 1757, No. 30615, p. 3.
Agreement among the States Parties to the North Atlantic Treaty and the Other States participating in the Partnership for Peace regarding the Status of their Forces (Brussels, 19 June 1995)	United States, <i>Treaties and Other International Acts Series</i> , 12666.
International Agreement on Olive Oil and Table Olives (Geneva, 29 April 2005)	United Nations, <i>Treaty Series</i> , vol. 2684, No. 47662, p. 63.
Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Lugano, 30 October 2007)	<i>Official Journal of the European Union</i> , No. L 339, 21 December 2007, p. 3.
Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (Lisbon, 13 December 2007).	<i>Ibid.</i> , No. C 306, 17 December 2007, p. 1.

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*Les contre-mesures des organisations internationales*. Louvain-la-Neuve, Anthemis, 2010.

DUGARD, John

“Sanctions against South Africa: An international law perspective”, in Mark Orkin (ed.), *Sanctions against Apartheid*. New York, Community Agency for Social Enquiry, 1990, pp. 113–122.

### 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

<sup>1</sup> The text of the draft articles adopted by the Commission on first reading is reproduced in *Yearbook ... 2009*, vol. II (Part Two), para. 50. The text of the draft articles with commentaries thereto is reproduced in

Commission decided, in accordance with articles 16 to 21 of its Statute, to request the Secretary-General to transmit

*ibid.*, para. 51. For its part, the text of the draft articles on responsibility of States for internationally wrongful acts with commentaries thereto (hereinafter referred to as “the draft articles on responsibility of States”) is reproduced in *Yearbook ... 2001*, vol. II (Part Two), p. 30, para. 77.

the draft articles to Governments<sup>2</sup> and international organizations for comments and observations, requesting also that such comments and observations be submitted to the Secretary-General by 1 January 2011. The Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed a communication, dated 13 January 2010, to 51 international organizations and entities bringing to their attention the first reading text of the draft articles on the responsibility of international organizations, and inviting their comments in accordance with the request of the Commission.

2. As at 17 February 2011, written comments had been received from the following 22 entities (dates

<sup>2</sup> Comments received from Governments are to be found in document A/CN.4/636 and Add.1–2, reproduced in the present volume.

## Comments and observations received from international organizations

### A. General comments

#### COUNCIL OF EUROPE<sup>1</sup>

1. The Council of Europe has had so far no specific practice regarding wrongful acts under international law involving the organization's responsibility. In these circumstances, any possible comments would not be based on relevant experience of breaches of international obligations and would have to be rather theoretical in nature. In addition, the Council of Europe has never been confronted with problems in relation to the *ius gestionis*.

2. The Council of Europe welcomes the fact that the present draft articles draw inspiration from the draft articles on responsibility of States and considers this approach as a wise starting point.

3. The Council of Europe looks forward to future discussions of the draft articles by the Commission which would permit to explore further the draft articles' applicability to different international organizations, taking into account the variety of their respective natures and the specificity of the legal system governing the different international organizations: the constituent treaty, the headquarters agreement and general international law.

<sup>1</sup> The Council of Europe attached a summary of the relevant case law of the European Court of Human Rights, available for consultation in the Codification Division of the Office of Legal Affairs.

#### CTBTO, ICAO, IFAD, ILO, IMO, IOM, ITU, UNESCO, UNWTO, WHO, WIPO, WMO AND WTO

1. The main concerns of these organizations relate to: the excessive alignment of the draft articles with the articles on responsibility of States; the uncertainty as to the scope of the draft articles, in particular with regard to the responsibility of States *vis-à-vis* that of international organizations; the ambiguous interplay of the *lex specialis* principle with the role devoted to the "rules of the organization" and the appearance of not having sufficiently taken into account the different types of existing international organizations with very diverse structures, functions and mandates; the limited attention paid to the

of submission in parentheses): UNIDROIT (19 December 2010); NATO, OSCE (20 December 2010); European Commission (22 December 2010); OECD (23 December 2010); World Bank (29 December 2010); IMF (5 January 2011); CTBTO, ICAO, IFAD, ILO, IMO, IOM, ITU, UNESCO, UNWTO, WHO, WIPO, WMO and WTO (joint submission of 11 January 2011); ILO (individual submission of 20 January 2011); Council of Europe (24 January 2011); and the United Nations (17 February 2011). Those comments are reproduced below, organized thematically, starting with general comments and continuing with comments on specific draft articles. In a submission dated 12 January 2011, the Asian Development Bank indicated its support for the comments of the World Bank of 29 December 2010.

special situation of international organizations in relation to the obligation to compensate; and the solutions proposed in respect of *ultra vires* acts of an agent or organ of an international organization.

2. The methodology followed by the Commission is a source of concern mainly from two points of view: first, the draft articles are based on a very limited body of practice—largely originating from the activities of very few international organizations; second, they take limited account of the special situation of international organizations compared with that of States in regard to responsibility under international law in general and, more particularly, to reparation. These issues originate from the method followed by the Commission, which retained the articles on responsibility of States as the point of departure for its draft articles on the responsibility of international organizations even though the two situations are extremely different and raise largely distinct legal issues. International organizations and States have very different legal personalities and the Commission's approach risks creating practical problems since the specific characteristics of international organizations are only taken into account in a limited manner. In particular, the fact that international organizations act necessarily within the territory of States, and the fact that they exercise their mandates through the principle of speciality should receive more consideration by the Commission.

3. The Commission should have followed a more practical approach and only focused on areas where there is a space for rules common to all international organizations, where there is practice upon which to base such rules and where there is a practical need for codification or progressive development of international law arising from the activities and experience of international organizations.

4. It could also be envisaged, at least if the draft articles were eventually to be adopted in the form of an international convention, to provide for a mechanism analogous to the one embodied in the Convention on the privileges and immunities of the specialized agencies, whereby the standard clauses and annexes were first submitted to the approval of the international organizations concerned before being opened to acceptance by member States.

Moreover, a practice has developed under the same Convention to subject the deposit of reservations to the consent of concerned agencies. An even clearer option to safeguard the interests of international organizations would be that the latter may become parties to an international convention dealing with the responsibility of international organizations and creating obligations for them as was the case with the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

#### EUROPEAN COMMISSION

1. A principal general comment which has been highlighted throughout previous comments is the need for the draft articles to allow sufficient room for the specificities of the EU. Most multilateral conventions today are open for the EU to become a Contracting Party, alongside States. The significant impact which the EU has on international treaty practice and law is due to its special characteristics, as a regional (economic) integration organization. The Union's member States have transferred competences and decision-making authority on a range of subject matters to the Union,<sup>1</sup> which as a result participates in the international arena on its own behalf and in its own name. The large number of international treaties concluded by the EU forms part of EU law. These agreements are binding not only on the EU's institutions but also on its member States. Moreover, unlike traditional international organizations, the EU acts and implements its international obligations to a large extent through its member States and their authorities, and not necessarily through "organs" or "agents" of its own. Consequently, there are significant differences between traditional international organizations on the one hand, and organizations such as the EU, on the other hand, a regional (economic) integration organization which has important law-based foreign relations powers that have a tendency to develop over time.

2. Because of the regularity with which it is admitted to participate in multilateral treaties alongside States, the EU has, as a regional (economic) integration organization, shaped treaty law and practice in a significant manner. Yet the foregoing is currently reflected only to a very limited extent in the draft articles on the responsibility of international organizations as they stand now. This is a concern as the EU is the international organization which is potentially most impacted by the draft rules of responsibility of international organizations. No other international organization is in that situation. For now, the EU remains unconvinced that the draft articles and the commentaries thereto adequately reflect the diversity of international organizations. Several draft articles appear either inadequate or even inapplicable to regional integration organizations such as the EU, even when account is taken of some of the nuances now set out in the commentaries. In addition, some commentaries show that there is very little or no relevant practice to support the suggested

<sup>1</sup> With the entry into force on 1 December 2009 of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, the areas of integrated Union policies have further been expanded (with the exception of the Common Foreign and Security Policy); see the categories and areas of Union competences listed in arts. 2–6 of the Treaty on the Functioning of the European Union.

provisions. For such cases the question remains whether there is a sufficient basis for the International Law Commission to propose the rule in question.

3. In view of these comments, the European Commission considers that the International Law Commission should give further thought as to whether the draft articles and the commentaries, as they stand now, are apt for adoption by the Commission on second reading or whether further discussion and work is needed.

#### ILO

1. The draft articles rely excessively on the articles on responsibility of States. It is considered that a parallelism between States and international organizations regarding the question of responsibility is not justified in the light of important differences between the two subjects of international law. While States exercise general jurisdiction, international organizations exercise jurisdiction specific to the competencies granted—explicitly or implicitly—by their constituent instruments.

2. International organizations, contrary to States, act necessarily within the territory of several States. As a consequence, many constituent instruments of international organizations contain a provision on juridical personality and legal capacity of international organizations within member States. Some examples are article 39 of the Constitution of the International Labour Organization; article 9, section 2, of the Articles of Agreement of the International Monetary Fund; chapter 9, article 27, of the Constitution of the International Organization for Migration; article 5 of the International Agreement on Olive Oil and Table Olives; article 5 of the European Patent Convention, and so forth.

3. It is important to distinguish between acts committed by international organizations that are internationally wrongful, which represent a violation of international law, and those that are wrongful under national law. While the Commission makes clear that the latter acts are not covered by the draft articles,<sup>1</sup> some examples quoted in the documents remain ambiguous. One of the main arguments of the Special Rapporteur in favour of the international responsibility of international organizations was that ICJ stated in the advisory opinion on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, that the United Nations may be required to bear responsibility for the damage arising from "such act".<sup>2</sup> It is important to recall that "such act" refers to statements considered defamatory by two commercial companies, which are normally violations of national law. As they are committed by the United Nations or its agents acting in their official capacity, the immunity from legal process applies but "the act" for which international organizations may be required to bear responsibility are still those that violated national law and not internationally wrongful acts.

4. When international organizations act within the national legal systems, including when they do not honour

<sup>1</sup> Para. (3) of the commentary to draft article 1.

<sup>2</sup> *I.C.J. Reports 1999*, pp. 88–89, para. 66.

a commercial contract or a peacekeeper drives incorrectly, that is, commit acts that are contrary to law, these violations of law do not represent acts that are internationally wrongful. They are simple violations of national law that are covered by the immunity from legal process. If this immunity were waived, international organizations would be subject to the jurisdiction of national courts. Consequently, such examples cannot serve directly as a basis for consideration of the topic under discussion by the Commission but only serve to support the general principle that international organizations may be required to bear responsibility for the damage arising from acts considered wrongful under national law. ILO would therefore urge the Commission to review the examples quoted in the commentaries, such as a car accident in Somalia quoted in paragraph (5) of the general commentary to chapter II of Part Two or situations leading to compensation by the United Nations quoted in the commentary to draft article 35.

### IMF

1. The primary concern of IMF is one of approach and the Commission's reliance on the articles on responsibility of States in preparing the draft articles. IMF believes this approach to be misguided for two reasons.

2. First, there is a fundamental difference between a State and an international organization. Unlike States, international organizations do not possess a general competence.<sup>1</sup> Rather, an organization's legal competence is circumscribed by its constituent document which, along with the rules and decisions adopted thereunder, constitutes the *lex specialis*. The organization's responsibility for actions taken towards its members should be determined by assessing whether it has acted in accordance with this legal framework or has otherwise breached a peremptory norm of international law or another obligation that it has voluntarily accepted. In their present form, the draft articles wrongly suggest that an international organization can incur responsibility with respect to its members even when it is in compliance with its constituent instrument, peremptory norms, and other obligations it has specifically accepted. This approach is not consistent with the principle *lex specialis derogat legi generali*.

3. Secondly, many of the draft articles do not lend themselves to universal application. There are significant differences between the legal frameworks of different international organizations and it is very difficult to formulate principles that apply to all such organizations. While States all possess the same attributes, international organizations have different purposes, mandates and powers. The draft articles fail to take these differences into account and, as a result, include provisions that would appear to be of limited relevance for at least some international organizations (e.g. the international financial institutions). IMF questions whether it is appropriate to include such provisions within the draft.

<sup>1</sup> In its advisory opinion *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, ICJ stated that "international organizations ... do not, unlike States, possess a general competence, but are governed by the 'principle of specialty', that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them" (*I.C.J. Reports 1996*, p. 78, para. 25).

4. There would also appear to be many features of the draft articles that go beyond generally accepted views on the responsibility of international organizations. IMF recognizes that article 1, paragraph 1, of the Commission's Statute provides that the "Commission shall have for its object the promotion of the progressive development of international law and its codification". While the Commission has not provided guidance on the extent to which the draft articles constitute the codification or the progressive development of international law, it is clear that the majority are an attempt at progressive development.<sup>2</sup> This point should be made explicit in the commentary.

<sup>2</sup> One example is draft article 16, paragraph 2, which provides that an international organization can incur responsibility by merely authorizing or recommending that a member State commit an act that would be internationally wrongful if committed by the organization.

### NATO

1. NATO would like to express a general concern that the draft articles and associated commentary do not always appear fully to contemplate the specific situation of organizations in which, owing to the nature of the activity in which it is engaged or other factors, the member States retain virtually all decision-making authority and participate on a daily basis in the governance and functioning of the organization.

2. The following comments relate to the structure of the organization, its decision-making procedures and its practice with respect to claims. NATO is an international organization within the meaning of draft article 2 (a) of the draft articles, and as such a subject of international law. It possesses international legal personality as well as treaty-making power.

3. The North Atlantic Council is the principal policy and decision-making institution of the Alliance. The Council consists of representatives of all member States of the Alliance, meeting together in permanent session. The Council most frequently meets at the level of permanent representatives, who are stationed at NATO headquarters, but also meets, normally twice per year, at the level of foreign or defence ministers and less frequently, at the level of Heads of State and Government. The Council acts with the same authority and powers of decision-making, and its decisions have the same status and validity, at whatever level it meets.

4. NATO decisions are taken on the basis of consensus, after discussion and consultation among the representatives of member States. There is no voting or majority decision. All member nations of the Alliance have an equal right to express their views at the Council, and decisions are not made until all nations are prepared to join consensus in their support. Decisions are thus the expression of the collective will of the sovereign member States, arrived at by common consent and supported by all. Each member State retains full responsibility for its decisions, and is expected to take those measures necessary to ensure that it has the domestic legal and other authority required to implement the decisions which the Council, with its participation and support, has adopted. The principle of consensus decision-making is applied throughout

the Alliance, reflecting the fact that it is the member States that decide and that each of them is or has full opportunity to be involved at every stage of the decision-making process. This principle is applied at every level of the organization; all member States may, and as a matter of practice do, participate on an equal basis in all committees and other subordinate bodies within NATO.

5. With regard to NATO missions, each NATO or NATO-led operation requires a mandate from the North Atlantic Council. It is in the power of the nations represented in the Council to decide on NATO-led operations on their own authority but, in practice, its decisions are normally made on the basis either of relevant resolutions of the United Nations Security Council or in response to the request of a specific State or group of States seeking NATO participation or support. Each mandate indicates the purpose and aim of the operation. NATO nations agree in the North Atlantic Council on the exact content of a given mission and request from the NATO military authorities information on the military requirements to successfully carry out the mission. Following a decision by the North Atlantic Council to initiate a NATO-led operation, the NATO military authorities establish an operational plan that must in turn be approved by the Council. This operational plan includes, *inter alia*, rules of engagement (including provisions on the use of force), jurisdiction and claims. Both the mandate of the North Atlantic Council and the military operational plan normally expressly reaffirm the nation's intention to execute the operation with full respect for applicable international public law, including international humanitarian law and, as appropriate, principles and norms of international human rights law.

6. With respect to contractual claims that might arise in the framework of a NATO operation or other activity, it should be noted that a standard arbitration clause is included in all contracts to which the Organization is a party. Disputes that might arise in the framework of a contractual relationship, if not settled amicably, may be submitted to arbitration in accordance with the terms of this provision.

7. Finally to be noted, but perhaps of most direct relevance to the question of legal responsibility, are the NATO procedures for settlement of claims. The procedures applicable to claims arising among NATO member States are set forth in article VIII of the Agreement between the Parties to the North Atlantic Treaty regarding the status of their forces. Through the Agreement among the States Parties to the North Atlantic Treaty and the Other States participating in the Partnership for Peace regarding the Status of their Forces, its provisions also apply, *mutatis mutandis*, to all States participating in the Partnership for Peace programme.

8. In the event of operations conducted in conjunction with States which are neither members of NATO nor participants in the Partnership for Peace programme, claims provisions are normally contained in a status or similar agreement entered into between NATO and that State or States, and covering participating non-NATO States as well as NATO member States.

9. The NATO claims provisions and procedures have been implemented successfully by NATO and its member

States for some six decades, in conjunction with NATO partners for a shorter but significant period of time, and have served as a model for similar relationships elsewhere in the international community.

#### OECD

1. The draft articles on responsibility of States may not always be applicable to international organizations, and therefore should not constitute the basis for the drafting of the articles on their responsibility. Indeed, while international organizations have international legal personality, they do not possess, unlike States, a general competence and are instead limited by the scope of their mandate as reflected in their constituent instruments. Thus, OECD shares the view that the Commission should consider explaining in its commentaries the extent to which the draft articles may or may not be regarded as codifying existing law on the basis of actual practice.

2. The current draft articles do not identify the mechanism for their enforcement nor the entities that would be responsible for their interpretation. Would the Commission anticipate an international body or a domestic court to have this general competence over organizations? As recalled by IMF,<sup>1</sup> both approaches could be inconsistent with the constituent instruments of some international organizations that precisely identify interpretation or enforcement mechanisms for certain issues such as dispute settlement.

<sup>1</sup> See *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/545, p. 22, para. 6, general remarks.

#### UNIDROIT

1. The purposes of UNIDROIT are to examine ways of harmonizing and coordinating the private law of States and of groups of States, and to prepare gradually for the adoption by the various States of uniform rules of private law. To that end, UNIDROIT prepares drafts of laws and conventions with the object of establishing uniform internal law; prepares drafts of agreements with a view to facilitating international relations in the field of private law; undertakes studies in comparative private law; follows projects already undertaken in any of these fields by other institutions with which it may maintain relations as necessary; organizes conferences and publishes works which the Institute considers worthy of wide circulation. UNIDROIT also exercises the function of depositary of some of the instruments adopted under its auspices and undertakes a number of information and technical assistance activities.

2. Apart from decisions taken by its organs on purely institutional or financial matters (approval of the budget, assessment of contributions, appointment of agents), UNIDROIT does not take decisions binding on its member States. Instruments adopted under its auspices only bind those States that have accepted, ratified or acceded to them. Furthermore, UNIDROIT is not a member of any other organization, nor is any other organization a member of UNIDROIT.

3. UNIDROIT has examined the draft articles carefully and has come to the conclusion that the activities

of UNIDROIT are not likely to offer occasion for acts or omissions that involve the type of responsibility that the draft intends to regulate.

#### UNITED NATIONS

1. The United Nations Secretariat notes that full recognition of the “principle of speciality” is fundamental to the treatment of the responsibility of international organizations. As ICJ observed in its advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*:

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”, that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.<sup>1</sup>

It is, therefore, of the essence that in transposing the full range of principles set forth in the draft articles on responsibility of States *mutatis mutandis* to international organizations, the Commission should be guided by the specificities of the various international organizations: their organizational structure, the nature and composition of their governing organs, and their regulations, rules and special procedures—in brief, their special character. The Secretariat notes that, while some effect is given to the principle through the application of draft article 63 on *lex specialis*, the principle of “speciality” cuts across many of the Secretariat’s comments.

2. In this connection, it would be the Secretariat’s preference that a general introduction preface the specific commentaries to the rules, and that, like the general introduction to the commentary to the draft articles on responsibility of States, it would set out the principles which guided the Commission in codifying or developing the international law rules or guiding principles on responsibility of international organizations. These principles should include, among others, an explanation of the differences between States and international organizations, and of the differences between international organizations (the principle of speciality), the dichotomy between primary and secondary rules, and the distinction between international law rules and the internal rules of the organization. In this connection, the Secretariat also suggests that such an introduction make clear that any references to primary rules in the commentary is without prejudice to the content or applicability of such rules to international organizations.

3. Another aspect in which the law of responsibility of international organizations differs from that of States is in the extent of practice that is available from which the Commission can discern the law. In this respect, the Secretariat notes that the Commission has acknowledged in the commentary to a number of draft articles that practice to support the proposed provision is limited or non-existent. A general introduction to the commentaries could make this point and explain the consequences for the character of the draft articles.

4. In cases where the Commission has not yet had access to existing practice, the Secretariat has sought to provide it with additional information with respect to any such relevant practice involving the United Nations.

5. The scope of the Secretariat’s review is limited to 26 draft articles of particular interest to the United Nations. This review has been conducted in the light of existing practice, which, while not necessarily exhaustive, is nonetheless indicative. In some cases, the practice is consistent with the proposed rule; in others, it contradicts it; and in still others, the practice has been inconsistent or its legal qualification controversial or not articulated. Much of the practice of the Organization that is discussed relates to peacekeeping operations and, in respect of some draft articles, to the manner in which the Organization addresses private claims by individuals or other non-State entities. While such claims are not the subject of these draft articles, this practice has been included for whatever assistance it might provide the Commission.

6. The absence of supportive practice of the Organization, however, is not always conclusive, and in some cases the Secretariat expresses support for the inclusion of a rule as a guiding principle for the possible development of future practice. But where the lack of practice is due to the intrinsic character of the Organization or where the analogy from State responsibility does not appear to be supported, the Secretariat questions the propriety of including the rule, or including it as formulated, in the draft articles.

#### WORLD BANK

1. In its initial report, the Commission’s Working Group on Responsibility of International Organizations clarified that the term “responsibility”, as used both in this project and in the earlier one on State responsibility, refers only to the “consequences under international law of internationally wrongful acts”.<sup>1</sup> From this, it follows that the draft articles are secondary rules, with no attempt on the part of the Commission to define the content of the international obligations which, once breached, give rise to responsibility. Defining the content of these obligations belongs in fact to primary, not secondary, rules. Moreover, given the diversity among international organizations with respect also to the different legal sources of their international obligations, it would practically be impossible for the Commission to elaborate rules of responsibility that would take into account the obligations incumbent on international organizations as a result of primary rules.

2. To avoid the risk that the Commission’s draft articles and accompanying commentaries may offer the pretext for invoking imaginary primary obligations of international organizations, the Commission may want to consider stating expressly, in its commentaries to the general principles (chapter I of Part Two), that all references to primary obligations, either in the draft articles or in the accompanying commentaries, are mere examples and do not reflect any finding by the Commission on such primary obligations, a task which does not belong to the Commission for the purposes of this project.

<sup>1</sup> *I.C.J. Reports 1996*, p. 66, at p. 78, para. 25.

<sup>1</sup> *Yearbook ... 2002*, vol. II (Part Two), p. 93, para. 465.

3. While the commentaries to a good number of the draft articles contain clear warnings regarding the scarcity of available practice (hence the use of such terms as “similarly”, “analogy”, “would seem”), it may be appropriate for the Commission to consider explaining, in its commentary, the extent to which it regards the draft articles as codifying existing law and, whenever this is the case, identify relevant instances of actual practice.

## B. Specific comments on the draft articles

### PART ONE

#### INTRODUCTION

##### *Article 1. Scope of the present draft articles*

###### COUNCIL OF EUROPE

The Council of Europe looks forward to further consideration by the Commission of the correlation between the scope of the application of the draft articles as contained in their draft article 1 (international responsibility for an act that is wrongful under international law) and the commentaries referring frequently to the *ius gestionis*.

CTBTO, ICAO, IFAD, ILO, IMO, IOM, ITU,  
UNESCO, UNWTO, WHO, WIPO, WMO AND WTO

1. These organizations share some concerns regarding the scope of the draft articles. In particular, they find it difficult to understand why the Commission has included provisions concerning some issues related to the responsibility of States in relation with that of international organizations while excluding others. Either, having in mind the distinct legal personality of international organizations, the Commission should have adhered to the title of the topic entrusted to it, which is limited to “responsibility of international organizations”; otherwise, it should have followed consistently a more flexible approach by including in the draft articles all the aspects of State responsibility related to international organizations (including the responsibility of States *vis-à-vis* international organizations).

2. Unfortunately, the draft articles do not choose consistently between those two approaches: on the one hand, in paragraph (10) of the commentary to draft article 1, the Commission explains that “The present articles do not address issues relating to the international responsibility that a State may incur towards an international organization” (see also draft article 18). On the other hand, however, several articles do address such issues, explicitly or by implication (in particular, draft articles 1, para. 2; 32, para. 2; 39, 49 and 57–61).

3. The Commission should follow this second approach and deal with all aspects of the responsibility of States related to international organizations. Contrary to what the Commission states in the aforementioned commentary to draft article 1, it does not appear that the articles on State responsibility effectively cover all issues related to the responsibility of States in connection with international organizations. If that were the case, it should be formally stated in a provision of the draft articles rather than

solely in a commentary. Nevertheless, these organizations have doubts that this is the case and are of the view that the approach initiated in the draft articles listed above should be completed in order to definitely and comprehensively address the interaction of the responsibility of States and international organizations under international law. Should the draft articles deal with the responsibility of States *vis-à-vis* international organizations as suggested here, these organizations urge the Commission and the Special Rapporteur to give due consideration to the different positions of member States of an international organization and non-member States.

#### ILO

1. Draft article 1 provides that the draft articles “apply” to the international responsibility of an international organization. The question that this formulation triggers is on what legal basis the draft articles are intended to “apply”. If the intention is to propose a new international treaty, the first question is who should be invited to negotiate and finally conclude that treaty. Should it be a treaty concluded only by international organizations, or only by States, or by both? If the draft articles are to be ratified only by States, the relationship between the existing constituent instruments and the new treaty needs to be addressed thoroughly. If the draft articles are to “apply” to international organizations as a matter of treaty law, it would appear to be more appropriate that these organizations and not only States become bound by these provisions. This would, in that case, represent a new legal obligation for which international organizations would need to obtain the consent of their supreme organs, normally those composed of most if not all of their member States. In this case, international organizations should be at least permitted to fully participate in the process of elaborating such a treaty, and their comments should carry greater weight in the deliberations of the Commission. One may want to find some inspiration in the way international organizations had been involved in the elaboration and implementation of the Convention on the privileges and immunities of the specialized agencies, or preferably, the way they can become bound by the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

2. If the idea is that the draft articles codify existing customary law, they would need to rely on both general practice and *opinio juris*. From the examples quoted by the Commission, it is difficult to detect any general practice. Furthermore, the views expressed by international organizations reflect not only the lack of *opinio juris* but rather a clear opposition to the existence of any customary law in the field except for a very narrow set of norms that may be recognized as *jus cogens* in international law. The draft articles do not thus appear to represent a codification of the existing law and their transformation into legally binding norms could be done only through an international treaty with an important level of involvement of international organizations.

3. Even if draft articles are only to be endorsed by the United Nations General Assembly, it is important that they are developed “under general rules of international law,

under [the organizations'] constitutions or under international agreements to which [the organizations] are parties", as ICJ put it in the advisory opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*.<sup>1</sup>

4. Furthermore, it may be prudent to see what result may arise from the practical implementation of the draft articles on responsibility of States before proceeding with the debate on the responsibility of international organizations. Nine years after their adoption by the Commission, those articles still remain under consideration by the General Assembly, with no call for an international treaty to be negotiated.

<sup>1</sup> *I.C.J. Reports 1980*, p. 73, at pp. 89–90, para. 37.

### Article 2. Use of terms

CTBTO, ICAO, IFAD, ILO, IMO, IOM, ITU,  
UNESCO, UNWTO, WHO, WIPO, WMO AND WTO

These organizations are unsure about the role which the "rules of the organization"—as defined in draft article 2, subparagraph (b),<sup>1</sup>—are called to play in the draft articles. They have difficulty in particular in understanding how the emphasis put on the rules of the organization is articulated with the principle of the irrelevance of the rules of the organization expressed in draft article 31.

<sup>1</sup> Several advisers had concerns in respect of the definition of the "rules of the organization", which they considered as incomplete and proposed that a hierarchy among the rules of organization should be in draft article 2 or, at least, stressed in its commentary.

#### EUROPEAN COMMISSION

The European Commission notes that draft article 2, subparagraph (c), refers to the term "agent" without, however, defining this. It might be appropriate for the Commission to re-examine this definition and perhaps to link it with draft article 5, which sets out a general rule of attribution relating to the conduct of an "organ" or an "agent".

#### ILO

1. The definition of "international organizations" proposed by the Commission in draft article 2 adds to the existing definitions that the members of organizations could be "other entities". This addition does not seem to add a significant element to what is already covered by the first part of the definition, which seems broad enough to include different possibility of membership of entities other than States. The variation in membership does not appear to have any impact on the issue of responsibility of international organizations. ILO notes that an organization already suggested deleting this text.<sup>1</sup> ILO, however, fully supports the idea of not using the expression of "inter-governmental organization", considering that it does not accurately reflect the tripartite structure of the members' representation within ILO.

<sup>1</sup> *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/556, p. 32, (comment by ICPO–INTERPOL).

2. Previous comments of ILO<sup>2</sup> had already presented certain reservations regarding the wide definition of term "agent". The Commission used only the last part of the definition of this term given by ICJ. By doing this, important qualifications such as "charged by an organ of the Organization"<sup>3</sup> were lost, leaving it open for an entity external to the organization to determine if the organization acted through a person or entity other than its officials. Such an approach disregards the rules of the organization and the finding can be even contrary to those rules in situations where agreements are made between parties that expressly exclude agency relationships. The understanding of "agent" proposed in the draft articles does not exist in the current practice of international organizations to ILO's knowledge, nor in general principles of agency law, and would trigger a considerable change in the way organizations act, leading to excessively cautious behaviour to the detriment of discharge of their mandates. For example, the term "agent" should not cover external collaborators (consultants) or subcontractors such as companies or non-governmental organizations that may be contracted to assist in performing some institutional tasks. A clause excluding liability of the organization for acts of external collaborators or service providers has been systematically included in contracts concluded by ILO.

3. The Commission may also want to pay attention to the situation of State representatives performing temporarily functions for the organization but in their national capacity, such as the chairpersons of meetings and organs; the members of various bodies, such as the Commission itself, or judges of administrative and international criminal tribunals. Should all these persons be considered as agents that could trigger the responsibility of the organization concerned?

4. ILO raised in its 2006<sup>4</sup> comments the issue of "entities", such as private companies. In the light of an increased trend of private–public partnership in international organizations, such a wide definition of "agent" may have far-reaching negative consequences for further development of such new trends.

<sup>2</sup> *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/568 and Add.1, p. 127.

<sup>3</sup> *Reparations for Injuries Suffered in the Service of the United Nations*, advisory opinion, *I.C.J. Reports 1949*, p. 174, at 177.

<sup>4</sup> *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/568 and Add.1, p. 127.

#### OSCE

In paragraph (4) of the commentary to draft article 2, the Commission appears to consider that OSCE, though not established by treaty, fulfils the two criteria provided for in draft article 2, subparagraph (a), defining international organizations. For the time being, there is no consensus among the OSCE participating States that OSCE should fulfil either of the two listed conditions: whether OSCE possesses its own legal personality, or whether the founding documents of OSCE (in the first place the Helsinki Final Act and the Charter of Paris for a New Europe) are governed by international law. These issues are currently under discussion by the deliberative and decision-making

bodies of OSCE, and the OSCE secretariat stands ready to inform the Commission on the progress or finalization of these deliberations.

#### UNITED NATIONS

1. As regards the definition of “international organization” in draft article 2, subparagraph (a), and in particular the composition of international organizations, in the recent practice of the United Nations the Secretariat has considered two international tribunals, the Special Court for Sierra Leone and the Special Tribunal for Lebanon, as international organizations. Both tribunals were established by agreement between the United Nations and the Governments of Sierra Leone<sup>1</sup> and Lebanon,<sup>2</sup> respectively, and both enjoy international legal personality and a limited treaty-making power. In the view of the Secretariat, therefore, a (single) State and an international organization can, by agreement, establish an international organization.

2. Draft article 2, subparagraph (b), raises the difficulty of the double nature of the “rules of the organization”, both as internal rules and rules of international law. While in its commentary to draft article 2 of the draft articles on the law of treaties between States and international organizations or between international organizations, of 1982, the Commission acknowledged the difficulty and concluded “There would have been problems in referring to the ‘internal law’ of an organization, for while it has an internal aspect, this law also has in other respects an international aspect”,<sup>3</sup> there is little discussion of this difficulty in the present draft articles. As presently defined, and subject to draft article 9, the “rules of the organization”, whether internal rules or rules of international law, could entail the international responsibility of the organization.

3. The Secretariat questions the propriety of transposing the definition of the “rules” under the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations to the field of international responsibility. It is furthermore of the view that the broad definition of the “rules of the organization”, which includes instruments extending far beyond the constituent instruments of the organization, not only increases greatly the breadth of potential breaches of “international law” obligations for which the organization may be held responsible, but also, and more importantly, subject to draft article 9, could extend them to breaches of internal rules as well.

4. To fully appreciate the impact of the proposed definition on the scope of application of the draft articles to the United Nations, the Secretariat wishes to provide the Commission with a brief description of the United

Nations instruments that would typically fall within the current definition of the “rules of the organization”, and the nature of which, depending on the rule in question, may be either international or internal:

(a) The constituent instrument of the United Nations is the Charter of the United Nations. While most of its provisions are international in character, certain provisions, such as Article 101, also constitute internal law of the Organization;

(b) “Decisions” and “resolutions” are normally understood as decisions and resolutions of the principal organs of the United Nations, such as the General Assembly, the Security Council<sup>4</sup> and the Economic and Social Council. Some decisions or resolutions of Principal Organs, such as international conventions adopted by the General Assembly, are international law in character, while others, such as resolutions adopting the Staff Regulations and Rules of the United Nations or the Financial Regulations and Rules, constitute internal law of the Organization;

(c) “Acts of the organization” consist of a variety of very different instruments, that is, decisions and resolutions of all organs, including the Secretariat (Secretary-General’s bulletins and other administrative issuances), exchange of letters between and among heads of United Nations organs, judicial decisions and rulings of United Nations-based international tribunals and internal United Nations tribunals, international agreements concluded between the Secretary-General and States or other international organizations, as well as contractual arrangements of all kinds.

5. A number of areas of activities of the United Nations have developed almost entirely through practice, most notably the establishment and conduct of peacekeeping operations and the conduct of business of principal and subsidiary bodies of the Organization (i.e. election of office holders, voting procedures, etc.).

6. The definition of the “rules of the organization” as presently formulated fails to distinguish between internal and international rules for the purpose of attributing responsibility to an international organization, within the meaning of draft article 9. Many of the instruments which would be included within the definition may, depending on their content, be considered either internal or international in character, with very different implications for the international responsibility of the organization. It is, therefore, the Secretariat’s recommendation that this important distinction be reflected in the definition of the “rules”, to make clear that a violation of the rules of the organization entails its responsibility, not for the violation of the “rule”, as such, but for the violation of the international law obligation it contains.

7. Concerning draft article 2, paragraph (c), the definition of an “agent” is based on a passage in the 1949 advisory opinion of ICJ on *Reparation for Injuries Suffered in the Service of the United Nations*, in which the Court expressed its understanding of the word “agent” to mean:

<sup>1</sup> Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Residual Special Court for Sierra Leone (New York, 29 July 2010 and Freetown, 11 August 2010), United Nations, *Treaty Series*, vol. 2871, No. I-50125.

<sup>2</sup> Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon (Beirut, 22 January 2007 and New York, 6 February 2007), *ibid.*, vol. 2461, No. 44232, p. 257.

<sup>3</sup> *Yearbook ... 1982*, vol. II (Part Two), p. 21, commentary to draft article 2, paragraph (25).

<sup>4</sup> The term “decision” of the Security Council now includes presidential statements adopted by the Security Council.

Any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the Organization with carrying out, or helping to carry out, *one of its functions*\*—in short, any person through whom it acts.<sup>5</sup>

8. The proposed definition omits, however, the qualifying preceding clause from the advisory opinion of ICJ: “any person who ... has been charged by an organ of the Organization with carrying out, or helping to carry out, *one of its functions*\*”. In its commentary to draft articles 5 and 7, the Commission notes that the term “agent” is “intended to refer not only to officials but also to other persons acting for the United Nations on the basis of functions conferred by an organ of the organization\*”,<sup>6</sup> and that “organs and agents are persons and entities exercising the functions of the organization\*”.<sup>7</sup> The nature of the functions performed, however, is not an express element of the Commission’s definition.

9. In order to carry out its functions, the Organization acts through a wide variety of persons and entities in different ways. These may range from staff members carrying out core functions of the United Nations to individual or corporate contractors providing goods and services, whose functions are incidental or ancillary to the “functions of the Organization”. This wide range of persons and entities, which goes far beyond the original categories of “staff” as envisaged by the Charter of the United Nations, or “officials” and “experts on mission” under the Convention on the Privileges and Immunities of the United Nations, has evolved in the 60-year practice of the Organization. These developments reflect the exponential growth in the number, diversity and complexity of United Nations mandates. Thus, the Organization routinely enters into partnerships and other collaborative arrangements with entities such as Governments and NGOs, and engages contractors to provide goods and services.

10. The following illustrate some of the different categories of persons and entities “through whom the organization acts”, whether or not they carry out its mandated functions:

(a) *Persons*—including staff members; officials other than Secretariat officials; United Nations Volunteers; experts (including those designated by United Nations organs, special rapporteurs, members of human rights treaty bodies, members of commissions of inquiry, members of sanctions expert panels, United Nations police, military liaison officers, military observers, consultants, persons on non-reimbursable loans and gratis personnel); individual contractors; and technical cooperation personnel;

(b) *Entities*—including those bodies which perform functions on behalf of the Organization or provide goods and services at its request. For example, the United Nations regularly enters into commercial agreements with private companies to provide goods and services. Under the “General Conditions of Contract”, appended to the contracts concluded for the provision of goods and services, it is stipulated that

The Contractor shall have the legal status of an independent contractor *vis-à-vis* the United Nations, and nothing ... shall be construed as establishing ... the relationship of employer and employee or of principal and agent. The officials, representatives, employees or subcontractors of each of the Parties shall not be considered in any respect as being the employees or agents of the other Party, and each Party shall be solely responsible for all claims arising out of or relating to its engagement of such persons or entities.<sup>8</sup>

The contract also requires the contractor to indemnify, hold harmless and defend the United Nations in respect of any claims regarding any acts or omissions of the contractor or any subcontractor employed by them in the performance of the contract. While such contracts may not be opposable *vis-à-vis* third parties, they set forth the position of the Organization as to the nature of the relationship between the parties.

11. The United Nations also routinely uses “executing agencies” and “implementing partners” to carry out certain aspects of its activities. UNDP regularly uses “executing agencies” to carry out aspects of its programmes of assistance. Under the UNDP Standard Basic Assistance Agreement, “executing agencies” are to be given privileges and immunities and are defined to include specialized agencies and IAEA. They are given the status of an “independent contractor”. “Implementing partners” may include NGOs and governmental bodies. Both UNDP and OCHA enter into agreements with NGOs to perform certain activities. Under the “Standard Project Cooperation Agreement between UNDP and an NGO”, it is specified that NGO personnel shall *not be considered employees or agents of UNDP*, and that UNDP does not accept any liability for claims arising out of the activities performed under the agreement. The agreement also requires that the NGO shall indemnify and hold harmless UNDP from all claims.

12. It is the view of the Secretariat that the broad definition adopted by the Commission could expose international organizations to unreasonable responsibility and should thus be revised. In the practice of the Organization, a necessary element in the determination of whether a person or entity is an “agent” of the Organization depends on whether such person or entity performs the *functions* of the Organization. However, while the performance of mandated functions is a crucial element, it may not be conclusive and should be considered on a case-by-case basis. Other factors, such as the status of the person or entity, the relationship and the degree of control that exists between the Organization and any such person or entity, would also be relevant. As indicated above, at least in some contexts, even persons and entities who perform functions that are also performed by the Organization, may not be regarded as “agents” by the Organization, but rather as partners who assist the Organization in achieving a common goal.

13. In the view of the Secretariat, the definition of an “agent” in the draft articles should, at the very least, differentiate between those who perform the functions of an international organization, and those who do not perform such functions. As such, the definition should include as an essential element the test of whether the person or entity performs the “mandated functions of the organization”. However, as noted above, this may not necessarily be determinative of the issue.

<sup>5</sup> *I.C.J. Reports 1949*, p. 174, at p. 177.

<sup>6</sup> Commentary to draft article 5, para. (3).

<sup>7</sup> Commentary to draft article 7, para. (2).

<sup>8</sup> United Nations, General conditions of contract: contracts for the provision of goods and services, para. 1.2.

14. Accordingly, the Commission is encouraged to consider further the practice of the United Nations and other international organizations so as to identify the circumstances which must apply in making a determination that a person or entity is an “agent” of an international organization in any particular case. This may assist in achieving greater clarity concerning the characteristics required for such a determination for the purposes of the draft articles.

#### WORLD BANK

The draft articles contain no definition of an “organ”, while they provide, in draft article 2 (c), a definition for “agent”. The current text may be improved. In particular:

(a) As the Commission has not defined the term “organ”, does the definition of an “agent” include also organs? On the one hand, one would be induced to give a negative answer to this question by the Commission’s use of the expression “organ or agent” (thus clearly distinguishing the two terms) in several draft articles; on the other hand, one may be tempted to give a positive answer to the same question by the Commission’s remark that “[t]he distinction between organs and agents does not appear to be relevant for the purpose of attribution of conduct to an international organization”.<sup>1</sup> To avoid any misunderstanding on this point, the World Bank would deem it preferable that the Commission provide, in the draft articles, a definition of an “organ” by reference to the rules of the organization, by analogy with the definition of the term provided in the articles on responsibility of States.<sup>2</sup>

(b) As to the definition of an “agent”, the World Bank understands that the term “includes” has been preferred to “means” as a way also of addressing the concern that attribution of conduct not be unduly restricted. However, for the sake of certainty, the World Bank’s definite preference is for the use of the term “means” instead of “includes” in any definition of both “agent” and “organ”.

<sup>1</sup> See para. (5) of the commentary to draft article 5.

<sup>2</sup> Article 4, para. 2 (“Conduct of organs of a State”).

## PART TWO

### THE INTERNATIONALLY WRONGFUL ACT OF AN INTERNATIONAL ORGANIZATION

#### CHAPTER I

#### GENERAL PRINCIPLES

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

#### EUROPEAN COMMISSION

1. The European Commission notes that the ILC decided not to include into the project a provision equivalent to draft article 3 of the articles on responsibility of States (“Characterization of an act of a State as internationally wrongful”). The reasons for not including an equivalent provision in the draft on responsibility of international organizations have been set out in the commentaries to draft article 4, in particular, in paragraphs (4) and (5). In

relation to the second sentence of article 3 of the draft articles on responsibility of States, these commentaries state that the internal rules of an international organization cannot be sharply differentiated from international law. However, while this comment may be correct for traditional international organizations, they do not appear to correspond to the situation of the EU. It is a general interpretation in the latter, including in its judicial practice, that its internal order is separate from international law.

2. Already in the landmark case *Van Gend en Loos v. Nederlandse Administratie der Belastingen (Netherlands Inland Revenue Administration)*, the Court of Justice of the European Union held that the Treaty on the European Economic Community established a new legal order which is distinguished from general international law:

The Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.<sup>1</sup>

3. More recently, in *Commission of the European Communities v. Ireland* (the “*Mox Plant*” case), the Court of Justice of the European Union underlined, in an infringement proceeding involving the United Nations Convention on the Law of the Sea:

An international agreement cannot affect the allocation of responsibilities defined in the Treaties and, consequently, the autonomy of the Community legal system, compliance with which the Court ensures.<sup>2</sup>

Further, in the *Kadi and Al Barakaat* appeals judgment of 3 September 2008, the Court of Justice of the European Union held that even the Charter of the United Nations could not prevail over constitutional rules set out in the founding treaties of the EU (“the European Union’s primary law”), relating to the general principles of EU law which includes the protection of fundamental rights.<sup>3</sup>

4. It follows that the relationship between the EU and its member States is not governed by international law principles, but by European law as a distinct source of law. This may also have repercussions on potential conflicts between EU law and the international agreements of the member States, either concluded with third States or between themselves, insofar as such agreements touch upon matters governed by EU law.<sup>4</sup> For example, under EU law, the international legal principle of “*pacta sunt servanda*” applies to international agreements entered into with non-EU member States, but not necessarily to agreements concluded between EU member States as EU law has primacy.

<sup>1</sup> Case 26/62, decision of 5 February 1963, *European Court Reports 1963*, p. 1.

<sup>2</sup> Case C-459/03, judgment of 30 May 2006, *ibid.*, 2006, p. I-4708, para. 132.

<sup>3</sup> Case C-402/05P and C-4 15/05P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, *ibid.*, 2008, paras. 307–308.

<sup>4</sup> See article 351 (2) of the Treaty on the Functioning of the European Union.

5. The EU does not contest that there are international organizations that are undoubtedly more “permeable” to international law than the EU, and that for these more traditional international organizations, the commentaries set out in paragraphs 4 and 5 of draft article 4 may be relevant. However, the commentaries should make clear that they do not apply to the EU.

## ILO

Draft article 4 provides that an internationally wrongful act may exist in the case of omission. On this point, the difference between States and international organizations seems important. While the decision of a State to act depends on its own organs, and can therefore be justified as the basis of responsibility in case of omission to act, the situation of international organizations is different. Its executive organs act upon a mandate given by governing organs composed of States. The organization itself cannot act without the will of member States, and the ability of member States to make decisions depends on compromise that is difficult to reach. Should the United Nations be held responsible for a failure of the Security Council to perform its assigned function regarding international peace and security? The question of omission when put in the context of what should have been an appropriate decision to act is a concept unsuitable for most if not all decisions taken by an international organization; in such context, draft article 58 would impede a finding of responsibility on the part of the organization. Furthermore, where decisions to act have already been taken by governing organs and an alleged omission occurs at the hand of the executive organs, the act would violate the internal rules of the organization and the matter would be governed under *lex specialis* (draft article 63).

## CHAPTER II

### ATTRIBUTION OF CONDUCT TO AN INTERNATIONAL ORGANIZATION

#### *Article 5. General rule on attribution of conduct to an international organization*

## OECD

Draft article 5 is based on a functional criterion of attribution in that the official is acting as “agent” of the organization. Such criterion should be consistent, in the view of OECD and in line with the comments previously mentioned by IMF,<sup>1</sup> with the criteria used to determine whether or not the conduct of OECD officials constitutes an act performed in their official capacity that would fall within the purview of the immunities of OECD. Indeed, the respect of an organization’s immunity provided for in its constituent instruments or within its agreements on immunities is essential to the fulfilment of its mission as it protects the organization from proceedings in national courts that may have diverging views on its international obligations. However, the draft articles and accompanying commentaries as currently drafted could be interpreted as overriding the organization’s constituent instruments or immunities agreements.

<sup>1</sup> See IMF, comment on rules for attribution of conduct, *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/545, p. 33, para. 3; see also *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/568 and Add.1, p. 127.

## UNITED NATIONS

1. In paragraph (5) of the introductory commentary to chapter II on Attribution of conduct to an international organization, the Commission makes the following point, otherwise self-evident:

The present articles do not point to cases in which conduct cannot be attributed to the organization. For instance, the articles do not say, but only imply, that conduct of military forces of States or international organizations is not attributable to the United Nations when the Security Council authorizes States or international organizations to take necessary measures outside a chain of command linking those forces to the United Nations.

While this statement would not otherwise call for any comment on the part of the United Nations, in the light of the recent jurisprudence of the European Court of Human Rights—which attributed to the United Nations responsibility for conduct of military forces operating under national or regional command and control—the Secretariat wishes to comment in some detail on the principles and practice of United Nations peacekeeping operations, which have developed over the past six decades.

#### *Attribution to the United Nations of acts of United Nations operations—the principle of United Nations command and control*

2. In the practice of the United Nations, a clear distinction is made between two kinds of military operations: (a) United Nations operations conducted under United Nations command and control, and (b) United Nations-authorized operations conducted under national or regional command and control. *United Nations operations* conducted under United Nations command and control are subsidiary organs of the United Nations. They are accountable to the Secretary-General under the political direction of the Security Council. *United Nations-authorized operations* are conducted under national or regional command and control, and while authorized by the Security Council, they are independent of the United Nations or the Security Council in the conduct and funding of the operation. Having *authorized* the operation, the Security Council does not *control* any aspect of the operation, nor does it monitor it for its duration. Its role following the authorization of the operation is limited to receiving periodic reports through the lead nation or organization conducting the operation.

3. In determining the attributability of an act or an omission of members of a military operation to the United Nations, the Organization has been guided by the principle of “command and control” over the operation or the action in question. Its position on the scope of its responsibility for the operational activities of military operations, including for combat-related activities, was set out in the report of the Secretary-General on the financing of the United Nations Protection Force and other peacekeeping operations, according to which:<sup>1</sup>

<sup>1</sup> Financing of the United Nations Protection Force, the United Nations Confidence Restoration Operation in Croatia, the United Nations Preventive Deployment Force and the United Nations Peace Forces headquarters (A/51/389), paras. 17–18.

17. The international responsibility of the United Nations for combat-related activities of United Nations forces is premised on the assumption that the operation in question is under the exclusive command and control of the United Nations. Where a Chapter VII-authorized operation is conducted under national command and control, international responsibility for the activities of the force is vested in the State or States conducting the operation. ...

18. In joint operations, international responsibility for the conduct of the troops lies where operational command and control is vested according to the arrangements establishing the modalities of cooperation between the State or States providing the troops and the United Nations. In the absence of formal arrangements between the United Nations and the State or States providing troops, responsibility would be determined in each and every case according to the degree of effective control exercised by either party in the conduct of the operation.

4. Questions about attribution of responsibility to a United Nations or a United Nations-authorized operation have arisen in the practice of the United Nations in only two cases: the operation in the Republic of Korea, and the Somalia operation. But while the operation in the Republic of Korea was conducted under national command and control, in the case of Somalia, the simultaneous or consecutive deployment of two operations—a United Nations and a United Nations-authorized operation—and the proximity in time and place between the two have given rise to questions about attribution of responsibility for damage or injury caused in the course of either operation.

5. The operation in the Republic of Korea in the 1950s was the first United Nations-authorized operation.<sup>2</sup> Conducted under United States unified command, it reported periodically, through the United States Government, to the Security Council. Claims against the operation were settled by the Unified Command or, as the case may have been, by the participating States pursuant to bilateral agreements concluded between the United States and the participating States. While the United Nations cannot say with confidence that all such claims were settled and compensated for by the Unified Command, it can say with certainty that none were settled by the United Nations.

6. In Somalia, between 1992 and 1994, a number of United Nations and United States-led operations were deployed for the most part simultaneously and within the same area of operation. They maintained a separate command and control structure, including in the conduct of joint or coordinated operations.<sup>3</sup> Claims commissions established by either operation settled third-party claims according to whether the United Nations or the United Nations-authorized operation had effective command and control over any given operation.

7. The practical arrangements put in place for settling third-party claims in Somalia, where multiple operations were conducted sequentially or simultaneously, reflect the principle that each State or organization is responsible

<sup>2</sup> The operation in the Republic of Korea was established pursuant to Security Council resolution 83 (1950) (S/1511, 27 June 1950).

<sup>3</sup> Following the establishment of the United Nations Operation in Somalia (UNOSOM I) (by Security Council resolution 751 (1992)), the Security Council authorized the establishment of the Unified Task Force (UNITAF) (by resolution 794 (1992)). UNITAF, in turn, was succeeded by the expanded United Nations Operation in Somalia (UNOSOM II) (established by Security Council resolution 814 (1993)). Two additional United States forces, the Quick Reaction Force and the United States Rangers, were deployed in parallel to UNOSOM II.

for damage caused by forces under its command and control, regardless of the fact that in both cases the Security Council, as the “source of authority”, had either mandated or authorized the operation. In settling a large number of third-party claims for damage caused by forces under its command and control, the United States as well as other States contributing troops have accepted responsibility and liability in compensation. In the case of Somalia, as in that of the Republic of Korea, while the United Nations cannot attest to the settlement of all such claims by the United States, it can confirm that no such claims were attributed to the United Nations, or otherwise compensated by the Organization.

8. The principle that responsibility is entailed where command and control is vested is now reflected in a host of recently concluded bilateral agreements and arrangements between the United Nations and Member States cooperating with United Nations operations under separate command and control structure. Such agreements contain provisions to the effect that each participant will be solely responsible for handling third-party claims in respect of death, personal injury or illness caused by its personnel or agents, or for loss or damage to third-party property to the extent that such claims arise from or in connection with, acts or omissions of that party or of its personnel or agents.<sup>4</sup>

9. The recent jurisprudence of the European Court of Human Rights, beginning with the *Behrami* and *Saramati* joint cases,<sup>5</sup> disregarded this fundamental distinction between the two kinds of operation for purposes of attribution. In attributing to the United Nations acts of a United Nations-authorized operation International Security Force in Kosovo (KFOR) conducted under *regional command and control*, solely on the grounds that the Security Council had “delegated” its powers to the said operation and had “ultimate authority and control” over it,

<sup>4</sup> These include the Agreement between the United Nations Organization and the Government of the United States of America Concerning the Establishment of Security for the United Nations Assistance Mission for Iraq (New York, 8 December 2005) (United Nations, *Treaty Series*, vol. 2351, No. 42202, p. 52); the arrangement between the United Nations and the EU concluded further to the Arrangement on the European Union Force in the Democratic Republic of the Congo (EUFOR RD Congo) support to the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) (see Security Council resolution 1671 (2006)); the Technical Arrangement between the United Nations and the Government of Australia Concerning Cooperation with and Assistance to the United Nations Integrated Mission in Timor-Leste (UNMIT), 2007; and the Arrangements between the United Nations and the European Union Governing the Cooperation between the United Nations Mission in the Central African Republic and Chad (MINURCAT) and the European Union Force EUFOR Chad/RCA, 2008. The case of the African Union/United Nations Hybrid Operation in Darfur (UNAMID) is the exception. Established by Security Council resolution 1769 (2007) as a joint operation, UNAMID is a joint subsidiary organ of both the United Nations and the African Union. Responsibility for third-party claims for personal injury, death and property damage attributable to UNAMID is “settled by the United Nations” only (para. 54 of the Agreement between the United Nations and the African Union and the Government of the Sudan Concerning the Status of the African Union/United Nations Hybrid Operation in Darfur, 2008).

<sup>5</sup> ECHR, *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, application Nos. 71412/01 and 78166/01. The *Behrami* and *Saramati* cases were followed by a string of cases in which the question of attribution was similarly decided by the European Court. *Kasumaj v. Greece*, application No. 6974/05, 5 July 2007; *Gajic v. Germany*, application No. 31446/02, 28 August 2008; *Beric v. Bosnia and Herzegovina*, application No. 36357/04, 16 October 2007.

the Court disregarded the test of “effective command and control” which for over six decades has guided the United Nations and Member States in matters of attribution.

10. Consistent with the long-standing principle that responsibility lies where command and control is vested, the responsibility of the United Nations cannot be entailed by acts or omissions of those not subject to its command and control. Since the early days of peacekeeping operations, the United Nations has recognized its responsibility and liability in compensation for acts or omissions of members of its peacekeeping operations, and by the same token, it has refused to entertain claims against other military operations—notwithstanding the fact that they were authorized by the Security Council. This practice has been uniform, consistent and without exception.

#### *Definition of an “organ”*

11. Draft article 2 provides no definition of an “organ”. This omission is presumably based on the assumption that, as in the case of article 4, paragraph (2), of the draft articles on responsibility of States,<sup>6</sup> an “organ” is that which the rules of the organization determine it to be, or that no distinction between an “organ” or an “agent” is necessary or relevant for the purpose of attribution of conduct to an international organization.

12. In the view of the Secretariat, “an agent” and “an organ” are not necessarily interchangeable. While an “agent” may or may not be contractually linked to the United Nations, an “organ” must maintain an “organic link” to the Organization to be considered as such by the Organization. A diversity of entities that are currently either “institutionally linked” to the United Nations or serviced by it,<sup>7</sup> or otherwise established by agreement between the United Nations and a Member State pursuant to a mandate by a principal organ,<sup>8</sup> are not considered United Nations organs, notwithstanding the degree of assistance to, or control over such entities. The Secretariat would thus favour a definition of an “organ” to read: “[a]ny entity which has that status in accordance with the rules of the organization”.

<sup>6</sup> Article 4, para. 2, provides that “an organ includes any person or entity which has that status in accordance with the internal law of the State”.

<sup>7</sup> For example, human rights treaty bodies, or secretariats of environmental conventions.

<sup>8</sup> For example, the Special Court for Sierra Leone, the Special Tribunal for Lebanon or the International Commission against Impunity in Guatemala established by agreements between the United Nations and the Governments of Sierra Leone (Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Residual Special Court for Sierra Leone (New York, 29 July 2010 and Freetown, 11 August 2010), United Nations, *Treaty Series*, vol. 2871, No. 1-50125); Lebanon (Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon (Beirut, 22 January 2007 and New York, 6 February 2007), *ibid.*, vol. 2461, No. 44232, p. 257); and Guatemala (Agreement between the United Nations and the State of Guatemala on the establishment of an International Commission against Impunity in Guatemala (New York, 12 December 2006), *ibid.*, vol. 2472, No. 44373, p. 57).

#### WORLD BANK

1. Draft article 5, which contains the general rule on the attribution of conduct, provides in its first paragraph that the conduct of an organ or agent “in the performance

of functions of that organ or agent shall be considered as an act of that organization”. Is this formulation meant to imply that the exclusive criterion of attribution is functional? If so, one may question whether something more is not, in practice, required for attribution, namely that the agent has not only factually performed functions of the organization but that it has also acted on the instruction and under the control of the organization in question.

2. The second paragraph of draft article 5 confines the relevance of the “rules of the organization” to determining the functions of organs and agents. However, elsewhere in its commentary to the draft articles, the Commission acknowledges that the rules of the organization “may also affect the application of the principles and rules set out in Part Two in the relations between an international organization and its members, for instance in matter of attribution”.<sup>1</sup> In the light of this pertinent remark, the Commission may want to revisit the question of the relevance of the rules of the organization to attribution of conduct, and revise draft article 5 accordingly.

<sup>1</sup> Para. (4) of the commentary to draft article 31.

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

##### EUROPEAN COMMISSION

1. The key provision proposed is an “effective control” standard, which is ultimately predicated on factual control, and follows equivalent articles from the articles on responsibility of States. The European Commission notes that the commentaries to this draft article are largely devoted to United Nations practice and to a discussion of the case law of the European Court of Human Rights. As the commentaries show, the latter court has by now rendered several further judgments confirming the controversial line adopted earlier in *Behrami* and *Saramati*,<sup>1</sup> and with which the Special Rapporteur, the ILC and many academics disagree.

2. Regardless of the merits of the disagreements, the question must be asked whether the international practice is presently clear enough and whether there is identifiable *opinio juris* that would allow for the proposed standard of the International Law Commission (which thus far has not been followed by the European Court of Human Rights) to be codified in the current draft. There is no doubt that this remains a controversial area of international law, in relation to which one can expect a steady stream of case law not only from the European Court of Human Rights, but also from domestic courts, in addition to voluminous academic writings.

3. Part of the reasoning behind the rule set out in draft article 6 and the commentary thereto may be the perception that international organizations tend to “escape” accountability for international wrongs. It should be noted that as far as the EU is concerned, pursuant to express

<sup>1</sup> ECHR, *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*, 2 May 2007, on the admissibility of application Nos. 71412/01 and 78166/01.

provisions of the founding treaties, the EU's institutions are fully accountable *vis-à-vis* each other and EU member States for acts and failure to act.<sup>2</sup> In addition, non-EU States may by virtue of express provisions in international agreements concluded with the EU have the possibility of seizing EU courts with cases of alleged breaches of the agreement by the EU. Such agreements may also provide for participation of non-EU contracting parties to preliminary reference proceedings, which is one of the main activities of the Court of Justice of the European Union.<sup>3</sup> Moreover, the EU has standing before several dispute settlement bodies (including the WTO dispute settlement bodies and ITLOS) which allow non-EU States to bring proceedings against EU acts. In addition, unlike other international organizations, the EU does not invoke jurisdictional immunity when EU acts are challenged by private parties, as long as this is done in EU courts.<sup>4</sup> Any natural or legal person (regardless of nationality or residence) may institute proceedings against a decision addressed to him or her or which is of direct and individual concern.<sup>5</sup>

<sup>2</sup> See articles 260, 263 and 265 of the Treaty on the Functioning of the European Union.

<sup>3</sup> See, for instance, the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, concluded between the EU, Switzerland and other EFTA States, which provides in, Protocol 2, art. 2, that non-EU States may participate through statements of case or written observations in proceedings concerning preliminary reference proceedings referred to by courts of EU member States to the European Court of Justice.

<sup>4</sup> The EU invokes jurisdictional immunity when it is challenged in courts of non-EU States. The immunity invoked is based on the principle of functionality: namely, immunity that encompasses all acts needed for the execution of the official functions and activities of the organization. Insofar as Common Foreign and Security Policy actions are concerned, specific provisions included in status of forces agreements concluded by the EU deal with immunity from civil and criminal proceedings in foreign courts and procedures for settlement of claims against the EU.

<sup>5</sup> The competence of the Court of Justice of the EU, in accordance with arts. 263 and 265 of the Treaty on the Functioning of the European Union, encompasses exclusive jurisdiction to decide on the legality of acts of the European institutions that produce legal effects (or for failure to act). The jurisdiction of the Court is however excluded with respect to acts adopted under the Common Foreign and Security Policy provisions, with certain limited exceptions: see art. 275 of the Treaty on the Functioning of the European Union.

## ILO

Draft article 6 does not seem to take into account the fact that there are two modalities in the law of international civil services under which national officials are put at the disposal of international organizations. These two modalities, formerly defined as “loan” and “secondment”, distinguish clearly the level of responsibilities for acts of such officials, denying any responsibility for their acts under the arrangement of “loan”. ILO has already presented its comment on this issue and respectfully requests the Commission to take into account the 2006 ILO comments regarding draft article 5.<sup>1</sup>

<sup>1</sup> *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/568 and Add.1, p. 132.

## UNITED NATIONS

1. The test of “effective control” proposed by the Commission is a factual test of actual control over the conduct

in question, and is to be applied in the relationship between the organization and the lending State, or in the case of United Nations operations, between the United Nations and troop-contributing States. In the latter case, conditioning the attribution of an act of a national contingent to the United Nations on the degree of the “effective control” over the act or conduct in question implies, in fact, that, where the lending State continues to exercise operational control over the imputed act, responsibility should be attributed to the lending State and not to the receiving organization.

2. In the practice of the United Nations the test of “effective command and control” applies “horizontally” to distinguish between a United Nations operation conducted under United Nations command and control and a United Nations-authorized operation conducted under national or regional command and control. In contrast, the test of “effective control” proposed by the Commission would apply “vertically” in the relations between the United Nations and its troop-contributing States to condition the responsibility of the Organization on the extent of its effective control over the conduct of the troops in question.

3. It has been the long-established position of the United Nations, however, that forces placed at the disposal of the United Nations are “transformed” into a United Nations subsidiary organ<sup>1</sup> and, as such, entail the responsibility of the Organization, just like any other subsidiary organ, regardless of whether the control exercised over all aspects of the operation was, in fact, “effective”. In the practice of the United Nations, therefore, the test of “effective control” within the meaning of draft article 6 has never been used to determine the division of responsibilities for damage caused in the course of any given operation between the United Nations and any of its troop-contributing States. This position continued to obtain even in cases, such as United Nations Operation in Somalia (UNOSOM II), where the United Nations command and control structure had broken down.

4. In this connection, the Secretariat notes that the residual control exercised by the lending State in matters of disciplinary and criminal prosecution, salaries and promotion for the duration of the operation, is inherent in the institution of United Nations peacekeeping, where the United Nations maintains, in principle, exclusive “operational command and control” and the lending State such other residual control. However, as long as such residual control does not interfere with the United Nations operational control, it is of no relevance for the purpose of attribution.

5. Mindful of the realities of peacekeeping operations but keen to maintain the integrity of the United Nations operation *vis-à-vis* third parties, the United Nations has struck a balance, whereby it remains responsible *vis-à-vis* third parties, but reserves the right in cases of gross negligence or wilful misconduct to revert to the lending State. Under the memorandum of understanding between the United Nations and the [participating State] contributing resources to [the United Nations peacekeeping operation]:

<sup>1</sup> Paragraph 15 of the 1990 model status-of-forces agreement for peacekeeping operations provides, “The United Nations peacekeeping operation, as a subsidiary organ of the United Nations, enjoys the status, privileges and immunities of the United Nations” (A/45/594, annex).

The United Nations will be responsible for dealing with any claims by third parties where the loss of or damage to their property, or death or personal injury, was caused by the personnel or equipment provided by the Government in the performance of services or any other activity or operation under this MOU. However, if the loss, damage, death or injury arose from gross negligence or wilful misconduct of the personnel provided by the Government, the Government will be liable for such claims.<sup>2</sup>

6. For a number of reasons, notably political, the United Nations practice of maintaining the principle of United Nations responsibility *vis-à-vis* third parties in connection with peacekeeping operations and reverting as appropriate to the lending State is likely to continue. The Secretariat nevertheless supports the inclusion of draft article 6 as a general guiding principle in the determination of responsibilities between the United Nations and its Member States with respect to organs or agents placed at the disposal of the Organization, including possibly in connection with activities of the Organization in other contexts.

<sup>2</sup> Manual on Policies and Procedures Concerning the Reimbursement and Control of Contingent-Owned Equipment of Troop/Police Contributors Participating in Peacekeeping Missions (COE Manual) (A/C.5/60/26), chap. 9, art. 9. In another context, administrative instruction ST/AI/1999/6 on gratis personnel provides in section 13, on third-party claims, as follows: "The United Nations shall be responsible for dealing with claims by third parties where the loss of or damage to their property, or death or personnel injury was caused by the actions or omissions of the gratis personnel in the performance of services to the United Nations under the agreement with the donor. However, if the loss, damage, death or injury arose from gross negligence or wilful misconduct of the gratis personnel provided by the donor, the donor shall be liable to the United Nations for all amounts paid by the United Nations to the claimants and all costs incurred by the United Nations in settling such claims."

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

CTBTO, ICAO, IFAD, ILO, IMO, IOM, ITU,  
UNESCO, UNWTO, WHO, WIPO, WMO AND WTO

The rules applicable to *ultra vires* acts of an organ of a State in draft article 7 of the articles on responsibility of States cannot be transposed automatically to those of an agent or an organ of an international organization which can only be held responsible within the framework of the principle of speciality. At least, a better balance should be struck, on the one hand, between attribution of *ultra vires* acts and the protection of third parties who rely on the good faith of agents or organs acting beyond their mandate, and, on the other hand, on the principle of speciality and the fact that an agent or organ acting *ultra vires* operate beyond the mandate and functions entrusted to an international organization by its members. Due account should be taken in this respect of internal mechanisms and rules. The rules and established practices applicable to privileges and immunities of international organizations and their agents, for example, might constitute a check on the nature of the acts in question.

#### UNITED NATIONS

1. In paragraph (4) of its commentary to draft article 7, the Commission notes that the "key element for attribution" in respect of *ultra vires* acts "is the requirement that the organ or agent acts 'in that capacity'", namely, in its official capacity. It explains that "[t]his wording is

intended to convey the need for a close link between the *ultra vires* conduct and the organ's or agent's functions". The commentary further notes that the practice of the United Nations is consistent with the principle.

2. There appears to be scant practice concerning actual claims against the Organization in respect of alleged *ultra vires* acts by its organs or agents. The practice identified by the United Nations requires a strong link between the impugned act or omission and the official functions of the organ or agent (see the discussion in connection with draft article 2, subparagraph (c), above). There is practice to suggest that when an organ or an agent identified as such by the Organization acts in its official capacity and within the overall functions of the Organization, but outside the scope of its authorization, such act may nevertheless be considered an act of the Organization.

3. As the wording of the draft article is intended to convey the "need for a close link between the *ultra vires* conduct and the organ's or agent's functions", the Secretariat recommends that the word "official" be inserted to make it clear that the organ or agent must be acting in an official rather than a private capacity at the time of the commission of the *ultra vires* act.

4. In this connection, the Secretariat notes that the 1986 opinion quoted by the Commission<sup>1</sup> does not reflect the consistent practice of the Organization. In 1974, the Office of Legal Affairs advised the Field Operations Service as to whether the United Nations Emergency Force (UNEF) Claims Review Board was authorized to handle and settle claims in respect of tortious acts committed during the Force members' off-duty periods. It advised that "there may well be situations involving actions by Force members off duty which the United Nations could appropriately recognize as engaging its responsibility", and made a distinction between off-duty acts of Force members in circumstances closely related to the functions of the Force member (i.e. the use of a Government-issued weapon), and actions entirely unrelated to the Force member's status as such. Accordingly, the test for the attribution of the act was whether it related to the functions of the Organization, irrespective of whether the Force member was on or off duty at the time.

5. The limited practice of the United Nations in the context of responsibility for *ultra vires* acts suggests that, at a minimum, the text of draft article 7 should be modified so as to provide that attribution in any such case could exist only where an organ or agent "acts in an official capacity and within the overall functions of the organization". In addition, the United Nations recommends that the Commission give additional consideration to the question of whether the standard for attribution in respect of such acts should be the same for agents as for organs of the organization, in the light of the fact that an agent may have a more remote institutional link to the organization than an organ.

6. In the interest of clarity, the United Nations also recommends that the Commission not include in the commentary the excerpt of the legal opinion from the 1986 *United Nations Juridical Yearbook* concerning on-duty and off-duty acts in peacekeeping operations.

<sup>1</sup> In para. (9) of the commentary to art. 7 and footnote 128.

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

EUROPEAN COMMISSION

In paragraph (3) of the commentaries to draft article 8, reference is made to a statement of the European Community in a World Trade Organization case (*European Communities-Customs Classification of Certain Computer Equipment*). This statement is cited in support of the proposition that practice does not always clearly distinguish between acknowledgment of attribution of conduct or of responsibility to an international organization. However, the reference to this statement appears misplaced. In relation to the WTO case referred to, the EU declared that it was ready to assume the entire international responsibility for all measures in the area of tariff concessions because it was exclusively competent for the subject matter concerned and thus the only entity in a position to repair the possible breach, namely, the only entity to ensure possible restitution under the WTO rules for dispute settlement.

UNITED NATIONS

1. In paragraph (1) of the commentary, “acknowledgement” and “adoption” of conduct by an organization are cumulative conditions for the attribution of conduct not otherwise attributable to the Organization through its agent or organ. The Commission explains that attribution is based “on the attitude taken by the organization with regard to certain conduct”, but leaves open the question of the competence of the organization or of any of its agents or organs to acknowledge or adopt the conduct in question, the form of the acknowledgement, and whether the act of acknowledging should be made in full knowledge of the unlawful character of the conduct, and of the legal and financial consequences of such acknowledgment. These questions would have to be clarified for the draft article to have any practical effect for the United Nations.

2. The Secretariat is unaware of any case in which any United Nations organ has acknowledged or adopted conduct not otherwise attributable to it, or that as a consequence thereof has agreed to assume responsibility or liability in compensation. It furthermore submits that there is little likelihood that such admission would be made by an intergovernmental organ, or, if it were made, that it would be respected by the political organ having the budgetary authority to authorize the compensation.

3. In the practice of the United Nations Secretariat, *ex gratia* payment is the only case where the Secretary-General is authorized to make payment *without* recognizing the responsibility of the Organization (in fact, it is conditional upon recognition that there is no responsibility), if he considers such payment nevertheless to be in the interest of the Organization. Rule 105.12 of the Financial Rules and Regulations provides in this respect:

*Ex gratia* payments may be made in cases where, although in the opinion of the Legal Counsel there is no clear legal liability on the part of the United Nations, payment is in the interest of the Organization ... The approval of the Under-Secretary-General for management is required for all *ex gratia* payments.<sup>1</sup>

<sup>1</sup> ST/SGB/2003/7.

4. The underlying assumption of rule 105.12 is that, while the *conduct* itself may be attributed to the United Nations, the responsibility is not. It has been the consistent view of the Office of Legal Affairs that an *ex gratia* payment cannot be made if *responsibility* is legally entailed, in which case, compensation should be paid as a matter of obligation.

CHAPTER III

BREACH OF AN INTERNATIONAL OBLIGATION

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

EUROPEAN COMMISSION

1. Paragraph 2 of draft article 9 raises again the questionable generic assumption that the “rules of the international organization” belong to the sphere of international law. For the reasons set out above,<sup>1</sup> the EU does not accept the proposition that its internal law forms part of this sphere. It would request that this be made clear in the commentaries.

2. In addition, the rule set out in draft article 9, paragraph 2, does not appear coherent with the later draft articles. The inconsistency is apparent when comparing draft article 9 with the first sentence of draft article 31. The latter provides that an international organization cannot rely on its internal law (“its rules”) as justification for failing to comply with the draft articles on the content of the international responsibility. Consequently, the draft articles, as they currently stand, appear to state that the rules of the international organization should be considered irrelevant for the establishment of the content of the responsibility of the organization, and later on for the remedies, but not for the existence of the breach. This is inconsistent and there appears to be no support for this in the constituent instruments of many international organizations.

3. Moreover, paragraph (9) of the commentaries to draft article 9 erroneously cites the case of *Parliament v. Council*,<sup>2</sup> for the proposition that an international organization may be bound by an obligation to achieve a certain result irrespective of whether the necessary conduct will be taken by the organization itself or by one or more of its member States. The European Commission would note in this regard that the Court of Justice of the European Union case in question was not concerned with the boundary between the “inner” and “outer” sphere, but with a “mixed agreement”. These are agreements that cover subject matters that fall both under EU and the national competence of the EU member States and are hence concluded by both the EU and all its member States together, *in casu* the Fourth ACP-EEC Convention. In such a specific case, involving “bilateral” cooperation between the EU and its member States on the one hand and the non-EU States on the other, all the treaty obligations bind both the EU and its member States irrespective of the exact internal delimitation of competences. In sum, this case does not bring clarification to the rule currently set out in draft article 9.

<sup>1</sup> See the comments of the European Commission under draft article 4.

<sup>2</sup> Court of Justice of the European Union, case C-316/91, judgment of 2 March 1994, *European Court Reports 1994*, p. I-653.

## UNITED NATIONS

1. Draft article 9, paragraph 1, is identical to article 12 of the articles on responsibility of States with obvious modifications. Paragraph 2, however, is an entirely new provision. Draft article 9 does not distinguish between international law rules and the internal law of the international organization in characterizing conduct as unlawful, or for the purposes of attributing responsibility to the international organization.

2. The Commission states in paragraph (4) of its commentary, “For an international organization most obligations are likely to arise from the rules of the organization”, and that it is “preferable to dispel any doubt that breaches of these obligations are also covered by the present articles. The wording in paragraph 2 is intended to include any international obligation that may arise from the rules of the organization”.

3. In the debate over the nature of the “rules of the organization”, the Commission did not take a stand. In paragraph (6) of its commentary, it stated:

Paragraph 2 does not attempt to express a clear-cut view on the issue. It simply intends to say that, to the extent that an obligation arising from the rules of the organization has to be regarded as an obligation under international law, the principles expressed in the present article apply.

The Secretariat takes this to mean that only breaches of international law obligations contained in the rules, and not breaches of the rules as such, would be considered breaches of an international obligation within the meaning of draft article 9. The question of whether any given rule entails an international obligation depends on the nature, object and purpose of the rule in question, and on whether it is intended to give rise to an international legal obligation. The Secretariat recalls in this connection that many of the rules of the Organization, including resolutions of its political organs, may not give rise to international law obligations.

4. The question of whether a violation of a rule of the organization amounts to a breach of an international law obligation cannot be determined in the abstract, but rather on a case-by-case basis. The United Nations, therefore, endorses the current text of draft article 9, paragraph (1), and suggests that the commentary be revised to clarify the distinction between international law and internal rules of the organization.

## WORLD BANK

1. Pursuant to paragraph 1 of draft article 9, an international organization breaches an international obligation when its act is not in conformity with what that obligation requires, “regardless of its origin and character”. Paragraph 2 of the same draft article then adds that the scope of paragraph 1 “includes the breach of an international obligation that may arise under the rules of the organization”. However, paragraph (5) of the commentary to draft article 9 acknowledges that the legal nature of the rules of the organization “is to some extent controversial” and, in any event, it remains open to question “whether all the obligations arising from the rules of the organization are to be considered as international obligations”. This is why paragraph (6) of the commentary expressly clarifies that paragraph 2

does not attempt to express a clear-cut view on the issue [and] simply intends to say that, to the extent that an obligation arising from the rules of the organization has to be regarded as an obligation under international law, the principles expressed in the present article apply.

2. Precisely because the World Bank agrees with the Commission in its cautious approach to this important point, it thinks that the clarification provided in the commentary would be better reflected by the deletion of paragraph 2 from draft article 9. In fact, paragraph 1 already states that a breach is a breach regardless of the origin and character of an obligation binding an international organization, thus clearly implying that this origin may also be in the rules of the organization. On the contrary, retaining paragraph 2 may wrongly lead to the unsubstantiated conclusion (expressly denied in the Commission’s commentary) that the breach of any rule of the organization is necessarily a breach of an international obligation.

## CHAPTER IV

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

## EUROPEAN COMMISSION

1. In paragraph (4) of the introductory commentary, reference is made to cases before international tribunals or other bodies for the proposition that the question of the international organization’s international responsibility has not been examined on *ratione personae* grounds. It is not clear to the European Commission that this comment is entirely well placed here. In addition, it should be noted that all but one of the cases referred to relate to actions involving the EU and its member States before the European Court of Human Rights. In this regard, it should be pointed out that the cases that have been dismissed at the level of the former European Commission of Human Rights do not have the same legal authority as judgments of the European Court of Human Rights. Furthermore, the picture given by these decisions of the former European Commission of Human Rights and the judgments of the European Court of Human Rights appears much more nuanced than would appear from the current introductory text to chapter IV of the draft. Applications directed against the EU as an organization have been declared inadmissible *ratione personae* (*Confédération Française Démocratique du Travail*<sup>1</sup>). However, the former European Commission of Human Rights did not dismiss applications involving an EU act as inadmissible *ratione personae*, when those applications were directed against one or all the EU member States and not against the EU as such (*Senator Lines*<sup>2</sup>; *Emesa Sugar*<sup>3</sup>). In addition, the

<sup>1</sup> *Confédération Française Démocratique du Travail v. the European Communities*, application No. 8030/77, decision of 10 July 1978 on the admissibility of the application, European Commission of Human Rights, *Decisions and Reports 13*, p. 231.

<sup>2</sup> *Senator Lines v. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom*, application No. 56672/00, decision of 10 March 2004, *Reports of Judgments and Decisions*, 2004-IV, p. 331.

<sup>3</sup> *Emesa Sugar v. the Netherlands*, application No. 62023/00, decision of 13 January 2005.

European Court of Human Rights has held that an EU member State can be held responsible for acts of primary EU law (*Matthews*<sup>4</sup>) and for national implementation act of EU secondary law, irrespective of the nature of the EU act and of the fact whether the member State enjoys discretion or not (*Cantoni*<sup>5</sup>; *Bosphorus*<sup>6</sup>).

2. It should also be noted that the EU is currently negotiating its accession to the European Convention on Human Rights as mandated by article 6, para. 2, of the Treaty of the European Union. Upon the EU's accession applications to the European Court of Human Rights, involving the EU as an organization will no longer be declared inadmissible on *ratione personae* grounds—provided that the impugned act or omission is itself imputable to the EU.

<sup>4</sup> *Matthews v. United Kingdom*, application No. 24833/94, judgment of 18 February 1999, *Decisions and Reports 1999-I*, p. 251.

<sup>5</sup> *Cantoni v. France*, application No. 45/1995/551/637, judgment of 15 November 1996, *ibid.*, 1996-V, p. 1614.

<sup>6</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*.

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

EUROPEAN COMMISSION

Since aid or assistance is often used in a financial context, it would seem desirable that this draft article and its interpretation be kept as narrow as possible so as not to turn it into a disincentive for development aid by international organizations. Given that the threshold for the application of the rule seems low (knowledge), one should add in the commentary some limitative language (intent) in line with the commentaries of the draft articles on responsibility of States.

ILO

The wording of subparagraph (a), which comes from the draft articles on responsibility of States, may need to be further clarified to determine whether the expression “knowledge of circumstances” refers to the knowledge of the organization that it is committing an internationally wrongful act.

UNITED NATIONS

1. The Secretariat is unaware of any case in which the United Nations has assisted a State or another international organization in the commission of an internationally wrongful act, or where its international responsibility was otherwise invoked in connection with the behaviour of the recipient of its assistance. Recently, however, the possibility of United Nations aid or assistance being used to facilitate the commission of unlawful acts arose in the case of the United Nations Mission in the Democratic Republic of the Congo (MONUC).

2. Established by Security Council resolution 1279 (1999), MONUC was mandated both to protect civilians and to support Government forces in their operations to disarm foreign and Congolese armed groups.<sup>1</sup> In the

<sup>1</sup> Security Council resolutions 1565 (2004) and 1794 (2007).

course of MONUC-assisted operations it became apparent that elements of Government-led forces, notably the Armed Forces of the Democratic Republic of the Congo (FARDC) who were the beneficiaries of United Nations assistance, committed violations of human rights and international humanitarian law of the kind they were supposed to prevent with United Nations aid.<sup>2</sup> Faced with the dilemma of continuing to provide assistance to Government forces, as mandated by the Security Council, and the risk that by doing so the United Nations would be perceived as implicated in the commission of the wrongful act, the Security Council modified the MONUC mandate. By resolution 1856 (2008), it authorized MONUC to support only those operations of the FARDC that were jointly planned in accordance with international humanitarian, human rights and refugee law.

3. In implementing Security Council resolution 1856 (2008), the Secretary-General devised a “conditional policy” setting out the conditions for MONUC assistance. Accordingly, the Mission was not to participate in or support operations with FARDC units if there were substantial grounds for believing that there was a real risk that such units would violate international humanitarian, human rights or refugee law in the course of the operation.<sup>3</sup>

4. In its resolution 1906 (2009), the Security Council approved the measures taken by the Secretary-General and:

22. *Reiterates*, consistent with paragraphs 3 (g) and 14 of resolution 1856 (2008) that the support of MONUC to FARDC-led military operations against foreign and Congolese armed groups is strictly conditioned on FARDC's compliance with international humanitarian, human rights and refugee law and on an effective joint planning of these operations, *decides* that MONUC military leadership shall confirm, prior to providing any support to such operations that sufficient joint planning has been undertaken, especially regarding the protection of the civilian population, *calls upon* MONUC to intercede with the FARDC command if elements of a FARDC unit receiving MONUC's support are suspected of having committed grave violations of such laws, and if the situation persists, *calls upon* MONUC to withdraw support from these FARDC units.

The Council also:

23. *Notes* in this regard the development by MONUC of a Policy Paper setting out the conditions under which the Mission can provide support to FARDC units, and *requests* the Secretary-General to establish an appropriate mechanism to regularly assess the implementation of this Policy.

5. The case of MONUC is an example of a policy decision taken by the Organization to avoid being implicated or being perceived to be implicated in facilitating the commission of a wrongful act. And while it remains a unique example, the Secretariat nevertheless supports the inclusion of an appropriate article addressing aid or assistance in the commission of an internationally wrongful act in the draft articles. In this connection, the Secretariat

<sup>2</sup> In the preamble of its resolution 1856 (2008), the Security Council condemned the targeted attacks of all kinds against civilians, and stressed the urgent need for the Government of the Democratic Republic of the Congo, in cooperation with MONUC, “to end those violations of human rights and international humanitarian law, in particular those carried out by the militias and armed groups and by elements of the Armed Forces of the Democratic Republic of the Congo (FARDC)”.

<sup>3</sup> Thirtieth report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo (S/2009/623).

wishes to underscore the fundamental difference between States and international organizations, whose aid and assistance activities in an ever-growing number and diversity of areas often constitute their core functions.

6. It is precisely because of its wide-ranging scope of assistance activities, and of the difficulty of monitoring the final destination or use of such aid or assistance, that the condition for imputing responsibility to the Organization in connection with any such aid or assistance, namely, knowledge of the *circumstances of the wrongful act*, becomes all the more important. It is the understanding of the Secretariat that knowledge of the circumstances of the wrongful act should be taken to include knowledge of the *wrongfulness of the act*, and requests that this be reflected in the commentary.

7. The Secretariat suggests that the clarification provided in the commentary to the draft articles on responsibility of States be added also in the context of the articles on responsibility of international organizations. In so doing, the Commission may wish to consider revising the commentary or the draft article itself, to clarify that responsibility would arise not for the wrongful act itself, but for the organization's own conduct that has caused or contributed to the internationally wrongful act; that the assistance should be intended for the wrongful act; that the act should actually be committed, and that such assistance should be a significant factor leading to the commission of the act.

#### WORLD BANK

1. The World Bank is not at all convinced that applying to international organizations the provision, found in the draft articles on responsibility of States, on aid and assistance in the commission of an internationally wrongful act "is not problematic", as the Commission's commentary to draft article 13 suggests. Actually, if not strictly confined to its proper scope, this provision is worrisome and may create a dangerous chilling effect for any international financial institution providing economic assistance to eligible borrowers and recipients. If the source of draft article 13 on the responsibility of organizations is article 16 in the project on State responsibility, then it is assumed that the clarification given in paragraph (4) of the commentary to article 16 of the draft articles on responsibility of States applies likewise to draft article 13.

2. The assumption of the World Bank would seem to find support in footnote 66 of the Commission's commentary to the draft articles on the responsibility of international organizations, where it is written:

To the extent that provisions of the present articles correspond to those of the articles on the responsibility of States, reference may also be made, where appropriate, to the commentaries on those earlier articles.

Even if this footnote remains in the commentary after the second reading (and, *a fortiori*, if it disappears from the final commentary), the World Bank asks the Commission to consider expressly indicating, in its commentary to draft article 13, that organizations providing financial assistance do not, as a rule, assume the risk that assistance will be used to carry out an international wrong, as the commentary to the draft articles on responsibility of States clearly provides.

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

#### UNITED NATIONS

1. The rule on "direction and control" finds its parallel in article 17 of the draft articles on responsibility of States. An illustration of the principle in relation to international organizations or an example of "joined exercise" of "direction and control", in the view of the Commission, is the argument made by France in the case of the *Legality of Use of Force (Yugoslavia v. France)* before ICJ, whereby "NATO [was] responsible for the 'direction' of KFOR, and the United Nations, for 'control' of it".<sup>1</sup>

2. In paragraph 7 of its commentary to article 17 of the draft articles on responsibility of States, the Commission noted "the term 'controls' refers to cases of domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or concern", and that "the word 'directs' does not encompass mere incitement or suggestion but rather connotes actual direction of an operative kind". An example of "direction and control" exercised by an international organization "in certain circumstances"<sup>2</sup> is a binding decision leaving no discretion to the State or the organization to which it is addressed to carry out the conduct mandated by the resolution.

3. The Secretariat knows of no practice supporting the rule on "direction and control" within the meaning of draft article 14, as commented upon by the Commission, and doubts the propriety of applying it by analogy from the articles on responsibility of States. Many aspects of this rule, in particular, the threshold for "direction and control", its nature, and the means by which it can be exercised by international organizations, remain unclear. Unlike States, the United Nations does not, as in fact it cannot, control and direct a State by means normally available to States (military, economic, diplomatic). To the extent that "direction and control" takes the form of a binding resolution, it is difficult to envisage a single resolution controlling or directing a State. Finally, a binding resolution which would meet the condition referred to above, that is, one which would exert "operational control" over the commission of an internationally wrongful act, has never been encountered in the six-decade practice of the Organization.

4. It would be the Secretariat's preference that the argument made by France in the *Legality of Use of Force (Yugoslavia v. France)* case before ICJ not be included as an example of "direction and control". Not only is the statement controversial, as it has never been judicially determined, but in using it, the Commission may be seen as endorsing the argument that the United Nations had exercised control over the International Security Force in Kosovo (KFOR), which was not the case.

5. In the light of the foregoing, the Secretariat has serious doubts about the existence of "certain circumstances" in which a binding decision could constitute "direction

<sup>1</sup> Preliminary objections of the French Republic (5 July 2000), *I.C.J. Reports 2001*, p. 33, para. 46, commentary to draft article 14, para. (2). Available from: [www.icj-cij.org/files/case-related/107/10873.pdf](http://www.icj-cij.org/files/case-related/107/10873.pdf).

<sup>2</sup> Commentary to draft article 14, para. (3).

and control” within the meaning of draft article 14, and is of the view that the draft article has little practical effect for the Organization.

#### WORLD BANK

1. As to the requirement of “knowledge”, the World Bank would appreciate a clear indication, in the commentary to both this draft article and the previous one on “aid and assistance”, that this is actual (not presumed) knowledge, as in fact the Commission had indicated in paragraph (9) of its commentary to article 16 in the draft articles on responsibility of States.

2. As to “direction and control”, what are they? As a result of an agreement between an international financial institution and a borrower or recipient, direction and control for the implementation of project or programme activities are never really ceded, because the responsibility for implementation remains with the borrower or recipient, while the international financial institution engages at most in the exercise of oversight. Oversight is neither “control” nor “direction”, though. As the commentary to the corresponding provision in the draft articles on responsibility of States appropriately points out, control “refers to cases of domination over the commission of wrongful conduct and not simply the exercise of oversight”.<sup>1</sup> An express clarification to this effect in the commentary to draft article 14 would be critical to an accurate understanding of the text and to assuage any possible concern on the meaning and effect of such a provision.

<sup>1</sup> *Yearbook ... 2001*, vol. II (Part Two), p. 69, para. (7) of the commentary to art. 17.

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

##### UNITED NATIONS

1. In paragraph (2) of its commentary to draft article 15, the Commission points out:

Between an international organization and its member States or international organizations, a binding decision by an international organization could give rise to coercion only under *exceptional circumstances*\*.

It reproduces the commentary to the draft articles on responsibility of States and its description of coercion as follows:

Coercion... has the same essential character as *force majeure*... Nothing less than conduct which forces the will of the coerced State will suffice, giving it no effective choice but to comply with the wishes of the coercing State.<sup>1</sup>

2. It is the view of the Commission that the only means of coercion available to an international organization are binding resolutions, and that “coercion” within the meaning of draft article 15 must be akin to *force majeure*, leaving no choice to the coerced State or organization but to comply. “Coercion”, in the view of the Commission, can only occur “under exceptional circumstances”, but no example, however theoretical, is provided by the Commission for such circumstances.

<sup>1</sup> *Yearbook ... 2001*, vol. II (Part Two), p. 69, para. (2) of the commentary to art. 18.

3. The Secretariat knows of no practice supporting the rule on “coercion”, and doubts the likelihood of its occurrence within the meaning of draft article 15. In the realities of the Organization, the probability of adopting a binding resolution by the Security Council which would meet the conditions of draft article 15—namely, a resolution not only binding a State to commit an international wrongful act, but through “coercion” having the effect of *force majeure*—is virtually non-existent. From the perspective of the Secretariat, therefore, this draft article, as with draft article 14, is likely to have little effect, if any, on the practice of the Organization.

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

##### EUROPEAN COMMISSION

In its previous contributions,<sup>1</sup> the EU has commented that to hold that an international organization incurs responsibility on the basis of mere “recommendations” made to a State or an international organization appears to go too far. It remains the case that the commentary cites no authority for such a rule. Furthermore, the entire draft article and the commentaries thereto appear to be inspired by the European Court of Human Rights judgment in the *Bosphorus* case.<sup>2</sup> It should be noted in this regard, as mentioned above, that the EU is currently negotiating its accession to the European Convention on Human Rights.

<sup>1</sup> *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/568 and Add.1.

<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*.

##### ILO

Draft article 16 makes reference, not only to decisions and authorizations, but also to recommendations. It would appear that recommendations are—by their nature—non-binding acts and that for an internationally wrongful act to be committed as a consequence of a recommendation there needs to be an intervening act—the decision of the State or another international organization to commit that act. The chain of causation would be thus broken.

##### OECD

A wrongful act committed by a member country while implementing a decision or recommendation of an organization cannot be attributed to such organization, absent the direction or control of the organization regarding the act itself. Thus, the member country alone should be responsible for the manner in which it implements, or not, the decision or recommendation. It is understood that an organization shall not, through a decision or a recommendation, request a member country to breach any of the latter’s international obligations. In other words, as stated by IMF,<sup>1</sup> the identification of a certain objective by an international organization, which the member country decides to achieve by breaching its international obligations, can neither result in a breach of such obligations by the organization, nor in attribution to its responsibility.

<sup>1</sup> *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/556, pp. 51–52.

## UNITED NATIONS

1. Draft article 16 addresses the case of an international organization trying to influence its members to achieve a result that it could not have lawfully achieved, and thus circumvent its international obligations. Proof of intent, according to the Commission, is not required.

2. The draft article distinguishes between binding and authorizing resolutions. A binding resolution entails the responsibility of the organization at the time of its adoption; an authorizing resolution entails its responsibility when the act is actually committed, and if committed because of that authorization or recommendation. The Commission adds in that connection that, while an international organization might be responsible for acts committed by States acting on the basis of an authorization, it would not be responsible “for any other breach that the member State or international organization to which the authorization or a recommendation is addressed might commit”.<sup>1</sup> It finally concludes that draft article 16 may overlap with draft articles 14 and 15, but is nevertheless necessary to cover situations in which the conduct of a member State to which a decision is addressed is not unlawful.

3. The examples set out below do not fall within the ambit of article 16, namely, of a binding resolution “tainted” with initial illegality, adopted to circumvent an obligation of an international organization. They are nevertheless provided as an indication of the practice of the United Nations when claims were received in respect of binding resolutions.

4. The United Nations has on occasion received claims for damages resulting from the implementation of a Security Council sanctions regime. In cases where claims were submitted for financial loss or damage, or for costs otherwise incurred in implementing Security Council enforcement measures, the Secretariat has rejected the responsibility of the Organization and maintained the position that in carrying out enforcement measures under Chapter VII of the Charter of the United Nations, States are responsible for meeting the costs of their implementation actions.

5. In the two cases brought to the attention of the Office of Legal Affairs in the mid-1990s, the legality of the Security Council resolution was not questioned. In the first, a claim was brought by an airline company for compensation for additional costs resulting from the re-routing of its passenger aircraft to avoid flying over Libyan territory. The claimant argued that Security Council resolution 748 (1992) imposed an “embargo” on Member States and prohibited their flights over Libyan airspace. The Secretariat response was, firstly, that no such prohibition had been imposed under the resolution, and, secondly, that

[u]nder international law it is clear that if the Security Council takes action under Chapter VII of the Charter, individuals or corporate entities that suffer financial loss as a consequence of such action do not have a claim against the United Nations.<sup>2</sup>

<sup>1</sup> Para. (12) of the commentary.

<sup>2</sup> United Nations, *Juridical Yearbook 1993*, ST/LEG/SER.C/31 (United Nations publication, Sales No. E.97.V.13), pp. 352–353.

6. The second case concerned a claim for the reimbursement of costs of carrying out an arms embargo imposed by the Security Council in resolution 733 (1992) on Somalia (i.e. the costs of discharging the cargo and reloading it after the completion of the search at the request of a State). The Secretariat responded:

The responsibility for carrying out embargoes imposed by the Security Council rests with Member States which are accordingly responsible for meeting the costs of any particular action they deem necessary for ensuring compliance with embargo.<sup>3</sup>

7. In the *Kadi* case decided before the European Court of Justice, the Court held that its judicial review was not of the legality of the Security Council resolution under international law, but that of its implementing Regulation within the EU legal order. Its conclusion was premised on the assumption that States remain free to choose the particular model of implementation of Security Council resolutions in their domestic legal order, and that giving effect to Security Council resolutions must be in accordance with “the procedure applicable in that respect in the domestic legal order of each Member of the United Nations”.<sup>4</sup>

8. In attributing responsibility to international organizations for their binding and non-binding resolutions adopted in breach of their international obligations, draft article 16 has no parallel in the draft articles on responsibility of States. The cumulative conditions that it sets, including in particular the requirement that the decision imputing responsibility to the organization must be in circumvention of its international obligation (namely, in violation of the international obligations of the organization but not in that of any of the obligations of its member States), makes its application in the realities of international organizations, highly unlikely. At the same time, the Secretariat notes that, at least in respect of the proposal to extend responsibility to international organizations in certain cases in connection with *recommendations* that they may make to States or other international organizations, this would appear to extend the concept of responsibility well beyond the scope of previous practice with respect to either States or international organizations, and suggests that the Commission reconsider this point.

9. The Secretariat wishes to note that in imposing sanctions regimes the Security Council often makes allowance for breaches of contractual arrangements previously concluded between the States concerned. Thus, for example, paragraph 24 of Security Council resolution 687 (1991) imposes a ban on the sale and supply of arms and related materiel, technology and other training or technical support to Iraq. In paragraph 25 thereof, the Security Council “[called] upon all States and international organizations to act strictly in accordance with paragraph 24..., notwithstanding the existence of any contracts, agreements, licences or any other arrangements”<sup>5</sup>.

<sup>3</sup> *Ibid.*, 1995, ST/LEG/SER.C/33 (United Nations publication, Sales No. E.01.V.1), pp. 464–465.

<sup>4</sup> Joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakat International Foundation v. Council of the European Union and Commission of the European Communities*, *European Court Reports 2008*, p. I-6351, para. 6 of the summary.

10. The Secretariat suggests the deletion of the words “albeit implicitly” from paragraph (12) of the commentary. This is not only because United Nations governing organs do not operate on the basis of “implied” authorizations or recommendations, let alone binding resolutions, but also, if not mainly, because of the difficulty of proving an “intent” to authorize absent clear, specific language to that effect.

11. If there is to be a rule imputing responsibility to the Organization for its binding and authorizing resolutions, it would be the Secretariat’s preference that draft articles 14, 15 and 16 be reconsidered independently of their parallel articles in the draft articles on responsibility of States with a view to drafting a single overarching draft article on the legal consequences of resolutions of all kinds adopted in breach of the Organization’s international obligations and their consequences for the responsibility of the Organization. Any such rule should respect the practice of international organizations in this area. It should, in particular, and as indicated in draft article 66, be without prejudice to the Charter of the United Nations.

## CHAPTER V

### CIRCUMSTANCES PRECLUDING WRONGFULNESS

#### *Article 19. Consent*

##### UNITED NATIONS

1. In its commentary to draft article 19, the Commission notes that the principle that consent precludes the unlawfulness of conduct is generally relevant in the case of an international organization when such consent is given “by the State on whose territory the organization’s conduct takes place”.<sup>1</sup> It cites the examples of a United Nations commission of inquiry conducting an investigation, or a United Nations verification or monitoring mission deployed in a State’s territory.<sup>2</sup>

2. The Secretariat is of the view that in these examples the consent of the host State is not necessarily a circumstance precluding the wrongfulness of conduct, but rather a *condition* for that conduct, as it is, in fact, a condition for the deployment of any United Nations presence in a State’s territory (i.e. a United Nations conference, a United Nations Office, a peacekeeping operation (other than an operation under Chapter VII of the Charter of the United Nations), a political mission, a commission of inquiry or any other judicial or non-judicial accountability mechanism). A State’s consent for the presence of the United Nations or for the conduct of its operational activities in its territory is thus the legal basis for the United Nations deployment, without which the conduct would not take place.

3. In traditional peacekeeping operations where consent has been withdrawn before the end of the mandate, the withdrawal of the United Nations operation has usually followed suit. The case of the United Nations Emergency Force (UNEF) in 1967 is the most notable example. A more

recent case is that of Eritrea, which in 2008 demanded the withdrawal of the United Nations Mission from its territory. In its resolution 1827 (2008), adopted on 30 July 2008, the Security Council “[regretted] that Eritrea’s obstructions towards the United Nations Mission in Ethiopia and Eritrea (UNMEE) reached a level so as to undermine the basis of the Mission’s mandate and compelled UNMEE to temporarily relocate from Eritrea”, and decided “to terminate UNMEE’s mandate effective on 31 July 2008”.

4. The Secretariat recalls that in the practice of the United Nations there are no instances of an unlawful act or conduct of the Organization consented by, or remedied by consent of, the “injured” entity. In suggesting the deletion of the examples given by the Commission, for the reasons explained above, the Secretariat has no objection to maintaining a broadly conceived rule applicable to any kind of State’s consent to an unlawful act by an international organization, as an element precluding wrongfulness. However, the understanding is that the act itself must be unlawful or already in breach of an international obligation for the responsibility of the international organization to be precluded by the consent of a State or another international organization.

5. The Secretariat is mindful of the fact that similar examples are provided by the Commission in its commentary to the draft articles on responsibility of States. It nevertheless emphasizes the difference in this regard between States and international organizations. Unlawful acts of States in territories of other States are quite often possible without the consent of the territorial State—for the most part because of territorial proximity. In the case of the United Nations, however, access to a territory of a State is conditioned upon a mandate by its political organs, and is virtually impossible without the consent of the host State.

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

##### UNITED NATIONS

1. In its commentary, the Commission notes that self-defence is an exception to the prohibition on the use of force; that its applicability to international organizations is likely to be relevant to only those international organizations “administering a territory or deploying an armed force”,<sup>1</sup> and that the “extent to which United Nations forces are entitled to resort to force depends on the primary rules concerning the scope of the mission”.<sup>2</sup>

2. The Secretariat’s comments on the draft article do not address cases of “self-defence” outside the context of armed conflict in which peacekeeping forces are engaged. Rather, they are limited to the use of force in self-defence in response to attacks against a United Nations operation in a situation of armed conflict.

3. The use of force in self-defence in situations of armed conflict has not been uncommon in the practice of peacekeeping operations. Some of the most recent examples are the cases of the United Nations Protection Force (UNPROFOR) in Bosnia and Herzegovina, United Nations Operation in Somalia (UNOSOM), United Nations

<sup>1</sup> Para. (2).

<sup>2</sup> Para. (3).

<sup>1</sup> Para. (2).

<sup>2</sup> Para. (3).

Organization Mission in the Democratic Republic of the Congo (MONUC), the United Nations Mission in the Sudan (UNMIS) and the African Union/United Nations Hybrid Operation in Darfur (UNAMID). In the long practice of peacekeeping operations, including United Nations transitional administrations, however, there has never been a case where the responsibility of the Organization was invoked for the illegal (or “aggressive”) use of force (*jus ad bellum*). However, the Organization has accepted liability in respect of certain types of damages incurred in the course of military operations, whether offensive or defensive in nature (*jus in bello*), normally through a third-party claims process implemented through the respective peacekeeping mission.

4. While the Secretariat considers that the measure of self-defence—its nature, content and scope of application—is essentially a question of the primary rules of international law, it concedes that it could also operate as a circumstance precluding wrongfulness and should thus be included in the text of the draft articles.

### Article 21. Countermeasures

#### UNITED NATIONS

1. The institution of countermeasures<sup>1</sup> as applicable to States is not easily transferable to international organizations. While countermeasures taken by States are intrinsically unlawful (but for the fact of the initial wrongfulness), countermeasures taken by international organizations are situated somewhere in the seam between legality and illegality, as they must be “not inconsistent” with the rules of the organization. Countermeasures undertaken by international organizations, therefore, cannot be specifically allowed, but they cannot be specifically prohibited either. The rules of the organization must be silent on the matter for the measure to be “not inconsistent” with the rules, and thus qualified as a “countermeasure” within the meaning of the draft articles of the Commission. The question of what effect, if any, the silence of the rules has on the permissibility or otherwise of the measure, remains debatable.

2. In the practice of the United Nations, while decisions have occasionally been made to achieve a result other than by means expressly provided for under the Charter of the United Nations, none has been qualified as a countermeasure. One such example was the exclusion of South Africa at the time of apartheid, from participation in meetings of the General Assembly and in conferences convened by it. In a legal opinion on the “Procedures for the suspension of a Member State from an organ open to general membership—Article 5 of the Charter”, the United Nations Legal Counsel expressed the view that any State upon admission to membership is entitled to expect that its obligations will not be increased and its rights not be curtailed “except in the manner expressly laid down in the Charter”; that the only procedure by which a State might be denied the rights and benefits of membership are those laid down in Articles 5, 6 and 19 of the Charter of the United Nations, and

[h]ad the drafters of the Charter intended to curtail membership rights in a manner other than those provided for in Articles 5, 6 and 19 of the Charter they would have so specified in the Charter. It may therefore be concluded that procedures to suspend a Member State from any of the benefits, rights and privileges of membership which do not follow those laid down in Article 5 are *not consonant*\* with the legal order established by the Charter.<sup>2</sup>

3. The principle that the exercise of powers or the employment of means not expressly provided for under the Charter of the United Nations (to achieve a result other than by the means provided for) are inconsistent with the Charter of the United Nations, was applied by the Office of Legal Affairs in subsequent years in other different contexts (i.e. rejection of the credentials of South Africa<sup>3</sup> or the case of the non-representation of the Federal Republic of Yugoslavia<sup>4</sup>). Based on the foregoing, it is highly likely that the questions of what legal effect should be attributed to the silence of the rules, and whether “not inconsistent with” necessarily means “not illegal”, will remain debatable.

4. In applying by analogy the institution of countermeasures to the relations between international organizations and their member States, little account was taken of the fact that the process leading to the adoption of countermeasures by international organizations is fundamentally different from the process leading to the adoption of countermeasures by States. When taken by States, countermeasures are considered “unilateral acts” both in defining the presumed illegality of the initial act, and in the choice of the response. Countermeasures taken by international organizations, on the other hand, are the result of a multilateral, all-inclusive and, in the case of the United Nations, virtually universal process. It is a “centralized process” unlike the “decentralized” system of States’ countermeasures. The question of what effect, if any, should be given to such a multilateral system of countermeasures in legalizing the measure, or legitimizing it, has been overlooked.

5. Equally overlooked is the principle of “cooperation and good faith” guiding the relations between the Organization and its Member States,<sup>5</sup> against which the institution of countermeasures should also be examined when it is applied by analogy from States.

6. The lack of practice that is a distinctive feature of a significant number of the draft articles, characterizes also and perhaps more particularly, those on countermeasures, where even a hypothetical example of countermeasures is difficult to envision.

7. In the practice of the United Nations, no measure taken, whether against a State or an organization, has ever been qualified as a countermeasure. Nevertheless, certain authors suggest that some instances could be considered countermeasures, such as the decision by the General Assembly to reject the credentials of South

<sup>2</sup> *United Nations Juridical Yearbook 1968*, ST/LEG/SER.C/6 (United Nations publication, Sales No. E.70.V.2), p. 195.

<sup>3</sup> A/8160.

<sup>4</sup> A/47/485, annex.

<sup>5</sup> *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, advisory opinion, I.C.J. Reports 1980, p. 93, para. 43.

<sup>1</sup> Given the universal character of the United Nations, in which all States are presently members, the Secretariat has limited its comments to countermeasures taken by the Organization against its Member States.

Africa in response to its policies of apartheid;<sup>6</sup> the expulsion of South Africa from the Universal Postal Union in 1979; the rejection of the credentials of Israel by IAEA in 1982 in the aftermath of the raid on the Osiraq reactor; the denial of ILO cooperation assistance for Myanmar in 1999 in response to its practice of forced labour; the suspension in 1962 of Cuba from membership in OAS; and the suspension of Egypt from the Organization of the Islamic Conference in 1979 in the aftermath of the peace agreement with Israel. In none of these cases, however, were the measures adopted qualified as countermeasures.

8. In the view of the Secretariat, the number and complexity of the conditions put on an injured international organization in the pursuit of countermeasures within the meaning of the draft article, may make it virtually impossible for it to meet them. The injured organization is required to show that the measure taken is not inconsistent with the rules of the organization, that it is otherwise in accordance with the conditions set out in draft articles 50 to 56 and other unspecified “substantive and procedural conditions required by international law”, and that it had no other means to induce compliance but through the measure taken.

9. The Secretariat agrees with the Commission’s conclusion that

[s]anctions, which an organization may be entitled to adopt against its members according to its rules, are *per se* lawful measures and cannot be assimilated to countermeasures.<sup>7</sup>

10. Because of the fundamental differences between international organizations and States, the nature of the relationship between an international organization and its member States, the different processes leading to the adoption of countermeasures by States and by international organizations and the lack of relevant or conclusive practice, the Secretariat recommends that the chapter on countermeasures not be included in the draft articles on the responsibility of international organizations.

<sup>6</sup> The legality of the measure under the rules of the Organization, however, was debatable. While some defended the legality of the measure, others argued that the action by the General Assembly interfered illegally with South Africa’s rights of membership in the United Nations, and thus in violation of the Charter of the United Nations. See Dugard, “Sanctions against South Africa: An international law perspective”. See also Dopagne, *Les contre-mesures des organisations internationales*, pp. 91–95.

<sup>7</sup> Para. (3) of the commentary to draft article 21.

### Article 24. Necessity

UNITED NATIONS

1. Drawn by analogy from draft article 25 of the draft articles on responsibility of States, “necessity” as a circumstance precluding wrongfulness must be the only means available for an international organization to safeguard against a grave risk threatening the interest of the international community. The plea of “necessity” can only be invoked by the organization whose function it is to protect the interest in peril. However, the examples given by the Commission hardly evidence an act to safeguard an interest of the international community against an imminent peril.

2. The United Nations has not as yet encountered a situation of “necessity” within the meaning of draft article 24. The concept of “operational necessity” which developed in the context of peacekeeping operations is of course a very different concept of “necessity”, in the nature of the obligation breached, the interest protected and the “grave” peril against which it is safeguarded. Drawn by analogy from the concept of “military necessity” applicable in times of armed conflict, the concept of “operational necessity” applies to the non-military activities of the United Nations force, as a circumstance precluding liability for property loss or damage caused in the ordinary conduct of the operation and in pursuit of the force mandate.

3. The 1996 report of the Secretary-General on the financing of the peacekeeping operations redefined the concept of “operational necessity” and circumscribed its lawful contours. In striking a balance between the operational necessity of the United Nations force and respect for private property, the Secretary-General placed the following conditions on the United Nations invocation of “operational necessity” as a circumstance precluding liability:

(a) There must be a good-faith conviction on the part of the force commander that an “operational necessity” exists;

(b) The operational need that prompted the action must be strictly necessary and not a matter of mere convenience or expediency. It must also leave little or no time for the commander to pursue another, less destructive option;

(c) The act must be executed in pursuance of an operational plan and not the result of a rash individual action;

(d) The damage caused should be proportional to what is strictly necessary in order to achieve the operational goal.<sup>1</sup>

4. While in the practice of the United Nations there has never been a situation where “necessity”, within the meaning of article 24, has arisen as a circumstance precluding responsibility, the eventuality that such a situation may occur in the future practice of the Organization, including its temporary administration and peacekeeping operations, cannot be excluded. The Secretariat, therefore, supports the inclusion of the rule on “necessity” in the proposed draft articles.

<sup>1</sup> Financing of the United Nations Protection Force, the United Nations Confidence Restoration Operation in Croatia, the United Nations Preventive Deployment Force and the United Nations Peace Forces headquarters(A/51/389), para. 14.

## PART THREE

### CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION

#### CHAPTER I

#### GENERAL PRINCIPLES

### Article 29. Cessation and non-repetition

UNITED NATIONS

1. With respect to subparagraph (b) of the draft article, paragraph (4) of the commentary to article 29 states that

“[e]xamples of assurances and guarantees of non-repetition given by international organizations are hard to find”. In fact, the commentary provides no example of an assurance or guarantee of non-repetition provided by an international organization. The commentary continues, however, that “should an international organization be found in persistent breach of a certain obligation—such as that of preventing sexual abuses by its officials or members of its forces—guarantees of non-repetition would hardly be out of place”.

2. The Secretariat questions whether, in view of the complete absence of cited practice with respect to the provision of assurances and guarantees of non-repetition by international organizations, it is appropriate for the Commission to conclude that an obligation to offer such assurances and guarantees exists at the present time, and suggests that the Commission reconsider the inclusion of this subparagraph in draft article 29.

3. The Secretariat also suggests that the Commission reconsider the sentence in the commentary with respect to the prevention of sexual abuses by officials of an international organization or members of a force of such an organization. The subject is indeed an important one that has received substantial attention by the United Nations and other international organizations, and an off-hand reference to the subject that seems to suggest a “hardly out of place” standard for the requirement of assurance and guarantees of non-repetition in this context may not reflect the complexity of the issue.

### *Article 30. Reparation*

CTBTO, ICAO, IFAD, ILO, IMO, IOM, ITU, UNESCO, UNWTO, WHO, WIPO, WMO AND WTO

These organizations are concerned that limited attention seems to have been paid by the Commission to the special situation of international organizations in relation to the obligation to compensate. If international organizations are “under an obligation to make full reparation for the injury caused by the internationally wrongful act”, this could lead to excessive exposure taking into account that international organizations in general do not generate their own financial resources but rely on compulsory or voluntary contributions from their members. This could be unrealistic because, if the internationally wrongful act of an organization causes major damage, the organization might not have the funds to provide full compensation or, conversely, the payment of compensation could compromise its activities and mandates.

#### ILO

1. In order to determine the existence of practice, the Commission and its Special Rapporteur quoted, in particular, the examples of jurisprudence of the administrative tribunals, used to support the proposals regarding possible reparations by international organizations for internationally wrongful acts,<sup>1</sup> which are not relevant for the discussion on the responsibility of international organizations under general international law. Administrative tribunals have been created as a part of the “rules of the organization”

<sup>1</sup> Fifth report on responsibility of international organizations, *Yearbook ... 2007*, vol. II (Part One), p. 11, document A/CN.4/583, para. 43.

and have been given different mandates by each “parent” organization. For example, the reinstatement of an official, as a measure that can be ordered by an administrative tribunal, does not exist in the statutes of all administrative tribunals. ILO therefore considers that such a practice is not relevant for the discussion on the responsibility of international organizations under general international law. It is also important to distinguish between acts committed by international organizations that are internationally wrongful, namely, being violations of international law, and those that are wrongful under national law.

2. Another potential problem with examples quoted by the Special Rapporteur is the unique situation of the EU.<sup>2</sup> Examples of responsibility of organizations that are themselves members of other organizations, such as the EU, and therefore subject to judicial or quasi-judicial organs of the latter organizations, would not necessarily amount to the practice applicable to all other “traditional” international organizations. The Commission may want to review the examples that led to some conclusions of the Commission in order to ensure that they apply only to such narrow situations.

3. The criterion of “full reparation”, may lead to ideas requiring international organizations to maintain a contingency fund or have a large amount of insurance in order to ensure solvency in the event of such liabilities, or another type of mechanism for member States to contribute to pay such liabilities when and if they arise. International organizations are—in principle—not profit-generating and cannot rely on a tax system to finance their operations. They have to rely on funds allocated to them. If they were to provide funds for contingent obligations such as a possible compensation, they would have reduced funds for fulfilling their original mandates. By imposing such a parallel obligation on international organizations, the Commission risks limiting effectively their future operations. The requirement of “full reparation” may lead, in the case of compensation, to the disappearance of the international organization concerned. The Commission may want to consider some limits in the duty to compensate, as was done in the case of satisfaction.

<sup>2</sup> Third report on responsibility of international organizations, *Yearbook ... 2005*, vol. II (Part One), p. 10, document A/CN.4/553, paras. 11–12.

#### UNITED NATIONS

1. In applying the principle of full reparation to international organizations, the International Law Commission recognizes the inadequacy of financial resources often available to international organizations to respond in cases of international responsibility. In this connection, it suggests that compensation offered *ex gratia* by international organizations is not necessarily due to abundance of resources, but rather to their reluctance to admit their international responsibility.<sup>1</sup>

2. The Secretariat notes that, in the practice of the Organization to date, compensation would appear to be the only form of reparation, although restitution and satisfaction remain possible forms of reparation.

<sup>1</sup> Paras. (3) and (4) of the commentary to draft article 30.

3. By its resolution 52/247, of 26 June 1998, the General Assembly adopted certain financial and temporal limitations on third-party liability resulting from peacekeeping operations. They include claims arising from: (a) personal injury, illness or death; (b) damage to property; and (c) non-consensual use of privately owned premises, unless such claims are precluded as a result of “operational necessity”.

4. Under the above-mentioned resolution, the payment of compensation is subject to the following limitations:

(a) Compensable types of injury or loss are limited to economic loss, such as medical and rehabilitation expenses, loss of earnings, loss of financial support, transportation expenses associated with the injury, illness or medical care, as well as legal and burial expenses;

(b) No compensation is payable by the United Nations for non-economic loss, such as pain and suffering or moral anguish, as well as punitive or moral damages;

(c) Except in exceptional circumstances, and subject to requisite approval (including approval by the General Assembly), the amount of compensation payable for injury, illness or death must not exceed a maximum of \$ 50,000, provided, however, that within such limitation, the actual amount is to be determined by reference to local compensation standards;

(d) Compensation for loss or damage to personal property shall cover the reasonable costs of repair or replacement;

(e) The payment of compensation is excluded in the event of operational necessity.

5. The above financial limitations do not apply to claims of gross negligence or wilful misconduct, or in particular areas, such as vehicle accidents and aircraft accidents, where the United Nations has made arrangements for commercial insurance to cover third-party claims for personal injury or death.

6. In order to ensure the opposability of such limitations to third parties, the United Nations concludes agreements with Member States in whose territories peacekeeping missions are deployed, and includes in such agreements provisions for the application of such financial and temporal limitations on third-party liability.

7. In addition to peacekeeping operations, financial limitations on the liability of the United Nations are prescribed in regulation 4, adopted by the General Assembly in its resolution 41/210 of 11 December 1986 for the United Nations Headquarters district in New York. The regulation aims at placing “reasonable limits on the amount of compensation or damages payable by the United Nations in respect of acts or omissions occurring within the Headquarters district”. Accordingly, compensation for economic loss cannot be paid in excess of the limits prescribed under the Rules Governing Compensation to Members of Commissions, Committees or Similar Bodies in the Event of Death, Injury or Illness Attributable to Service with the United Nations, and for non-economic loss in an amount not exceeding \$100,000.

8. The Secretariat is of the view that the obligation to make reparation, as well as the scope of such reparation, must be subject, in the case of the United Nations, to the rules of the organization, and, more particularly, to the *lex specialis* rule within the meaning of draft article 63.

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

#### COUNCIL OF EUROPE

Draft article 31 may give rise to certain hesitations as it would seem difficult to hold an international organization responsible for provisions contained in its constituent treaty which are wrongful under international law. The meaning of the word “rules” in paragraph 1 of the draft article would benefit from further clarification.

#### EUROPEAN COMMISSION

As commented above in relation to draft article 9, it is not consistent for the draft articles to state, on the one hand, that a responsible international organization may not rely on its internal law (“its rules”) to justify its failure to comply with its obligations (draft article 31, para. 1) and, on the other hand, state that a breach of the internal law of the organization may amount to a breach of international law (draft article 9, para. 1).

#### ILO

The rules of organizations should not be compared to the internal rules of States, as was done in draft article 31 where the Commission makes a simple parallel to the principle that a State may not rely on its internal law as a justification for failure to comply with its obligations. It remains important to clarify whether the “rules of the organization” are part of international law or represent a *sui generis* system. In the situation described by draft article 31, one can detect a conflict of norms on the same level rather than the hierarchy of norms that was justified in the context of State responsibility. One can even imagine the precedence of constituting instruments. For example, if an international organization under the decision of its organs refrains from providing technical assistance to a member State with which it has a valid treaty, would it be a conflict of two international obligations at the same level or should the obligation that prevails be the one derived from the constituent instrument of the organization? Should the rules of the organization preclude illegality of breach of another international obligation and provide a sufficient justification for not making reparations? Or, should the responsibility be of a purely objective nature, which means that an organization would be responsible for having breached an international obligation even if its governing bodies requested it to act in that way? Chapter V of the draft articles does not seem to adequately address this question.

#### UNITED NATIONS

1. The Secretariat reiterates the importance of the dual nature of the rules of the organization and the distinction to be made between the rules of international law and the internal law of the organization. The Secretariat also notes that, in the case of the United Nations, whose “rules” include the Charter of the United Nations, reliance on the

latter would be a justification for failure to comply, within the meaning of draft article 31, paragraph 1.

2. The Secretariat considers that paragraph 2 of draft article 31, read in conjunction with the Commission commentary, in particular paragraphs (3) and (4) thereof, addresses its concerns that in the relations between the Organization and its Member States, the rules of the organization on the forms of reparation, including limitations of its third-party liability, should apply as part of the more general rule of *lex specialis*.

**Article 32. Scope of the international obligations set out in this Part**

UNITED NATIONS

1. In paragraph (5) of its commentary to draft article 32, paragraph (2), the Commission provides two examples of significant areas in which rights accrue to persons other than States or organizations. The first concerns breaches by international organizations of their obligations under international law concerning employment, and the second concerns breaches by peacekeepers which affect individuals. The Commission goes as far as stating that, while the consequences of these breaches with regard to individuals are not covered in the draft articles, “certain issues of international responsibility arising in this context are arguably similar to those that are examined in the draft”.

2. The Secretariat recommends the deletion of paragraph (5) of the commentary, as it may create the misconception that the rules contained in the draft article apply with respect to entities and persons other than States and international organizations. The Secretariat notes that the terms and conditions of employment are governed by the internal rules of the Organization<sup>1</sup> and their violation would therefore not entail the international responsibility of the Organization. The Secretariat also notes that in the practice of peacekeeping operations, claims against the Organization have been, with few exceptions, of a private law nature. Finally, the Secretariat notes that under article VIII, section 29, of the Convention on the privileges and immunities of the United Nations, the Organization is duty-bound to provide alternative modes of settlement to address disputes of a private law character.

<sup>1</sup> For example, United Nations Staff Regulations and Rules.

CHAPTER II

REPARATION FOR INJURY

**Article 35. Compensation**

ILO

See the comment under draft article 30, above.

**Article 36. Satisfaction**

ILO

As regards satisfaction as one of the possible forms of reparations by international organizations, there is a difference between the responsibility of States and that of

international organizations. While the customary rule of international law as to who represents a State in international relations is well established, this is not obvious for international organizations, especially as different organs may be at the origin of the internationally wrongful act that needs to be repaired. Examples quoted by the Special Rapporteur<sup>1</sup> and the Commission demonstrate that there is confusion in this field. While executive heads are a visible part of an organization, they are rarely empowered in the constituent instrument to represent the organization in such matters. It would thus seem important to add a qualifier at the end of the second paragraph of draft article 36, such as “made in accordance with the rules of the organization concerned” or a reference to a “competent organ”.

<sup>1</sup> Fifth report on responsibility of international organizations, *Yearbook ... 2007*, vol. II (Part One), p. 12, document A/CN.4/583, paras. 50–52.

UNITED NATIONS

1. In the commentary,<sup>1</sup> the Commission refers to pronouncements made by the United Nations Secretary-General in connection with the report of the independent inquiry into the acts of the United Nations during the 1994 genocide in Rwanda, and his report on the fall of Srebrenica<sup>2</sup> expressing “regret” and “remorse” at the failings of the United Nations.

2. Without in any way attempting to qualify the nature of those expressions of regret in relation to events still loaded with heavy moral and political implications, the Secretariat wishes to reiterate that, in the words of the Commission, those “examples... do not expressly refer to the existence of a breach of an obligation under international law”<sup>3</sup>.

<sup>1</sup> Paras. (2) and (3).

<sup>2</sup> Report of the Secretary-General pursuant to General Assembly resolution 53/35: The fall of Srebrenica (A/54/549), para. 503.

<sup>3</sup> Para. (1) of the commentary.

**Article 37. Interest**

UNITED NATIONS

1. The Commission states in its commentary that the rules on interest “are intended to ensure application of the principle of full reparation” and that “similar considerations in this regard apply to international organizations”<sup>1</sup>.

2. As a matter of policy, the United Nations generally does not pay interest. Consistent with the United Nations Financial Regulations and Rules, and with appropriations made by the United Nations General Assembly, the Organization pays for goods and services received by it from commercial contractors. In its contracts with commercial vendors, therefore, the United Nations typically excludes the payment of interest. Accordingly, the United Nations has paid interest in rare instances only, for example, on the basis of adjudications by arbitral tribunals.

3. The Secretariat considers that this draft article, like others in this part, should be subject to the “rules of the organization” and the principle of *lex specialis* within the meaning of article 63 of the present draft articles.

<sup>1</sup> Para. (1).

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

CTBTO, ICAO, IFAD, ILO, IMO, IOM, ITU, UNESCO, UNWTO, WHO, WIPO, WMO AND WTO

Draft article 39 is a step in the right direction but it does not go far enough. Since the draft articles are largely an exercise in progressive development of international law, this could be a unique occasion to state the obligation of member States to provide sufficient financial means to organizations with regard to their responsibility.

EUROPEAN COMMISSION

The rule proposed in draft article 39 appears to be primarily based on one precedent, namely, the *Tin Council* case.<sup>1</sup> As far as the EU is concerned, there would appear to be no need for the draft articles to include such a generic rule. In any event, it should be noted that the EU has a budget line providing a contingency reserve to deal with unforeseen circumstances.

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

ILO

Paragraph (3) of the commentary to draft article 30 regarding reparations clearly states that international organizations may not have all the necessary means for making the required reparations, especially due to the inadequacy of financial resources. This commentary is, however, disregarded in the light of the explanation that inadequacy cannot exempt a responsible organization from the legal consequences resulting from its responsibility under international law. While the general principle may be acceptable, its practical application in terms of compensation seems problematic. In this context, draft article 39 is welcome as an innovative approach, but may need to be reinforced even further. The requirement for member States to act in accordance with the rules of the organization seems, however, redundant.

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**

EUROPEAN COMMISSION

The EU has standing before several international dispute settlement bodies, allowing non-EU States to bring

proceedings against it (e.g. WTO dispute settlement bodies and ITLOS). In addition, non-EU States may have by virtue of express provisions in international agreements concluded with the EU the possibility of seizing EU courts with cases of alleged breaches of the agreement by the EU. Furthermore, as mentioned above, when the EU accedes to the European Convention on Human Rights, non-EU States will be able to bring applications against the EU on the basis of the “inter-State” provisions of the Convention.

OSCE

The conjunction “and” in the phrase “the position of all the other States and international organizations” in subparagraph (b) (ii) should be replaced by “or”.

**Article 44. Admissibility of claims**

OSCE

A reference to the functional character of claims of an international organization against another international organization or State based on the criterion of “agent” (draft article 2 (c)) could be added in draft article 44, preferably before paragraph 2.

UNITED NATIONS

1. In its commentary to the draft article, the Commission acknowledges that effective remedies within international organizations exist in only a limited number of international organizations, and notes that “local remedies” within the meaning of draft article 44 include such other remedies available before arbitral tribunals, national courts or administrative bodies when the international organization has accepted their competence to examine claims.<sup>1</sup>

2. From the perspective of the Secretariat, it is essential to clarify at the outset that the reference to “exhaustion of local remedies” should not be read to suggest any obligation on the part of international organizations in any context to open themselves up to the jurisdiction of national courts or administrative bodies. The Commission makes reference, for example, to the applicability of paragraph 2 in the context of “the treatment of an individual by an international organization while administering a territory”.<sup>2</sup> The Secretariat notes, however, that insofar as the United Nations is concerned, when it has acted as an interim territorial administrator, no remedies in local courts or administrative bodies were available to private persons with respect to actions taken by the Organization. In fact, the applicable rules have provided for a general immunity from the jurisdiction of local courts and tribunals. It is conceivable that the reference to “exhaustion of local remedies” in this context could create confusion and the Secretariat suggests that it be made clear that no contradiction with the immunity regime of the United Nations or other organizations as appropriate is intended by the reference to local remedies.

<sup>1</sup> Para. (9).

<sup>2</sup> Para. (6).

3. At the same time, however, the Secretariat notes that the Organization's practice supports two conclusions with respect to such "available and effective" remedies as it has created: first, where the Organization has created an "available and effective remedy", that remedy provides the only process available for the consideration of matters falling within the scope of the remedy; and, second, any decision resulting from such a process is regarded as final and binding in character.

4. Two types of "available and effective remedies" created by the Organization can be identified to illustrate the Organization's practice. First, there is the internal justice system available for United Nations staff members in all matters relating to their conditions of service. As presently restructured, it consists of a two-tiered system of administration of justice (United Nations Dispute Tribunal and United Nations Appeals Tribunal) to hear cases against the Secretary-General in appeal of an administrative decision alleged to be in non-compliance with the terms of appointment or contract of employment.<sup>3</sup>

5. Second, there are the procedures established in cases of disputes of a private law character between the Organization and third parties, the establishment of which are mandated under article VIII, section 29, of the Convention on the privileges and immunities of the United Nations. These procedures would include those established to address claims arising in the context of United Nations peacekeeping and other missions, including cases in which the Organization has acted as a temporary territorial administrator, and contractual terms providing for recourse to final and binding arbitration in respect of claims arising under the contract.

6. Finally, the Secretariat notes, in respect of draft article 49 as it applies to draft article 44, paragraph 2, that the practice of the United Nations is uniform with respect to persons or entities other than States that, where "available and effective remedies" are provided by the United Nations, there is no possibility of recourse to the Organization except through the procedures provided.

<sup>3</sup> Statute of the United Nations Dispute Tribunal, General Assembly resolution 63/253, 24 December 2008, annex I.

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

EUROPEAN COMMISSION

In relation to draft article 47, reference is made to the comments made above in relation to paragraph (9) of the commentaries to draft article 9. The Court of Justice of the European Union case *Parliament v. Council*<sup>1</sup> is correctly discussed here as an example of a "mixed" agreement, where on the EU side not only the EU but also its member States are parties. It is worth noting also that while both the EU and all its member States are members of the WTO, most disputes are entirely directed and enforced against the EU only.

<sup>1</sup> Court of Justice of the European Union, case C-316/91, judgment of 2 March 1994, *European Court Reports 1994*, p. I-653.

CHAPTER II

COUNTERMEASURES

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

EUROPEAN COMMISSION

In relation to the commentaries set out in paragraph (4), it should be pointed out that WTO operates a specific regime of "countermeasures" under articles 21 and 22 of the Disputed Settlement Understanding. To the extent that these countermeasures are authorized by treaty, it is arguable that these do not provide genuine examples of countermeasures under general international law.

OSCE

OSCE agrees with the possibility of countermeasures by or against international organizations, which ought to be distinguished from sanctions that an organization may impose on its members in accordance with its internal rules. The relevant provisions of the draft articles (draft articles 21 and 50–56) apply only to the former category of actions. Some specific countermeasures concerning the non-performance of obligations owed to other international organizations or States may, however, ultimately affect third parties, for example, the beneficiaries of a programme jointly implemented by two or more international organizations and States, which is common in OSCE. In this context, the cessation of the (funding of the) implementation of such a project, as a countermeasure against a partner, may also affect the State where the project is being implemented or the final beneficiaries of the project. While the draft articles address the impact that countermeasures may have on the targeted entity (see draft article 53), it may also be useful to address the issue of the impact of countermeasures on non-targeted entities. A specific explanation in the commentary may cover this issue.

UNITED NATIONS

The Secretariat notes that draft article 50, paragraph (1), does not contemplate the possibility of countermeasures taken by an injured international organization against a State or a member State, but only against an international organization. This appears to be inconsistent with the text of draft article 21. The same comment applies to draft article 54.

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

EUROPEAN COMMISSION

Draft article 51, subparagraph (a), again raises the question, referred to above, of the status under international law of the internal law of an organization. It is very much doubtful that this draft article could be applied to the EU so as to allow for the hypotheses of countermeasures under international law between the organization and its member States. This is demonstrated in part by the case law of the Court of Justice of the European Union discussed in paragraph (6) of the commentaries, where it is correctly stated that the existence of judicial remedies within the EU appears to exclude EU member States from resorting to countermeasures against the EU.

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

UNITED NATIONS

1. In its commentary to paragraph 1, subparagraph (a), of draft article 52, the Commission suggests:

The use of force could be considered a countermeasure taken against an international organization only if the prohibition to use force is owed to that organization.<sup>1</sup>

The Secretariat is of the view that the prohibition on the use of force should be stated unequivocally both in the text of the draft article and in the commentary.

2. The Secretariat also recommends that, if maintained, paragraph 2 (b) of draft article 52 should be redrafted to reflect accurately the privileges and immunities enjoyed by international organizations. In addition to agents, premises, archives and documents, it should include property, funds and assets, as these are particularly vulnerable to countermeasures when situated in the territory of the injured State. The Commission may wish to consider the following formulation of paragraph 2 (b) to read as follows:

“To respect the applicable privileges and immunities of agents of the responsible international organization, its property, funds and assets as well as the inviolability of the premises, archives and documents of that organization.”

<sup>1</sup> Para. (1) of the commentary.

**Article 53. Proportionality**

UNITED NATIONS

In its commentary to draft article 53, the Commission states that when an international organization is injured it would be for the organization and not for its member States to take the countermeasures as a means to prevent an excessive impact.<sup>1</sup> In the realities of the United Nations, however, the distinction between the Organization and its Member States for this purpose is not always self-evident. If ever adopted, countermeasures would most likely be taken by means of a resolution and, as such, would be implemented by the Member States of the Organization.

<sup>1</sup> Para. (4).

**PART FIVE**

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

ILO

1. ILO expressed its reservations as to what appear to be a joint responsibility of States and international organizations already in its 2006 comments.<sup>1</sup> In determining the right of the United Nations to make an international claim, the starting point for ICJ was the argument that the organization occupied a position in certain aspects in detachment from its members. It is difficult to reconcile this position with the position of the Commission:

<sup>1</sup> *Yearbook ... 2006*, vol. II (Part One), p. 132, document A/CN.4/568 and Add.1.

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

Unless the organization itself authorizes its members to act on its behalf (“through the medium of the Member States”) as, for example, when due to the impossibility for the organization to accept the international obligation,<sup>3</sup> or where shared liability is provided by treaty, there seems to be no clear reason why, for example, member States should be held liable for decisions taken by the organization bodies, particularly as they may be (and usually are) taken by a (majority) vote.

2. The notions of aid and assistance (draft article 57), and even more direction and control (draft article 58), not to mention “coercion” (draft article 59), seem to deny the distinct legal personality of international organizations. The justification of piercing the “organization veil” cannot be found in the commentaries of the Commission and a parallelism between the corresponding articles on responsibility of States does not appear to be helpful in distinguishing between a participation in the decision-making process of an organization according to its pertinent rules, and the situations envisaged by the draft articles. The impact that “the size of the membership” and “the nature of the involvement” may have in this context requires further clarification.

3. It would appear that a distinction between members and non-members—or at least in what capacity States act in each situation—may be important in the situations foreseen in draft articles 57 to 59. Member States both act within international organizations and have an external legal relationship with them. Multiple layers of relationship between an international organization and its member States do not seem to be adequately taken into consideration. For example, member States contribute financially to the activities of the organizations not only (or even less and less) through their contributions to the regular budget, but also through their voluntary contributions, either budgetary or extrabudgetary. The responsibility in this type of relationship is based on both *lex specialis* of internally adopted rules and general treaty law.

<sup>2</sup> Para. (10) of the commentary to draft article 2.

<sup>3</sup> See, for example, opinion 2/91 of 19 March 1993 of the European Court of Justice, *European Court Reports 1993*, p. I-01061.

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

EUROPEAN COMMISSION

Reference is made to the comments in connection with draft article 16, above. The improvements made in the drafting of the present draft article compared to earlier versions appear welcome. As for the question of “intent”, the notion of “seeking to avoid” compliance does require establishment of intent, even if this intent can be inferred from the circumstances, as set out in paragraph (7) of the commentary.

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

EUROPEAN COMMISSION

1. The European Commission considers that draft article 61, paragraph 1 (a), should read: “(a) It has in conformity with the rules of the organization accepted responsibility for that act.”

2. It seems doubtful whether the concept of “reliance” referred to in draft article 61, paragraph 1 (b), is a workable concept. The commentary at paragraph (9) as a whole does not seem to support such a rule. It appears to be based on a single arbitration award, *Westland Helicopters*,<sup>1</sup> which could support the rule but appears to have been rendered in fairly exceptional circumstances.

3. On the whole, the main issue that draft article 61 raises is the question of “permeability” of international organizations *vis-à-vis* international law. The text of the draft articles and the commentaries as they stand appear to suggest to third States that there is legal uncertainty as regards where precisely the border lies.

<sup>1</sup> *Westland Helicopters Ltd. v. Arab Organization for Industrialization and others*, award of 21 July 1991, para. 56, cited by Rosalyn Higgins in “The legal consequences for member States of non-fulfilment by international organizations of their obligations toward third parties: provisional report”, in Institute of International Law, *Yearbook*, vol. 66-I (1995), pp. 393–394.

PART SIX

GENERAL PROVISIONS

**Article 63. Lex specialis**

CTBTO, ICAO, IFAD, ILO, IMO, IOM, ITU,  
UNESCO, UNWTO, WHO, WIPO, WMO AND WTO

The interplay of the *lex specialis* principle in relation to the role devoted in the draft articles to the “rules of the organization” is ambiguous. These organizations can accept that a single text covers all issues of responsibility involving international organizations. But, if this is so, special attention should be paid to the principle of speciality, which is one of the main factors differentiating the legal personality of international organizations from that of States. They therefore suggest the inclusion, in the introductory provisions of the draft articles, of an express provision specifying that the responsibility of international organizations is defined by the principle of speciality. The organizations are concerned that, if the draft articles follow the same course as the draft articles on responsibility of States and are left entirely to utilization by Governments, judicial bodies and other interpreters, their heavy reliance on the latter articles may make them unenforceable in practice or lead international organizations to be treated increasingly like States from the point of view of their responsibility under international law, with unpredictable long-term consequences.

EUROPEAN COMMISSION

1. There are ample reasons for assuming that the EU is an international organization that is unlike other more traditional international organizations. The special features of the EU are many and can be summarized as follows:

– EU member States have transferred competences (and therefore decision-making authority) on a range of subject matters to the EU. The overall dividing line between competences of the member States and of the EU is subject to continuous development, in accordance with rules set out in the founding treaties and the case law of the Court of Justice of the European Union.

– In many cases the EU is able to act in the international sphere in its own name. It can become a member of an international organization, where the constitutional rules of the latter so allow; it can conclude bilateral treaties on behalf of the EU with non-EU States and non-EU entities; it can become a party to multilateral agreements in its own name and on its own behalf; and it can also become a party to international legal proceedings on its own behalf. In cases where the EU is unable to exercise its competence in the international sphere, because of lack of standing at the “receiving end” (particularly when international treaties and organizations do not allow for international legal subjects other than States to become party), the EU may have to continue to use the vehicle of acting through its member States. However, in such cases, EU member States do not act on their own behalf but on behalf and in the interest of the EU.

– The special character of the EU as a result of the transfer of powers has implications for the freedom of EU member States to act in the international sphere; the EU acts to a large extent through its member States, rather than just through its own “organs” and “agents” as classical international organizations.

– The EU member States and their authorities are obliged to carry out binding decisions and policies adopted by the EU according to the EU’s internal rules.<sup>1</sup> This requires special rules of attribution and responsibility in cases where EU member States are in fact only implementing a binding rule of the international organization. In other words, the EU exercises normative control of the member States who then act as Union agents rather than on their own account when implementing Union law.

– In areas of EU competence only the EU may be able to undo breaches of international law that have their root cause in the EU rules or practices; individual member States may be powerless to do so.

– The transfer of powers to the EU from EU member States in a range of subject matters means that the EU may act in the international sphere (a) on its own

<sup>1</sup> See Treaty on European Union, art. 4, para. (3), second and third subparagraphs:

“The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts or institutions of the Union.

“The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives.”

behalf to the exclusion of its member States; (b) through the vehicle of its member States; and (c) sometimes along with its member States, where the latter retain competences on subject matters alongside the EU (either on a transitional or permanent basis).

– The rules regarding the transfer of powers are set out in the founding treaties of the EU and the jurisprudence of the EU’s highest court, the Court of Justice of the European Union. It is the interpretation of the EU judicature that this set of internal EU rules governing the relationship between the EU as an organization and its member States is more of a constitutional nature rather than qualified as international law. The Court of Justice of the European Union has in a series of cases taken the view that international law can permeate the EU’s internal constitutional order only under the conditions set by the latter; and that no international treaty can upset the constitutional division of powers between the EU and its member States.

2. While the EU may currently be the only such organization that exhibits all the special internal and external features that have been described above, other regional organizations may sooner or later be in a position to make similar claims. To the extent that the draft articles, even taking account of the commentaries, at present do not adequately reflect the situation of regional (economic) integration organizations such as the EU, it would seem particularly important for the draft to explicitly allow for the hypothesis that not all of its provisions can be applied to regional (economic) integration organizations (“*lex specialis*”).

#### ILO

1. This is a key provision of the draft articles and the Commission may wish to consider giving it a greater prominence in the overall structure. The attempts aimed at progressive development of international law should not have an adverse impact on the existing law. States’ behaviour in a variety of international organizations very often differs. In fact, the rules of organizations are rarely identical and this may demonstrate that States do not necessarily wish to have a uniform set of rules applicable to all international organizations. Thus, the task of creating uniformly applicable rules for their responsibility becomes very complex, even with the caveat of draft article 63.

2. While there may be some value in arguments that the issue of the responsibility of a non-member State might have been better dealt with by the draft articles on responsibility of States, the relationship between member States and the organization (including the situations described in draft articles 61 and 62) should be analysed in the light of the internal legal system of each organization, as created by the constituent instrument and developed further by the organization’s internal rules and practice. These rules represent *lex specialis* and the relationship between the member State and the international organization should not be subject to general rules of international law for the issues regulated by the internal rules. The scope of draft article 63 has therefore to be understood broadly, not just as relevant to the determination of responsibility of an international organization, but also as pre-empting any general international law rules on responsibility where they coexist, following the principle *lex specialis derogat*

*legi generali*. In that line of reasoning, the Commission may wish to revisit also paragraph 2, of draft article 9. ILO has already made extensive comments on this provision in its 2006 comments.<sup>1</sup>

<sup>1</sup> *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/568 and Add.1, p. 134.

#### IMF

While IMF is encouraged by the inclusion of draft article 63 in the draft and its recognition of the primary importance of *lex specialis*, it believes that much greater clarity is needed with respect to the scope of this provision and the extent to which it qualifies other provisions. The provision itself and the related commentary should be redrafted to make it clear that, as noted above, the responsibility of an international organization for actions taken towards its members will be determined by reference to the organization’s constituent instrument, and the rules and decisions adopted thereunder, along with peremptory norms of international law and other obligations that the organization has voluntarily assumed. Clarifying the scope and implications of draft article 63 will be critical as the Commission commences its second reading of the draft articles, and IMF strongly encourages the Commission to take the opportunity to do so.

#### NATO

With reference to the phrase “special rules of international law, including rules of the organization applicable to the relations between the international organization and its members”, it may be observed that the fundamental internal rule governing the functioning of the organization—that of consensus decision-making—is to be found neither in the treaties establishing NATO nor in any formal rules and is, rather, the result of the practice of the organization.

#### OECD

1. The constituent instruments and internal rules and procedures of international organizations are the primary source of obligations from which their responsibility is derived and should be assessed. Draft article 63 is a key provision. Indeed, the draft articles on responsibility of international organizations should not apply if the conditions, content or implementation of responsibility are governed by “special rules of international law, including rules of the organization applicable to the relations between the international organization and its members”. OECD shares the view that the legality of an international organization’s act and the mechanism of responsibility should be primarily determined on the basis of its constituent instruments, internal rules and procedure.

2. The responsibility of an international organization can only be challenged when an act is clearly in breach of its constituent instruments, internal rules and procedures, or if in accordance with them, is in breach of peremptory norms.

3. The Commission, in its second reading, should revisit both the draft articles and the accompanying commentaries in such a way so that there may be no doubt on the

prevailing centrality of *lex specialis* and the residual character of the general rules on the responsibility of international organizations. This contention is supported by the fact that the very purpose of special law is to supersede general rules, except if the matter at stake is governed by a peremptory norm.

4. In applying the principle of *lex specialis*, OECD supports the role of international organizations in creating internal definitions for certain terms. It notes in particular that a definition of the term “organ” is lacking within the draft articles. However, owing to the diversity of international organizations, OECD does not advocate for a generic definition, but instead considers that the internal rules of each international organization govern with respect to defining an “organ” of that organization.

#### OSCE

As international organizations do not possess general competence and therefore operate under the principle of speciality, it is important to acknowledge the fact that in several cases the specific rules of each organization would supersede the general ones provided for in the draft articles. Therefore, it is proposed that the Commission consider the possibility to include the relevant draft article 63 (*Lex specialis*) in Part One (Introduction) of the draft articles, as a new draft article 3. With the exception of the presence of a peremptory norm of general international law, the *lex specialis* rule is key to resolving potentially conflicting characterization of any act of an international organization as “wrongful or not” under general international law *vis-à-vis* the internal law of the said international organization.

#### UNITED NATIONS

1. In its commentary to draft article 63, the Commission explains that specialized rules may supplement or replace the general rules set out in the draft articles, in whole or in part.<sup>1</sup> The Commission notes that the draft article is modelled on article 55 of the draft articles on responsibility of States, and is designed to make it unnecessary to add to many of the draft articles a proviso such as “subject to special rules”.<sup>2</sup> While the commentary focuses almost exclusively on the attribution to the European Community of the conduct of its member States when they implement binding acts of the Community, there is little discussion of how it may apply to international organizations not of a supranational character.

2. The most notable examples of *lex specialis* in the practice of the United Nations include the principle of “operational necessity”, which precludes responsibility for property loss or damage caused in the course of United Nations peacekeeping operations under the conditions set out by the Secretary-General and endorsed by the General Assembly<sup>3</sup> (see the comments on draft article 24), and

<sup>1</sup> Para. (1).

<sup>2</sup> Para. (6).

<sup>3</sup> In paragraph 6 of resolution 52/247 of 26 June 1998, the General Assembly endorsed “the view of the Secretary-General that liability is not engaged in relation to third-party claims resulting from or attributable to the activities of members of peacekeeping operations arising from ‘operational necessity’, as described in paragraph 14 of the first report of the Secretary-General on third-party liability [(A/51/389)]”.

the temporal and financial limitations adopted in the same resolution for injury or damage caused in the course of the same operations. Resolution 52/247 of 26 June 1998 on third-party liability: temporal and financial limitations sets temporal and financial limitations on the liability of the United Nations in respect of third-party claims arising out of United Nations peacekeeping operations, and as such prevails over the duty to provide full reparation under draft article 33. The resolution specifies, *inter alia*, that “no compensation shall be payable by the United Nations for non-economic loss” (para. 9 (b)), and that the amount of compensation payable for injury, illness or death of any individual, including for medical and rehabilitation expenses, loss of earnings, loss of financial support etc., “shall not exceed a maximum of 50,000 United States dollars” (para. 9 (d)). Pursuant to paragraph 12 of General Assembly resolution 52/247, the Secretary-General consistently includes the limitations on liability in the status-of-force agreements concluded between the United Nations and the States where peacekeeping operations are deployed.

3. The Secretariat supports the inclusion of draft article 63 on *lex specialis*.

#### WORLD BANK

1. If only one considers (a) the quasi-universal membership of the Bretton Woods institutions (the IMF and IBRD) and, in any event, the fact that international financial institutions operate, as a rule, within their member countries; (b) the comprehensive “rules of the organization” of international financial institutions; and (c) the detailed provisions, contained in their financial agreements, on the consequences deriving from the breach of primary obligations, it becomes evident that the occasions for resorting to rules on responsibility other than special law are quite rare (if at all) within the context of the operations of international financial institutions.

2. The draft articles contain, in draft article 63 on *lex specialis*, what is probably its key provision. While the current formulation of draft article 63 may certainly be improved, as the comments of other international organizations have suggested, its crucial role within the scheme of the draft articles is undisputable. On this basis, the World Bank takes the liberty of strongly encouraging the Commission, when proceeding to its second reading, to revisit both the draft articles and the accompanying commentaries in such a way that there may not be any doubt on the centrality of *lex specialis* and the residual character of the general rules on the responsibility of international organizations.

3. In paragraph (6) of the commentary to draft article 63, the Commission indicates that the draft article in question is “designed to make it unnecessary to add to many\* of the preceding articles a proviso such as ‘subject to special rules’”. Why this reference to “many” preceding rules instead of a reference to them all, save for the preservation of the effects of peremptory norms of *jus cogens*? In other words, which other draft articles on general rules, other than those on *jus cogens*, are not qualified by special law? The World Bank has difficulties thinking of any.

4. In paragraph (5) of the commentary to draft article 4, one reads:

It would be questionable to say that the internal law of the organization always prevails over the obligation that the organization has under international law towards a member State.

Again, as the internal law of the organization is, as a rule, the most significant component (when not the whole) of *lex specialis*, will not a special rule prevail over *all* international obligations other than those deriving from *jus cogens*? The World Bank cannot think of any dispositive (as opposed to peremptory) norm that would constitute an exception, precisely because, on any matter that is not governed by a peremptory norm, a general obligation is qualified and superseded by special law, this being the very purpose of special law. The World Bank therefore encourages the Commission to reconsider the above-mentioned sentence, by either deleting or qualifying it by preserving the prevailing role of special law.

5. The World Bank encourages the Commission, in its second reading, to ensure that the expression “international law” (which is not defined in the draft articles) be used with a uniform meaning throughout the text, and that it also take due account of any applicable special law. For example, does the expression “under international law” have one and the same meaning in the current text of draft article 4, subparagraph (a), on the elements of an internationally wrongful act and draft article 5, paragraph (1), on the conduct of an organ or agent as an act of the organization? And, if so, is “international law” meant to encompass, in both draft articles, both general international law and any applicable special law?

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

##### UNITED NATIONS

1. In paragraph (1) of the commentary to the draft article, the Commission notes that the reference to the Charter of the United Nations includes not only obligations stated in the Charter, but also those flowing from binding

decisions of the Security Council which similarly prevail over other obligations under international law pursuant to Article 103 of the Charter. In paragraph (3) of its commentary, the Commission notes further:

The present article is not intended to affect the applicability of the principles and rules set forth in the preceding articles to the international responsibility of the United Nations.

2. Paragraph (3) of the commentary is unclear as to whether it is intended to exclude the United Nations from the scope of application of draft article 66. Since Article 103 of the Charter of the United Nations affects the responsibility of the Organization in the same way that it affects the responsibility of States and other international organizations, the Secretariat suggests that the statement in paragraph (3) of the commentary either be revised to clarify its intent, or be deleted.

3. As the constituent instrument of the United Nations, the Charter of the United Nations also constitutes the “rules of the organization” within the meaning of draft article 2, subparagraph (b). Unlike other organizations, however, which under draft article 31 may not rely on their rules as a justification for failure to comply with their international obligations, the United Nations could invoke the Charter of the United Nations and Security Council resolutions—to the extent that they reflect an international law obligation—to justify what might otherwise be regarded as non-compliance.

4. The Secretariat notes that, in its commentary to article 59 of the draft articles on responsibility of States, the Commission stated:

The articles cannot affect and are without prejudice to the Charter of the United Nations. The articles are in all respects to be interpreted in conformity with the Charter.<sup>1</sup>

The Secretariat recommends that the same statement be included in the present context as well.

<sup>1</sup> *Yearbook ... 2001*, vol. II (Part Two), p. 143, para. (2) of the commentary to art. 59.