UNITED NATIONS **A**

General Assembly

Distr.
LIMITED

A/CN.4/L.654/Add.1
6 July 2004

Original: ENGLISH

INTERNATIONAL LAW COMMISSION
Fifty-sixth session
Geneva, 3 May-4 June and
5 July-6 August 2004

DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FIFTY-SIXTH SESSION

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CHAPTER V

RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

Addendum

C.2 Text of the draft articles with commentaries thereto

ATTRIBUTION OF CONDUCT TO AN INTERNATIONAL ORGANIZATION

(1) According to article 3, paragraph 2, of the present draft articles, attribution of conduct under international law to an international organization is the first condition for an international wrongful act of that international organization to arise, the second condition being that the same conduct constitutes a breach of an obligation that exists under international law for the

GE.04-62009 (E) 130704

international organization.[1] The following articles 4 to 7 address the question of attribution of conduct to an international organization. As stated in article 3, paragraph 2, conduct is intended to include actions and omissions.

(2) As was noted in the commentary to article 3, responsibility of an international organization may in certain cases arise also when conduct is not attributable to that international organization.[2] In these cases conduct would be attributed to a State or to another international organization. In the latter case, rules on attribution of conduct to an international organization are also relevant.

(3) Like articles 4 to 11 on responsibility of States for internationally wrongful acts,[3] articles 4 to 7 of the present draft deal with attribution of conduct, not with attribution of responsibility. Practice often focuses on attribution of responsibility rather than on attribution of conduct. This is also true of several legal instruments. For instance, Annex IX of the United Nations Convention on the Law of the Sea, after requiring that international organizations and their member States declare their respective competences with regard to matters covered by the Convention, thus considers in article 6 the question of attribution of responsibility:

> "Parties which have competence under article 5 of this Annex shall have responsibility for failure to comply with obligations or for any other violation of this Convention."[4]

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

(4) Although it may not frequently occur in practice, dual or even multiple attribution of conduct cannot be excluded. Thus, attribution of a certain conduct to an international organization does not imply that the same conduct cannot be attributed to a State, nor does

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[1] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), p. 45.

[2] Ibid., para. (1) of the commentary to art. 1, p. 45.

[3] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 80-122.

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

vice versa attribution of conduct to a State rule out attribution of the same conduct to an international organization. One could also envisage conduct being simultaneously attributed to two or more international organizations, for instance when they establish a joint organ and act through that organ.

(5) As was done on second reading with regard to the articles on State responsibility, the present articles only provide positive criteria of attribution. Thus, 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 are 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. This point, which is hardly controversial, was recently expressed by the Director of the Field Administration and Logistics Division of the Department of Peacekeeping Operations of the United Nations in a letter to the Permanent Representative of Belgium to the United Nations, concerning a claim resulting from a car accident in Somalia, in the following terms:

> "UNITAF troops were not under the command of the United Nations and the Organization has constantly declined liability for any claims made in respect of incidents involving those troops."[5]

(6) Articles 4 to 7 of the present draft consider most issues that are dealt with in regard to States in articles 4 to 11 of the draft articles on State responsibility. However, there is no text in the present articles covering the issues addressed in articles 9 and 10 on State responsibility.[6] The latter articles relate to conduct carried out in the absence or default of the official authorities and, respectively, to conduct of an insurrectional or other movement. These cases are unlikely to arise with regard to international organizations, because they presuppose that the entity to which conduct is attributed exercises control of territory. Although one may find a few examples of an

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[5] Unpublished letter dated 25 June 1998.

[6] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 109-110.

international organization administering territory,[7] the likelihood of any of the above issues becoming relevant in that context appears too remote to warrant the presence of a specific provision. It is however understood that, should such an issue nevertheless arise in respect of an international organization, one would have to apply the pertinent rule which is applicable to States by analogy to that organization.

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

Article 4

General rule on attribution of conduct to an international organization

1. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered as an act of that organization under international law whatever position the organ or agent holds in respect of the organization.

2 For the purposes of paragraph 1, the term "agent" includes officials and other persons or entities through whom the organization acts.

3. Rules of the organization shall apply to the determination of the functions of its organs and agents.

4. For the purpose of the present draft article, "rules of the organization" means, in particular: the constituent instruments; decisions, resolutions and other acts taken by the organization in accordance with those instruments; and established practice of the organization.

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

Commentary

(1) According to article 4 on responsibility of States for internationally wrongful acts,[8] attribution of conduct to a State is basically premised on the characterization as "State organ" of the acting person or entity. However, as the commentary makes clear,[9] attribution could hardly depend on the use of a particular terminology in the internal law of the State concerned. Similar reasoning could be made with regard to the corresponding system of law relating to international organizations.

(2) It is noteworthy that, while some provisions of the Charter of the United Nations use the term "organs",[10] the International Court of Justice, when considering the status of persons acting for the United Nations, gave relevance only to the fact that a person had been conferred functions by an organ of the United Nations. The Court used the term "agent" and did not give relevance to the fact that the person in question had or did not have an official status. In its advisory opinion on *Reparation for injuries suffered in the service of the United Nations,* the Court noted that the question addressed by the General Assembly concerned the capacity of the United Nations to bring a claim in case of injury caused to one of its agents and said:

> "The Court understands the word 'agent' in the most liberal sense, that is to say, any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the organization with carrying out, or helping to carry out, one of its functions - in short, any person through whom it acts."[11]

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[8] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), p. 84.

[9] Ibid., p. 90.

[10] Article 7 of the Charter of the United Nations refers to "principal organs" and to "subsidiary organs". This latter term appears also in Articles 22 and 30 of the Charter.

[11] *I.C.J. Reports 1949,* p. 174 at p. 177.

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

> "In practice, according to the information supplied by the Secretary-General, the United Nations has had occasion to entrust missions - increasingly varied in nature - to persons not having the status of United Nations officials."[12]

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

> "The essence of the matter lies not in their administrative position but in the nature of their mission".[13]

(3) More recently, in its advisory opinion on *Difference relating to immunity from legal process of a special rapporteur of the Commission on Human Rights*, the Court pointed out that:

> "the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents in their official capacity."[14]

In the same opinion the Court briefly addressed also the question of attribution of conduct, noting that in case of:

> "[...] damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity [t]he United Nations may be required to bear responsibility for the damage arising from such acts."[15]

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[12] *I.C.J. Reports 1989*, p. 177 at p. 194, para. 48.

[13] Ibid., p. 194, para. 47.

[14] *I.C.J. Reports 1999*, p. 62 at p. 88, para. 66.

[15] Ibid., pp. 88-89, para. 66.

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

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

> "As a rule, one may attribute to an international organization acts and omissions of its organs of all rank and nature and of its agents in the exercise of their competences."[16]

(5) The distinction between organs and agents does not appear to be relevant for the purpose of attribution of conduct to an international organization. The conduct of both organs and agents is attributable to the organization. When persons or entities are characterized as organs by the rules of the organization, there is no doubt that the conduct of those persons or entities has to be attributed, in principle, to the organization. The category of agents is more elusive. It is thus useful to provide a definition of agents for the purpose of attribution. The definition given in paragraph 2 is based on the above-quoted passage of the advisory opinion on *Reparation for injuries suffered in the service of the United Nations*.[17] As the Court then said, what matters for a person to be regarded as an agent is not his or her character as official but the fact that it is a "person through whom [the organization] acts".

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

[17] Supra, note 11.

(6) The legal nature of a person or entity is also not decisive for the purpose of attribution of conduct. Organs and agents are not necessarily natural persons. They could be legal persons or other entities through which the organization operates. Thus, paragraph 2 specifies that the term "agents" "includes officials and other persons or entities through whom the organization acts".

(7) The reference in paragraph 1 to the fact that the organ or agent acts "in the performance of functions of that organ or agent" is intended to make it clear that conduct is attributable to the international organization when the organ or agent exercises functions that have been given to that organ or agent, and at any event are not attributable when the organ or agent acts in a private capacity. The question of attribution of *ultra vires* conduct is addressed in article 6.

(8) According to article 4, paragraph 1, on State responsibility, attribution to a State of conduct of an organ takes place "whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State".[18] The latter specification could hardly apply to an international organization. The other elements could be retained, but it is preferable to use simpler wording, also in view of the fact that, while all States may be held to exert all the above-mentioned functions, organizations vary significantly from one another also in this regard. Thus paragraph 1 simply states "whatever position the organ or agent holds in respect of the organization".

(9) The relevant international organization establishes which functions are entrusted to each organ or agent. This is generally made, as indicated in paragraph 3, by the "rules of the organization". The wording of paragraph 3 is intended to leave the possibility open that, in exceptional circumstances, functions may be considered as given to an organ or agent even if this could not be said to be based on the rules of the organization.

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[18] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), p. 84 and paras. 6-7 of the related commentary, pp. 85-88.

(10) The definition of "rules of the organization" in paragraph 4 is to a large extent tributary to the definition of the same term that is included in the 1986 Vienna Convention on the Law of Treaties between States and international organizations and between international organizations.[19] Apart from a few minor stylistic changes, the definition in paragraph 4 differs from the one contained in the codification convention only because it refers, together with "decisions" and "resolutions", to "other acts taken by the organization". This addition is intended to cover more comprehensively the great variety of acts that international organizations adopt. For the purpose of article 4, those decisions, resolutions and other acts are relevant, whether they are regarded as binding or not, in so far as they give functions to organs or agents in accordance with the constituent instruments of the organization. The latter instruments are referred to in the plural, consistently with the wording of the model provision,[20] although a given organization may well possess a single constituent instrument.

(11) One important feature of the definition of "rules of the organization" which is adopted in paragraph 4 is that it gives considerable weight to practice. The definition appears to provide a balance between the rules enshrined in the constituent instruments and formally accepted by members of the organization, on the one hand, and the need for the organization to develop as an institution, on the other hand. As the International Court of Justice said in its advisory opinion on *Reparation for injuries suffered in the service of the United Nations*:

> "Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice."[21]

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

[20] Supra, note 19.

[21] *I.C.J. Reports 1949*, p. 174 at p. 180.

(12) Article 5 on State responsibility concerns "conduct of persons or entities exercising elements of governmental authority".[22] This terminology is generally not appropriate for international organizations. One would have to express in a different way the link that an entity may have with an international organization. It is however superfluous to put in the present articles an additional provision in order to include persons or entities in a situation corresponding to the one envisaged in article 5 on State responsibility. The term "agent" is given in paragraph 2 a wide meaning that adequately covers these persons or entities.

(13) A similar conclusion may be reached with regard to the persons or groups of persons referred to in article 8 on State responsibility.[23] This provision concerns persons or groups of persons acting in fact on the instructions, or under the direction or control, of a State. Should instead persons or groups of persons act under the instructions, or the direction or control, of an international organization, they would have to be regarded as agents according to the definition given in paragraph 2. As was noted above, paragraph 8, in exceptional cases, a person or entity would be considered, for the purpose of attribution of conduct, as entrusted with functions of the organization, even if this was not in accordance with the rules of the organization.

(14) Paragraphs 2 and 4 contain definitions which are explicitly given for the purpose of article 4, but have wider implications. For instance, the term "agents" also appears in articles 5 and 6 and clearly retains the same meaning. Again, the "rules of the organization", although not referred to in articles 6 and 7, are to a certain extent relevant also for that provision (see paragraphs 2 and 5 of the commentary to article 6 and paragraph 5 of the commentary to article 7). Further articles of the draft may refer to either "agents" or "rules of the organization". This may make it preferable to move, at a later stage of the first reading, current paragraphs 2 and 4 of article 4 to article 2 ("Use of terms"),[24] with the necessary changes in the wording.

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[22] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), p. 92.

[23] Ibid., p. 103.

[24] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), p. 38.

Article 5

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

The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.

Commentary

(1) When an organ of a State is placed at the disposal of an international organization, the organ may be fully seconded to that organization. In this case the organ's conduct would clearly be attributable only to the receiving organization. The same consequence would apply when an organ or agent of one international organization is fully seconded to another organization. In these cases, the general rule set out in article 4 would apply. Article 5 deals with the different situation in which the lent organ or agent still acts to a certain extent as organ of the lending State or as organ or agent of the lending organization. This occurs for instance in the case of military contingents that a State placed at the disposal of the United Nations for a peacekeeping operation, since the State retains disciplinary powers and criminal jurisdiction over the members of the national contingent.[25] In this situation the problem arises whether a specific conduct of the lent organ or agent has to be attributed to the receiving organization or to the lending State or organization.

(2) The lending State or organization may conclude an agreement with the receiving organization over placing an organ or agent at the latter organization's disposal. The agreement may state which State or organization would be responsible for conduct of that organ or agent. For example, according to the model contribution agreement relating to military contingents placed at the disposal of the United Nations by one of its Member States, the United Nations is regarded as liable towards third parties, but has a right of recovery from the contributing State under circumstances such as "loss, damage, death or injury [arising] from gross negligence or wilful misconduct of the personnel provided by the Government".[26] The agreement appears to

[25] This is generally specified in the agreement that the United Nations concludes with the contributing State. See the Secretary-General's report (A/49/691), para. 6.

[26] Article 9 of the model contribution agreement (A/50/995, annex; A/51/967, annex).

deal only with distribution of responsibility and not with attribution of conduct. At any event, this type of agreement is not conclusive because it governs only the relations between the contributing State or organization and the receiving organization and could thus not have the effect of depriving a third party of any right that that party may have towards the State or organization which is responsible under the general rules.

(3) The criterion for attribution of conduct either to the contributing State or organization or to the receiving organization is based according to article 5 on the factual control that is exercised over the specific conduct taken by the organ or agent placed at the receiving organization's disposal. Article 6 on State responsibility[27] takes a similar approach, although it is differently worded. According to the latter article, what is relevant is that "the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed". However, the commentary to article 6 on State responsibility explains that, for conduct to be attributed to the receiving State, it must be "under its exclusive direction and control, rather than on instructions from the sending State".[28] At any event, the wording of article 6 cannot be replicated here, because the reference to "the exercise of elements of governmental authority" is unsuitable to international organizations.

(4) With regard to States, the existence of control has been mainly discussed in relation to the question whether conduct of persons or of groups of persons, especially irregular armed forces, is attributable to a State.[29] In the context of the placement of an organ or agent at the disposal of an international organization, control plays a different role. It does not concern the issue whether a certain conduct is attributable at all to a State or an international organization, but rather to which entity - the contributing State or organization or the receiving organization - conduct is attributable.

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[27] *Official Records of the General Assembly, Fifty-sixth Session, supplement No. 10* (A/56/10), p. 95.

[28] Paragraph 2 of the commentary to article 6, ibid., p. 95.

[29] Ibid., pp. 103-109.

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

> "As a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization, and if committed in violation of an international obligation entails the international responsibility of the Organization and its liability in compensation."[30]

This statement sums up United Nations practice relating to the United Nations Operations in the Congo (ONUC),[31] the United Nations Peacekeeping Force in Cyprus (UNFICYP)[32] and later peacekeeping forces.[33]

(6) Practice relating to peacekeeping forces is particularly significant in the present context because of the control that the contributing State retains over disciplinary matters and criminal affairs.[34] This may have consequences with regard to attribution of conduct. For instance, the Office of Legal Affairs of the United Nations took the following line with regard to compliance with obligations under the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora:[35]

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[30] Unpublished letter of 3 February 2004 by the United Nations Legal Counsel to the Director of the Codification Division.

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

[32] *United Nations Juridical Yearbook* (1980), pp. 184-185.

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

[34] See above, para. (1) and note 25.

[35] United Nations, *Treaty Series*, vol. 993, p. 243.

> "Since the Convention places the responsibility for enforcing its provisions on the States parties and since the troop-contributing States retain jurisdiction over the criminal acts of their military personnel, the responsibility for enforcing the provisions of the Convention rests with those troop-contributing States which are parties to the Convention."[36]

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

(7) As has been held by several scholars,[37] when an organ or agent is placed at the disposal of an international organization, the decisive question in relation to attribution of a given conduct

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[36] *United Nations Juridical Yearbook* (1994), p. 450.

[37] J.-P. Ritter, "La protection diplomatique à l'égard d'une organisation internationale", *Annuaire français de Droit international*, vol. 8 (1962), p. 427 at p. 442; R. Simmonds, *Legal Problems Arising from the United Nations Military Operations* (The Hague: Nijhoff, 1968), p. 229; B. Amrallah, "The International Responsibility of the United Nations for Activities Carried Out by U.N. Peace-Keeping Forces", *Revue égyptienne de droit international*, vol. 32 (1976), p. 57 at pp. 62-63 and 73-79; E. Butkiewicz, "The Premises of International Responsibility of Inter-Governmental Organizations", *Polish Yearbook of International Law*, vol. 11 (1981-1982), p. 117 at pp. 123-125 and 134-135; M. Perez Gonzalez, "Les organisations internationales et le droit de la responsabilité", *Revue générale de Droit international public*, vol. 99 (1988), p. 63 at p. 83; M. Hirsch, *The Responsibility of International Organizations toward Third Parties* (Dordrecht/London: Nijhoff, 1995), pp. 64-67; C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge: Cambridge University Press, 1996), pp. 241-143; P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (Bruxelles: Bruylant/Editions de l'Université de Bruxelles, 1998), pp. 379-380; I. Scobbie, "International Organizations and International Relations" in R.J. Dupuy (ed.), *A Handbook of International Organizations*, 2nd ed. (Dordrecht/Boston/London: Nijhoff, 1998), p. 891; C. Pitschas, *Die völkerrechtliche Verantwortlichkeit der europäischen Gemeinschaften und ihrer Mitgliedstaaten* (Berlin: Duncker & Humblot, 2001), p. 51; J.-M. Sorel, "La responsabilité des Nations Unies dans les opérations de maintien de la paix", *International Law Forum*, vol. 3 (2001), p. 127 at p. 129. Some authors refer to "effective control", some others to "operational control". The latter concept was used also by M. Bothe, *Streitkräfte internationaler Organisationen* (Köln/Berlin: Heymanns Verlag, 1968), p. 87. Difficulties in drawing a line between operational and organizational control were underlined by L. Condorelli, "Le statut des forces de l'ONU et le droit international humanitaire", *Rivista di Diritto Internazionale*, vol. 78 (1995), p. 881 at pp. 887-888. The draft suggested by the Committee on Accountability of International Organizations of the International Law Association referred to a criterion of "effective control (operational command and control)". International Law Association, *Report of the Seventieth Conference held in New Delhi, 2-6 April 2002* (2002), p. 797.

appears to be who has effective control over the conduct in question. For instance, it would be difficult to attribute to the United Nations conduct of forces in circumstances such as those described in the report of the Commission of inquiry which was established in order to investigate armed attacks on UNOSOM II personnel:

> "The Force Commander of UNOSOM II was not in effective control of several national contingents which, in varying degrees, persisted in seeking orders from their home authorities before executing orders of the Forces Command. Many major operations undertaken under the United Nations flag and in the context of UNOSOM's mandate were totally outside the command and control of the United Nations, even though the repercussions impacted crucially on the mission of UNOSOM and the safety of its personnel."[38]

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

> "The international responsibility of the United Nations for combat-related activities of United Nations forces is premised on the assumption that the operation in question is under the exclusive command and control of the United Nations [...] In joint operations, international responsibility for the conduct of the troops lies where operational command and control is vested according to the arrangements establishing the modalities of cooperation between the State or States providing the troops and the United Nations. In the absence of formal arrangements between the United Nations and the State or States providing troops, responsibility would be determined in each and every case according to the degree of effective control exercised by either party in the conduct of the operation."[39]

What has been held with regard to joint operations, such as those involving UNOSOM II and the Quick Reaction Force in Somalia, should also apply to peacekeeping operations, insofar as it is possible to distinguish in their regard areas of effective control respectively pertaining to the

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[38] S/1994/653, paras. 243-244, p. 45.

[39] A/51/389, paras. 17-18, p. 6.

United Nations and the contributing State. While it is understandable that, for the sake of efficiency of military operations, the United Nations insists on claiming exclusive command and control over peacekeeping forces, attribution of conduct should also in this regard be based on a factual criterion.

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

> "If the disaster relief unit is itself established by the United Nations, the unit would be a subsidiary organ of the United Nations. A disaster relief unit of this kind would be similar in legal status to, for example, the United Nations Force in Cyprus (UNFICYP) [...]"[40]

(10) Similar conclusions would have to be reached in the rarer case that an international organization places one of its organs at the disposal of another international organization. An example is provided by the Pan American Sanitary Conference, which, as a result of an agreement between the World Health Organization (WHO) and the Pan American Health Organization (PAHO), serves "respectively as the Regional Committee and the Regional Office of the World Health Organization for the Western Hemisphere, within the provisions of the Constitution of the World Health Organization".[41] The Legal Counsel of WHO noted that:

> "On the basis of that arrangement, acts of PAHO and of its staff could engage the responsibility of WHO."[42]

Article 6

Excess of authority or contravention of instructions

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

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

[41] Article 2 of the Agreement of 24 May 1949, reproduced at http://intranet.who.int.

[42] Unpublished letter of 19 December 2003, sent by the Legal Counsel of WHO to the United Nations Legal Counsel.

Commentary

(1) Article 6 deals with *ultra vires* conduct of organs or agents of an international organization. This conduct may exceed the competence of the organization.[43] It also may be within the competence of the organization, but exceed the authority of the acting organ or agent. While the wording only refers to the second case, the first case is also covered because an act exceeding the competence of the organization necessarily exceeds the organ's or agent's authority.

(2) Article 6 has to be read in the context of the other provisions relating to attribution, especially article 4. It is to be understood, that, in accordance with article 4, organs and agents are persons and entities exercising functions of the organization. Apart from exceptional cases (paragraph 9 of the commentary to article 4) the rules of the organization, as defined in article 4, paragraph 4, will govern the issue whether an organ or agent has authority to take a certain conduct. It is implied that instructions are relevant to the purpose of attribution of conduct only if they are binding the organ or agent. Also in this regard the rules of the organization will generally be decisive.

(3) The wording of article 6 closely follows that of article 7 on State responsibility.[44] The main textual difference is due to the fact that the latter article takes the wording of articles 4 and 5 on State responsibility into account and thus considers the *ultra vires* conduct of "an organ of a State or a person or entity empowered to exercise elements of governmental authority", while the present article only needs to be aligned on article 4 and thus more simply refers to "an organ or an agent of an international organization".

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

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

I.C.J. Reports 1996, p. 66 at p. 78 (para. 25).

[44] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), p. 99.

(4) The key element for attribution both in article 7 on State responsibility and in the present article is the requirement that the organ or agent acts "in that capacity". This wording is intended to convey the need for a close link between the *ultra vires* conduct and the organ's or agent's functions. As was said in the commentary to article 7 on State responsibility, the text "indicates that the conduct referred to comprises only the actions and omissions of organs purportedly or apparently carrying out their official functions, and not the private actions or omissions of individuals who happen to be organs or agents of the State".[45]

(5) Article 6 only concerns attribution of conduct and does not prejudice the question whether an *ultra vires* act is valid or not under the rules of the organization. Even if the act was considered to be invalid, it may entail the responsibility of the organization. The need to protect third parties requires attribution not to be limited to acts that are regarded as valid.

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

> "If it is agreed that the action in question is within the scope of the functions of the Organization but it is alleged that it has been initiated or carried out in a manner not in conformity with the division of functions among the several organs which the Charter prescribes, one moves to the internal plane, to the internal structure of the Organization. If the action was taken by the wrong organ, it was irregular as a matter of that internal structure, but this would not necessarily mean that the expense incurred was not an expense of the Organization. Both national or international law contemplate cases in which the body corporate or politic may be bound, as to third parties, by an *ultra vires* act of an agent."[46]

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[45] Para. (8) of the commentary to art. 7, ibid., p. 102.

[46] *I.C.J. Reports 1962*, p. 168.

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

(7) A distinction between the conduct of organs and officials and that of other agents would find little justification in view of the limited significance that the distinction carries in the practice of international organizations.[47] The International Court of Justice appears to have asserted the organization's responsibility for *ultra vires* acts also of persons other than officials. In its advisory opinion on *Difference relating to immunity from legal process of a special rapporteur of the Commission on Human Rights*, the Court stated:

> "[...] it need hardly be said that all agents of the United Nations, in whatever official capacity they act, must take care not to exceed the scope of their functions, and should so comport themselves as to avoid claims against the United Nations."[48]

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

(8) The rule stated in article 6 also finds support in the following statement of the General Counsel of the International Monetary Fund:

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[47] The Committee on Accountability of International Organizations of the International Law Association suggested the following rule:

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

International Law Association, *Report of the Seventieth Conference held in New Delhi 2-6 April 2002* (2002), p. 797.

[48] *I.C.J. Reports 1999*, p. 62 at p. 89 (para. 66).

> "Attribution may apply even though the official exceeds the authority given to him, he failed to follow rules or he was negligent. However, acts of an official that were not performed in his official capacity would not be attributable to the organization."[49]

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

> "United Nations policy in regard to off-duty acts of the members of peace-keeping forces is that the Organization has no legal or financial liability for death, injury or damage resulting from such acts [...] We consider the primary factor in determining an 'off-duty' situation to be whether the member of a peace-keeping mission was acting in a non-official/non-operational capacity when the incident occurred and not whether he/she was in military or civilian attire at the time of the incident or whether the incident occurred inside or outside the area of operation [...] [W]ith regard to United Nations legal and financial liability a member of the Force on a state of alert may none the less assume an off-duty status if he/she independently acts in an individual capacity, not attributable to the performance of official duties, during that designated 'state-of-alert' period. [...] [W]e wish to note that the factual circumstances of each case vary and, hence, a determination of whether the status of a member of a peace-keeping mission is on duty or off duty may depend in part on the particular factors of the case, taking into consideration the opinion of the Force Commander or Chief of Staff."[50]

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[49] Unpublished letter of 7 February 2003 from the General Counsel of the International Monetary Fund to the Secretary of the International Law Commission.

[50] *United Nations Juridical Yearbook* (1986), p. 300.

While the "off-duty" conduct of a member of a national contingent would not be attributed to the organization,[51] the "on-duty" conduct may be so attributed, although one would have to consider how any *ultra vires* conduct relates to the functions entrusted to the person concerned.

Article 7

Conduct acknowledged and adopted by an international organization as its own

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

Commentary

(1) Article 7 concerns the case in which an international organization "acknowledges and adopts" as its own a certain conduct which would not be attributable to that organization under the preceding articles. Attribution is then based on the attitude taken by the organization with regard to a certain conduct. The reference to the "extent" reflects the possibility that acknowledgement and adoption relate only to part of the conduct in question.

(2) Article 7 mirrors the content of article 11 on State responsibility,[52] which is identically worded but for the reference to a State instead of an international organization. As the commentary to article 11 explains, attribution can be based on acknowledgement and adoption of conduct also when that conduct "may not have been attributable".[53] In other words, the criterion of attribution now under consideration may be applied even when it has not been established that attribution cannot be effected on the basis of other criteria.

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

[52] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), p. 118.

[53] Para. (1) of the commentary to art. 11, ibid., p. 119.

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

> "ready to assume the entire international responsibility for all measures in the area of tariff concessions, whether the measure complained about has been taken at the EC level or at the level of Member States".[54]

(4) The question of attribution was clearly addressed by a decision of Trial Chamber II of the International Criminal Tribunal for the former Yugoslavia in *Prosecutor v. Dragan Nikolic*. The question was raised whether the accused's arrest was attributable to the Stabilization Force (SFOR). The Chamber first noted that the ILC articles on State responsibility were "not binding on States". It then referred to article 57 and observed that the articles -were "primarily directed at the responsibility of States and not at those of international organizations or entities".[55] However, the Chamber found that, "[p]urely as *general* legal guidance", it would "use the principles laid down in the draft articles insofar as they may be helpful for determining the issue at hand".[56] This led the Chamber to quote extensively article 11 and the related commentary.[57] The Chamber then added:

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[54] Unpublished document.

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

[56] Ibid., para. 61.

[57] Ibid., paras. 62-63.

> "The Trial Chamber observes that both Parties use the same and similar criteria of 'acknowledgement', 'adoption', 'recognition', 'approval' and 'ratification', as used by the ILC. The question is therefore whether on the basis of the assumed facts SFOR can be considered to have 'acknowledged and adopted' the conduct undertaken by the individuals 'as its own'."[58]

The Chamber concluded that SFOR's conduct did not "amount to an 'adoption' or 'acknowledgement' of the illegal conduct 'as their own'".[59]

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

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[58] Ibid., para. 64.

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