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Fifth report on responsibility of international organizations*

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I. Introduction

1. The International Law Commission has so far provisionally adopted 30 draft articles on "Responsibility of international organizations".[1] These articles build up Part One, entitled "The internationally wrongful act of an international organization". They include an introduction (articles 1 to 3) that considers the scope of the draft, defines the use of terms and states a few general principles. This introduction is followed by chapters on attribution of conduct to international organizations (articles 4 to 7), breach of an international obligation (articles 8 to 11), responsibility of an international organization in connection with the act of a State or another international organization (articles 12 to 16), circumstances precluding wrongfulness (articles 17 to 24) and responsibility of a State in connection with the act of an international organization (articles 25 to 30).

2. While the latter chapter does not have a parallel in the articles on responsibility of States for internationally wrongful acts,[2] articles 1 to 24 of the current draft follow the pattern and often the language of articles 1 to 27 on State responsibility, which build up Part One of those articles, entitled "The internationally wrongful act of a State": this is not a mechanical replica of the earlier text nor based on a presumption that solutions applying to States are generally applicable to international organizations, but is the result of an analysis of the available materials.

3. There are a few outstanding issues that concern Part One of the draft articles on responsibility of international organizations. Article 2 on the use of terms should no doubt be widened in order to include at least the definition of "rules of the organization", which has provisionally been placed in article 4, paragraph 4. The text of article 19 on "countermeasures" has been left blank pending an examination of the issues relating to countermeasures by an international organization: this will be undertaken in the context of the study of implementation of responsibility. A decision will have to be taken on the placement of the chapter concerning responsibility of a State in connection with the act of an international organization. Some provisions will have to be added, in a place yet to be determined, with regard to the responsibility of an international organization as a member of another international organization, since articles 28 and 29 only consider the case of members of international organizations that are States.

4. While decisions on some of these questions could be taken at the forthcoming session, it seems preferable to postpone all these decisions to the time when the Commission will have the opportunity to reconsider certain issues that are dealt with in the draft articles hereto provisionally adopted, in the light of the comments made by States and international organizations. While this could take place at the second reading, a practical reason suggests that it should preferably be done before the end of the first reading.[3] This reason consists in the fact that the Commission has so far provisionally adopted all its draft articles on the current topic at the same session in

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[1] The text of the draft articles is reproduced in *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), chap. VII, sect. C, para. 90.

[2] The text of these articles and their related commentaries are reproduced in *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and Corr.1), chap. IV, sect. E.1, para. 77.

[3] This suggestion was already voiced in my second (A/CN.4/541), para. 1, and third report (A/CN.4/553), para. 1.

which the respective drafts were submitted by the Special Rapporteur. Thus, unlike what occurred with regard to most other topics, in its work on responsibility of international organizations the Commission has so far been able to avail itself only of responses given to questions raised in chapter III of its annual reports. These concerned specific issues on which comments were considered to be of particular interest to the Commission. The Commission has not yet been able to take further comments made in the Sixth Committee and in written observations into account.

5. The reconsideration of certain issues would no doubt greatly benefit from elements of practice that States and international organizations could supply in the meantime. Any indication of accessible materials that the Commission may have ignored[4] would also be helpful. A wider knowledge of practice would clearly allow a better apprehension of questions relating to the international responsibility of international organizations. Moreover, the Commission would then be more consistently able to illustrate its draft articles with examples drawn from practice.

6. The review of the articles provisionally adopted before the end of the first reading will be introduced by a comprehensive analysis by the Special Rapporteur of the comments made by States and international organizations and of practice that has taken place or has become accessible since the draft articles were originally adopted. Views expressed in legal writings would also be considered.

7. It may be useful to make at this stage a couple of preliminary comments. One of the remarks frequently made on the current draft is that it takes insufficiently into account the great variety of international organizations.[5] However, most, if not all, articles that the Commission has so far adopted on international responsibility, whether of States or of international organizations, have a level of generality that does not make them appropriate only for a certain category of entities. The fact that certain articles, for instance, the article on self-defence, are unlikely to be relevant for many international organizations does not require as a consequence that the draft should not include a general provision that refers to all international organizations. The inclusion of such a provision does not imply that all international organizations would necessarily be affected. On the other hand, should the particular features of certain international organizations warrant the application of some special rules, this could be taken into account by including a text similar to article 55 on State responsibility in the final provisions of the draft; according to that provision, the articles on State responsibility "do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law".

8. My second remark concerns an aspect of the definition of international organization that is given in draft article 2. This states that an international

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[4] This is not the case of the judgement of the European Court of Human Rights in *Bosphorus Hava Yollary Turizm ve Ticaret Anonim Sirketi v. Ireland*. Although the Austrian delegation maintained that "the draft did not take the *Bosphorus* decision into account" (A/C.6/61/SR.13), para. 40, the key passage of this judgement had been quoted *in extenso* and endorsed in paragraph 4 of the commentary on article 28. See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), at pp. 284-285.

[5] For instance, the delegation of the United Kingdom of Great Britain and Northern Ireland complained of "no allowance [being made] for the diversity of types of international organizations and of their functions" (A/C.6/61/SR.15), para. 24.

organization is covered by the current draft only if it is an entity possessing "its own international legal personality". This is easily understandable since an international organization that has no legal personality under international law cannot be held internationally responsible. The text of draft article 2 does not say whether legal personality depends or not on the recognition by the injured State. Only the commentary notes that the International Court of Justice:

> "appeared to favour the view that when legal personality of an organization exists, it is an 'objective' personality. Thus it would not be necessary to enquire whether the legal personality of an organization has been recognized by an injured State before considering whether the organization may be held internationally responsible according to the present draft articles".[6]

9. Some comments were made to the effect that the draft articles should consider recognition of an international organization on the part of the injured States as a prerequisite of its legal personality and hence of its international responsibility. For instance, this seems implied by the Director-General of Legal Service of the European Commission when he made the following criticism in a letter of 18 December 2006:

> "The Commission is also of the view that a clear distinction must be made between the legal positions of States that are members of international organizations, third States that recognize the organization and third States that explicitly refuse to do so."[7]

Should one accept this view, the consequence would be that responsibility of an international organization would arise only towards non-member States that recognize it. With regard to non-member States that do not recognize the organization, member States would have to be held responsible and the articles on State responsibility would then apply. The content of the draft articles on the responsibility of international organizations would not be affected.

10. The quoted passage from the letter of the European Commission also mentions the need to single out the relations between an international organization and its member States. It should not be controversial that an international organization incurs international responsibility for the breach of an obligation under international law that it may have towards its member States. However, the rules of the organization may come into play with regard to the content of international responsibility and its implementation. The first issue will be considered in this report in section II below, and the second one in the following report.

11. Postponing the review of some of the questions already dealt with in the articles provisionally adopted is not likely to affect the analysis of the following

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[6] Paragraph 9 of the commentary to article 2. See *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), chap. IV, sect. C, para. 54.

[7] See A/CN.4/582, sect. II, E. A similar view was expressed by the Austrian delegation (A/C.6/61/SR.13, para. 36). Curiously, the European Commission's view that absence of recognition by non-member States is relevant is close to the approach that the Soviet Union had taken for several years towards the European Community. This outdated practice was recently invoked as an argument for maintaining that recognition is a prerequisite of legal personality by Maurice Mendelson, "The definition of 'international organization' in the International Law Commission's current project on the responsibility of international organizations", in Maurizio Ragazzi (ed.), *International responsibility today: essays in memory of Oscar Schachter* (Leiden/Boston: Martinus Nijhoff Publishers, 2005), p. 371, at p. 387.

parts of the draft. In accordance with the general pattern of the articles on State responsibility, the questions still to be addressed are "content of the international responsibility", "implementation of the international responsibility" and "general provisions".

12. The present report addresses issues relating to the content of international responsibility. The analysis will be divided into sections corresponding to the three chapters of Part Two of the articles on State responsibility: "general principles", "reparation for injury" and "serious breaches of obligations under peremptory norms of general international law".

II. Content of the international responsibility of an international organization: general principles

13. The applicability to international organizations of the first three of the general principles that are stated in Part Two on State responsibility seems uncontroversial. The first one (article 28 on State responsibility) is merely an introduction to Part Two and says that the following articles define the legal consequences of the internationally wrongful act. Since the current draft is intended to follow the same general pattern as that of the articles on State responsibility, a similar provision can usefully be included with regard to the responsibility of international organizations.

14. Part One of the current draft envisages certain cases in which the responsibility of States arises in connection with that of an international organization. The content of the responsibility concerning a State would then be covered by the rules that generally apply to the international responsibility of States. This seems self-explanatory. It is therefore not necessary to restate those rules in the present draft or to make a reference to the articles adopted by the Commission in 2001.

15. Article 29 on State responsibility asserts that the breach of an international obligation and the new set of legal relations which result from an internationally wrongful act do not affect the continued existence of the obligation breached as long as the obligation has not ceased. As was outlined in the commentary on article 29:

> "Whether and to what extent that obligation subsists despite the breach is a matter not regulated by the law of State responsibility but by the rules concerning the relevant primary obligation."[8]

For instance, an obligation not to interfere with the internal affairs of a State does not cease according to whether or not it has been breached, while an obligation to preserve a certain object ends once the object has been destroyed. Also in this regard, the fact that the obligation rests on a State or on an international organization is immaterial.

16. The first part of article 30 on State responsibility represents an implication of what has been stated in the previous article. If the international obligation that was breached subsists and the breach continues, the author of the wrongful act is required to cease that act. This clearly applies to international organizations as well

[8] Paragraph 4 of the commentary on article 29. See *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), at p. 216.

as to States. It is not a legal consequence of the breach but of the fact that the obligation subsists.

17. The same article also provides for assurances and guarantees of non-repetition. These are not per se legal consequences of the breach of an international obligation although only the occurrence of a breach may reveal the need for those assurances and guarantees in order to prevent a repetition of the wrongful act. While the related practice mainly concerns States, there is no reason to distinguish international organizations from States in this respect and to rule out that assurances and guarantees may also be required from international organizations.

18. Given the applicability of the three principles hereto considered also to international organizations, the following texts, which are as close as possible to the corresponding articles on State responsibility, are proposed:

Draft article 31
Legal consequences of an internationally wrongful act

The international responsibility of an international organization which is entailed by an internationally wrongful act in accordance with the provisions of Part One involves legal consequences as set out in this Part.

Draft article 32
Continued duty of performance

The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible international organization to perform the obligation breached.

Draft article 33
Cessation and non-repetition

The international organization responsible for the internationally wrongful act is under an obligation:

(a) To cease that act, if it is continuing;

(b) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

19. Article 31 on State responsibility declares that "[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act". The provision further specifies that "[i]njury includes any damage, whether material or moral, caused by the internationally wrongful act of a State".

20. The principle stated in the articles on State responsibility reflects the well-known dictum by the Permanent Court of International Justice in the *Factory at Chorzów* case that:

> "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form."[9]

[9] *Jurisdiction, P.C.I.J., Series A*, 1927, *No. 9*, p. 21.

In the same case the Permanent Court later added:

> "The essential principle contained in the actual notion of an illegal act — a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals — is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[10]

21. Although the Permanent Court was considering relations between States, the principle requiring reparation is worded more generally so as to apply to breaches of international obligations by any subject of international law. As was recently noted by France in the Sixth Committee:

> "The jurisprudence of the *Chorzów Factory* case should apply as much to international organizations as to States."[11]

22. It would be absurd to exempt international organizations from facing reparation as the consequence of their internationally wrongful acts.[12] This would be tantamount to saying that international organizations would be entitled to ignore their obligations under international law.

23. The existence of an obligation to make reparation has often been acknowledged by international organizations. A particularly clear example may be found in a report by the United Nations Secretary-General on the administrative and budgetary aspects of the financing of United Nations peacekeeping operations:

> "The applicability of international humanitarian law to United Nations forces when they are engaged as combatants in situations of armed conflict entails the international responsibility of the Organization and its liability in compensation for violations of international humanitarian law committed by members of United Nations forces."[13]

24. In its advisory opinion on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, the International Court of Justice considered "the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity" and said:

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[10] *Merits, P.C.I.J., Series A*, 1928, *No. 17*, p. 47.

[11] A/C.6/61/SR.14, para. 63.

[12] According to C. Dominicé, "The international responsibility of the United Nations for injuries resulting from non-military enforcement measures", in Maurizio Ragazzi (ed.), *International responsibility today: essays in memory of Oscar Schachter* (Leiden/Boston: Martinus Nijhoff Publishers, 2005), p. 363, at p. 368, articles 28 to 39 on State responsibility "express rules of customary international law. They are without a doubt also to be applied in matters of international responsibility of international organizations, including the United Nations". However, J. E. Alvarez, "International organizations: accountability or responsibility?" (http://www.asil.org) recently wrote: "When it comes to international organizations, some of which are purposely kept by their members at the edge of bankruptcy, the concept of responsibility-cum-liability seems something only a law professor (or the writer of a Jessup Moot problem) would love".

[13] A/51/389, para. 16.

> "The United Nations may be required to bear responsibility for the damage arising from such acts."[14]

25. Practice of international organizations concerning reparation for wrongful acts is extensive, although compensation is not seldom granted ex gratia even when it may be due under international law. One must also consider that, with regard both to international organizations and to States, claims for reparation are not always actively pursued by the injured party, whose main interest may be the cessation of the wrongful act. Some instances of practice relating to reparation by international organizations will be referred to in section III of the present chapter.

26. The fact that reparation may apply also to moral damages by international organizations finds confirmation in practice, especially in judgements by administrative tribunals, for instance in the judgement given by the United Nations Administrative Tribunal on 17 November 2000 in *Robbins v. The Secretary-General of the United Nations*,[15] or in arbitral awards, such as that of 4 May 2000 in *Boulois v. UNESCO*.[16]

27. Part One of the current draft identifies some cases in which States that are members of an international organization incur responsibility in connection with an internationally wrongful act of the organization. Should member States not incur responsibility, the problem arises whether they have any obligation to provide the organization with the necessary means to face claims for reparation, especially when reparation implies some financial compensation that exceeds the budgetary resources of the organization. In chapter III of its 2006 report to the General Assembly, the Commission asked the following question:

> "Do members of an international organization that are not responsible for an internationally wrongful act of that organization have an obligation to provide compensation to the injured party, should the organization not be in a position to do so?"[17]

28. With one or two possible exceptions, all the States that responded were firm in holding that there was "no basis for such an obligation".[18] The same view was

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[14] ICJ Reports 1999, para. 66, at pp. 88-89.

[15] AT/DEC/974. The Tribunal concluded that "[t]he seriousness of the wrong and moral injury done the Applicant warrants more than the compensation paid her by the Respondent".

[16] Unpublished. The Tribunal awarded the sum of two million French francs for "moral damage".

[17] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), chap. III, para. 28 (a).

[18] Thus the delegation of the Netherlands saw no basis for such an obligation (A/C.6/61/SR.14, para. 23). Similar views were expressed by Denmark, also on behalf of Finland, Iceland, Norway and Sweden (A/C.6/61/SR.13), para. 32; Belgium (A/C.6/61/SR.14), paras. 41 and 42; Spain (A/C.6/61/SR.14), paras. 52-53; France (A/C.6/61/SR.14), para. 63; Italy (A/C.6/61/SR.14), para. 66; United States of America (A/C.6/61/SR.14), para. 83; Belarus (A/C.6/61/SR.14), para. 100; Switzerland (A/C.6/61/SR.15), para. 5; Cuba (A/C.6/61/SR.16), para. 13; and Romania (A/C.6/61/SR.19), para. 60. The delegation of Belarus, however, suggested that "a scheme of subsidiary responsibility for compensation could be established as a special rule, for example in cases where the work of the organization was connected with the exploitation of dangerous resources" (A/C.6/61/SR.19, para. 100). Although sharing the prevailing view, the delegation of Argentina (A/C.6/61/SR.13, para. 49) requested the Commission to "analyse whether the special characteristics and rules of each organization, as well as considerations of justice and equity, called for exceptions to the basic rule, depending on the circumstance of each case".

expressed in a statement by the Organization for the Prohibition of Chemical Weapons.[19] This seems consistent with practice, which does not show any instance that would clearly support the existence of the obligation in question under international law.[20]

29. A different question is whether an obligation for members to provide financial support exists under the rules of the organization concerned. As was stated by the delegation of Belgium:

> "If those contributions were in keeping with the law of the international organization, the members would have to comply. That did not signify that the members were under an obligation to make reparation to the injured third party or that the latter could institute direct or indirect action against the members."[21]

In other words, the existence of an obligation for member States would entirely depend on the rules of the organization; when the obligation existed, it would benefit the injured party only indirectly. Several States took the same view.[22] According to the Russian Federation, States establishing an international organization are required to "give it the means to fulfil its functions, including those which had led it to incur responsibility towards a third party",[23] but apparently also this would not imply that an obligation arises towards the injured party.[24]

30. The views expressed in response to the Commission's question make it clear that, while the Commission should state the principle that international organizations are required to provide reparation for their internationally wrongful acts, no additional obligation should be envisaged for member States. The same applies to international organizations that are members of other organizations. Obligations existing for member States or organizations under the rules of the responsible organization need not be recalled here.

31. On the basis of the foregoing remarks, the following text is proposed:

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[19] See A/CN.4/582, sect. II, G., 1.

[20] The opinion that "members are obliged not to compensate creditors directly, but to put the organization in funds to meet the liabilities" was voiced by Henry G. Schermers and Niels M. Blokker, *International Institutional Law* (3rd ed.) (The Hague/London/Boston: Martinus Nijhoff Publishers, 1995), p. 992. See also H. G. Schermers, "Liability of international organizations", *Leiden Journal of International Law*, vol. 1 (1988), p. 3, at pp. 12 and 13. Moshe Hirsch, *The responsibility of international organizations toward third parties* (Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1995), p. 165, added that "[w]here the organization does not comply with its duty to resort to all the available legal measures available to it (including litigation) against the recalcitrant members, the injured party should be entitled to implement the rights of the organization and bring claims against those members". According to Pierre 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. 599-600, this opinion has no legal basis.

[21] A/C.6/61/SR.14, para. 42.

[22] Denmark, also on behalf of Finland, Iceland, Norway and Sweden (A/C.6/61/SR.13), para. 32; Spain (A/C.6/61/SR.14), para. 53; France (A/C.6/61/SR.14), para. 63 and Switzerland (A/C.6/61/SR.15), para. 5.

[23] A/C.6/61/SR.18, para. 68.

[24] This was made clear in the similar remark by the Netherlands (A/C.6/61/SR.14, para. 24).

Draft article 34
Reparation

1. The responsible international organization is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of an international organization.

32. Article 32 on State responsibility provides that "[t]he responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part". The relations between international law and the internal law of a State are not similar to those existing between international law and the internal rules of an international organization. As has already been noted, in relation to draft article 8, the latter rules are, at least to a large extent, part of international law.[25] They cannot thus be considered irrelevant in respect of the obligations under the present Part.

33. A distinction needs to be made, however, between obligations that international organizations have towards their members and those that they possess towards non-members. With regard to non-members, the rules of the organization are like the internal rule of a State and cannot per se impinge on the obligations set out in this Part. On the contrary, those rules may affect the relations of the organization with its members. This possibility must be reflected in the text of the current draft.

34. Article 32 on State responsibility is said to be "modelled on article 27 of the 1969 Vienna Convention on the Law of Treaties, which provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".[26] Although the corresponding article of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations similarly states that "an international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty",[27] it seems logical to introduce a distinction between relations concerning non-members and those concerning members and provide for a possible exception for the latter case. This is to be worded so as not to affect the obligations that members have with regard to serious breaches of obligations arising under a peremptory norm of general international law in accordance with chapter III.

35. The following text is here suggested:

Draft article 35
Irrelevance of the rules of the organization

Unless the rules of the organization otherwise provide for the relations between an international organization and its member States and

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[25] Paragraph 5 of the commentary to article 8, *Official Records of the General Assembly, Sixtieth session, Supplement No. 10* (A/60/10), chap. VI, para. 206.

[26] Para. 2 of the commentary to article 32. See *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), at p. 232.

[27] Article 27, para. 2.

organizations, the responsible organization may not rely on the provisions of its pertinent rules as justification for failure to comply with the obligations under this Part.

36. The last item that the articles on State responsibility consider in the corresponding chapter of Part Two, and also the last one that needs to be examined here, is the scope of international obligations set out in this Part. While Part One of the articles on State responsibility covers all the cases of internationally wrongful acts committed by a State, Part Two is limited to the obligations that the responsible State owes "to another State, to several States, or to the international community as a whole": this "without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State". The scope of Part Three, concerning implementation of international responsibility, is limited in the same way.

37. There are good reasons for taking a similar option with regard to international organizations and thus limiting the scope of Part Two to obligations that a responsible organization has towards one or more other organizations, one or more States, or the international community. This would not only be a way of following the general pattern provided by the articles on State responsibility, it would also avoid the complications that would no doubt arise if one widened the scope of obligations here considered in order to include those existing towards subjects of international law other than States or international organizations.

38. The following text is proposed:

Draft article 36
Scope of international obligations set out in this Part

1. The obligations of the responsible international organization set out in this Part may be owed to one or more other organizations, to one or more States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.

2. This Part is without prejudice to any right, arising from the international responsibility of an international organization, which may accrue directly to a person or entity other than a State or an international organization.

III. Reparation for injury

39. Consistently with the principle of reparation set out in article 31, articles 34 to 39 on State responsibility examine the various forms of reparation. Article 34 has an introductory character, while the other provisions cover restitution, compensation, satisfaction, interest and contribution to the injury.

40. If one accepts that responsible international organizations are under an obligation to provide reparation in the same way as States, it is difficult to see why restitution, compensation or satisfaction should be excluded or apply differently

when the responsible entity is an international organization rather than a State. The same applies to interest and contribution to the injury.

41. Thus, in a note of 24 June 1970, the Director General of the International Atomic Energy Agency [IAEA], considering the "international responsibility of the Agency in relation to safeguards", wrote:

> "Although there may be circumstances when the giving of satisfaction by the Agency may be appropriate, it is proposed to give consideration only to reparation properly so called. Generally speaking, reparation properly so called may be either restitution in kind or payment of compensation."[28]

42. While practice relating to reparation given by international organizations is certainly more limited than practice concerning responsible States, one may find examples of international organizations providing the various forms of reparation.

43. The principle that restitution, whenever possible, should be given by an international organization was for instance expressed by the Administrative Tribunal of the United Nations in *Leak v. The Secretary-General of the United Nations* with the following words:

> "it is probably no longer possible at the present time for the Respondent to restore the situation — in respect of the re-employment of the Applicant — that would have existed if the summary dismissal had never taken place. That being so, an award of compensation is the only means of drawing, in this respect, the legal inferences from the obligations resulting from the rescission."[29]

44. With regard to compensation provided by an international organization, the most well-known instance of practice concerns the settlement of claims arising from the United Nations Operation in the Congo. Compensation of nationals of Belgium, Switzerland, Greece, Luxembourg and Italy was granted through exchanges of letters between the Secretary-General and the permanent missions of the respective States. In the text of each letter, the United Nations:

> "stated that it would not evade responsibility where it was established that United Nations agents had in fact caused unjustifiable damage to innocent parties."[30]

With regard to the same operation, further settlements were made with Zambia, the United States of America, the United Kingdom of Great Britain and Northern Ireland and France,[31] and also with the International Committee of the Red Cross.[32]

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[28] GOV/COM.22/27, para. 27 (contained in an annex to A/CN.4/545, which is on file with the Codification Division of the Office of Legal Affairs and available for consultation).

[29] Judgement No. 97 of 4 October 1965 (available at http://untreaty.un.org/UNAT/UNAT_Judgements/Judgements_E/UNAT_00097_E.pdf).

[30] United Nations, *Treaty Series*, vol. 535, p. 191 at p. 199; vol. 564, p. 193; vol. 565, p. 3; vol. 585, p. 147; and vol. 588, p. 197.

[31] See Kirsten Schmalenbach, *Die Haftung Internationaler Organisationen* (Frankfurt am Main: Peter Lang, 2004), at pp. 314-321.

[32] The text of the agreement was reproduced by Konrad Ginther, *Die Völkerrechtliche Verantwortlichkeit internationaler Organisationen gegenüber Drittstaaten* (Wien/New York: Springer, 1969), pp. 166-167.

45. The fact that these compensations were given as reparation for breaches of obligations under international law may be gathered not only from some of the claims but also from a letter, dated 6 August 1965, addressed by the Secretary-General to the Permanent Representative of the Soviet Union. In this letter, the Secretary-General said:

> "It has always been the policy of the United Nations, acting through the Secretary-General, to compensate individuals who have suffered damages for which the Organization was legally liable. This policy is in keeping with generally recognized legal principles and with the Convention on Privileges and Immunities of the United Nations. In addition, in regard to the United Nations activities in the Congo, it is reinforced by the principles set forth in the international conventions concerning the protection of the life and property of civilian population during hostilities as well as by considerations of equity and humanity which the United Nations cannot ignore."[33]

46. A report of the United Nations Secretary-General dated 20 September 1996 on the administrative and budgetary aspects of the financing of the United Nations peacekeeping operations recalled that:

> "The applicability of international humanitarian law to United Nations forces when they are engaged as combatants in situations of armed conflict entails the international responsibility of the Organization and its liability in compensation for violations of international humanitarian law committed by members of United Nations forces. The scope of third-party liability of the Organization, however, will have to be determined in each case according to whether the act in question was in violation of any particular rule of international humanitarian law or the laws of war."[34]

Criteria and guidelines for the payment of compensation were approved by the General Assembly in its resolution 52/247 on third-party liability resulting or arising from peacekeeping operations conducted by the United Nations.[35]

47. In relation to some incidents that had occurred during the NATO air strikes in 1999, the Ombudsperson Institution in Kosovo requested NATO to provide "some kind of relief" for the victims, including "the possibility of compensation".[36]

48. A reference to the obligation for the United Nations to pay compensation was also made by the International Court of Justice in its Advisory Opinion on

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[33] *United Nations Juridical Yearbook*, 1965, p. 41. The view that the United Nations placed its responsibility at the international level was maintained by J.J.A. Salmon, "Les accords Spaak-U Thant du 20 février 1965", *Annuaire français de droit international*, vol. 11 (1965), p. 468, at pp. 483 and 487.

[34] A/51/389, para. 16.

[35] General Assembly resolution 52/247 of 26 June 1998 on third-party liability: temporal and financial limitations.

[36] "Attempts to obtain an official recognition of damages caused to victims of the 1999 NATO bombing of the bridge in Luzhan/Luzane", www.csotan.org/textes/KOSOVO%20Ombudsman%20rep2004.pdf. Arrangements made by NATO and IFOR for damages caused in Bosnia-Herzegovina were described by M. Guillaume, "La réparation des dommages causés par les contingents français en ex-Yougoslavie et en Albanie", *Annuaire français de droit international*, vol. 43 (1997), at p. 151-155.

Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights.[37]

49. Practice offers some examples of satisfaction, generally in the form of an apology or an expression of regret. Although the examples that follow do not expressly refer to the existence of a breach of an obligation under international law, they at least imply that an apology or an expression of regret by an international organization would be one of the appropriate legal consequences for such a breach.

50. With regard to the fall of Srebrenica, the United Nations Secretary-General said:

> "The United Nations experience in Bosnia was one of the most difficult and painful in our history. It is with the deepest regret and remorse that we have reviewed our own actions and decisions in the face of the assault on Srebrenica."[38]

51. On 16 December 1999, when receiving the report of the independent enquiry into the actions of the United Nations during the 1994 genocide in Rwanda, the Secretary-General stated:

> "All of us must bitterly regret that we did not do more to prevent it. There was a United Nations force in the country at the time, but it was neither mandated nor equipped for the kind of forceful action which would have been needed to prevent or halt the genocide. On behalf of the United Nations, I acknowledge this failure and express my deep remorse."[39]

52. Shortly after the NATO bombing of the Chinese embassy in Belgrade, a NATO spokesman, Jamie Shea, said in a press conference:

> "I think we have done what anybody would do in these circumstances, first of all we have acknowledged responsibility clearly, unambiguously, quickly; we have expressed our regrets to the Chinese authorities."[40]

A further apology was addressed on 13 May 1999 by the German Chancellor Gerhard Schroeder on behalf of Germany, NATO and NATO Secretary-General Javier Solana to Foreign Minister Tang Jiaxuan and Premier Zhu Rongji.[41]

53. With regard to contribution to the injury, one author referred to an unpublished document relating to the shooting of a civil vehicle in the Congo in which compensation by the United Nations was reduced because of the contributory negligence by the driver of the vehicle.[42]

54. The following draft articles, which are based on the corresponding articles on State responsibility, are here proposed:

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[37] ICJ Reports 1999, para. 66 at pp. 88-89.

[38] Report of the Secretary-General pursuant to General Assembly resolution 53/35: the fall of Srebrenica (A/54/549), para. 503.

[39] www.un.org/News/ossg/sgsm_rwanda.htm.

[40] http://www.ess.uwe.ac.uk/kosovo/Kosovo_Mistakes2.htm.

[41] "Schroeder issues NATO apology to the Chinese", archives.tcm.ie/irishexaminer/1999/05/13/fhead.htm.

[42] Pierre Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (Bruxelles: bruglant/Editions de l'Université de Bruxelles, 1998), at p. 606.

Draft article 37
Forms of reparation

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

Draft article 38
Restitution

An international organization responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(a) Is not materially impossible;

(b) Does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Draft article 39
Compensation

1. The international organization responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

Draft article 40
Satisfaction

1. The international organization responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.

2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.

3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible international organization.

Draft article 41
Interest

1. Interest on any principal sum payable under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.

2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

Draft article 42
Contribution to the injury

In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or international organization or of any person or entity in relation to whom reparation is sought.

IV. Serious breaches of obligations under peremptory norms of general international law

55. Like internationally wrongful acts committed by States, infringements by international organizations may constitute serious breaches of obligations under peremptory norms of general international law. The problem arises whether international organizations would then incur the same additional consequences that are defined for States in article 41 on State responsibility. These include the duty of States other than the responsible State to cooperate to bring the breach to an end.

56. Even if it would be difficult to find any specific practice relating to this type of infringement by an international organization, there appears to be no reason why the situation of an international organization should in this case be any different from that of a State. As was observed by the Organization for the Prohibition of Chemical Weapons:

> "States should definitely be under an obligation to cooperate to bring such a breach to an end because in the case when an international organization acts in breach of a peremptory norm of general international law, its position is not much different from that of a State."[43]

57. The same approach was taken by several States[44] in response to a question raised by the Commission in its 2006 report to the General Assembly.[45] For instance, the Spanish delegation said that:

> "[t]here were not sufficient grounds *a priori* for concluding that, in the event of an international organization committing a serious breach of an obligation stemming from a peremptory norm, a regime different to that laid down for

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[43] See A/CN.4/582, sect. II, G., 2.

[44] Thus the interventions by Denmark, also on behalf of Finland, Iceland, Norway and Sweden (A/C.6/61/SR.13), para. 33; Argentina (A/C.6/61/SR.13), para. 50; Netherlands (A/C.6/61/SR.14), para. 25; Belgium (A/C.6/61/SR.14), paras. 43 to 46; Spain (A/C.6/61/SR.14), para. 54; France (A/C.6/61/SR.14), para. 64; Belarus (A/C.6/61/SR.14), para. 101; Switzerland (A/C.6/61/SR.15), para. 8; Jordan (A/C.6/61/SR.16), para. 5; Russian Federation (A/C.6/61/SR.18), para. 68; and Romania (A/C.6/61/SR.19), para. 60.

[45] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), chap. III, para. 28.

> cases in which the same conduct would be attributable to a State should apply."[46]

58. Certain States have emphasized in their response the role that States should play, when cooperating to bring the breach by an international organization to an end, if they are members of that organization.[47] One may agree that the duty to cooperate is particularly significant when States are in a position to make a significant contribution in order to achieve the intended result and also that in many cases member States could be so described. Hence, it could be maintained that member States would then have a stricter duty. However, it is difficult to generalize and conclude that all the members of an organization always are in that position. The role that members can play clearly varies according to the situation. It is moreover likely that the position of members will not be identical in this respect. It is therefore preferable not to attempt to define a specific duty that members of the responsible organization would have.

59. In its 2006 report to the General Assembly, the Commission also raised the question whether international organizations have a duty to cooperate with States in bringing the breach of an obligation under peremptory norms to an end.[48] The question was raised in the context of the current draft, although the answer may have implications also in the case when the breach is committed by a State and therefore the legal consequences are governed by article 41 on State responsibility.

60. While neither the text of article 41 on State responsibility nor the related commentary expressly envisage cooperation by international organizations, this is not ruled out. The commentary considers that States may resort to an international organization for their response:

> "Cooperation could be organized in the framework of a competent international organization, in particular the United Nations."[49]

61. An international organization may in fact have among its purposes that of bringing certain serious breaches of obligations under peremptory norms, for instance aggressions, to an end. Whether or not the current draft will contain a provision like article 59 on State responsibility, which says that "[t]hese articles are without prejudice to the Charter of the United Nations", there would not be any need to include a provision referring to the fact that the United Nations or other organizations have among their purposes that of combating serious breaches of obligations under peremptory norms. What may be controversial is whether international organizations have a duty like States to cooperate in order to bring those breaches to an end.

62. The great majority of responses to the question raised by the Commission were in favour of stating that international organizations have a duty like States to

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[46] A/C.6/61/SR.14, para. 54.

[47] See the intervention by Denmark, also on behalf of Finland, Iceland, Norway and Sweden (A/C.6/61/SR.13), para. 33. The delegation of Switzerland made a different point, when it noted that "for the members of an organization, there might be an obligation to cooperate that extended beyond the prevention of violations of *jus cogens* only" (A/C.6/61/SR.15), para. 8.

[48] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), chap. III, para. 28 (b).

[49] Paragraph 2 of the commentary to article 41. See *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), at p. 287.

cooperate to bring the serious breach committed by another organization to an end.[50] As was said by the Russian Federation:

> "It should also be evident that States and international organizations were bound to cooperate to terminate unlawful acts by an international organization, just as if it were a State."[51]

63. When cooperating to bring a serious breach to an end, international organizations would not be required to act inconsistently with their constitutive instruments or other pertinent rules. The Organization for the Prohibition of Chemical Weapons called attention to this issue:

> "[…] it can be argued that the extent of the obligation of any international organization to bring a breach of *jus cogens* to an end, unlike that of States, should also be limited by the same, i.e. it must always act within its mandate and in accordance with its rules."[52]

However, an exception has to be made for the case that the pertinent rules of the organization are in conflict with a peremptory norm.

64. While the focus of the discussion on the legal consequences of a serious breach of an obligation under a peremptory norm is on cooperation to bring the breach to an end, article 41 on State responsibility also refers to other consequences, such as the prohibition to "recognize as lawful a situation created by a serious breach". Some instances of practice relating to serious breaches by States concern the duty for international organizations not to recognize as lawful the situation created by the breach. For instance, with regard to the annexation of Kuwait by Iraq, Security Council resolution 662 (1990) called upon "all States, international organizations and specialized agencies not to recognize that annexation, and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation".[53] Another example is provided by the declaration that Member States of the European Community made in 1991 on the "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union". This text included the following sentence:

> "The Community and its Member States will not recognize entities which are the result of aggression."[54]

65. The following draft articles are here proposed:

Draft article 43
Application of this chapter

1. This chapter applies to the international responsibility which is entailed by a serious breach by an international organization of an obligation arising under a peremptory norm of general international law.

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[50] Reference is to be made to the interventions listed in note 44. However, Romania did not specifically refer to a duty to cooperate for international organizations and Jordan only mentioned States.

[51] A/C.6/61/SR.18, para. 68.

[52] See A/CN.4/582, sect. II, G., 2.

[53] Security Council resolution 662 (1990) of 9 August 1990, para. 2.

[54] *International Legal Materials*, vol. 31 (1992), p. 1486, at p. 1487.

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible international organization to fulfil the obligation.

Draft article 44
Particular consequences of a serious breach of an obligation under this chapter

1. States and international organizations shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 43.

2. No State or international organization shall recognize as lawful a situation created by a serious breach within the meaning of article 43, nor render aid or assistance in maintaining that situation.

3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law.