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

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CHAPTER VIII

RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

Addendum

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C. Text of the draft articles on responsibility of international organizations provisionally adopted so far by the Commission

1. Text of the draft articles

1. The text of the draft articles provisionally adopted so far by the Commission is reproduced below.

[to be inserted]

2. Text of the draft articles with commentaries thereto adopted by the Commission at its fifty-ninth session

2. The text of draft articles together with commentaries thereto provisionally adopted by the Commission at its fifty-ninth session is reproduced below.

[See A/CN.4/L.713/Add.1]

CHAPTER II

REPARATION FOR INJURY

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.

Commentary

(1) The above provision is identical to article 34 on responsibility of States for internationally wrongful acts.[1] This seems justified since the forms of reparation consisting of restitution, compensation and satisfaction are applied in practice to international organizations as well as to States. Certain examples relating to international organizations are given in the commentaries to the following articles, which specifically address the various forms of reparation.

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[1] *Ibid*., p. 235.

(2) A note by the Director General of the International Atomic Energy Agency (IAEA) provides an instance in which the three forms of reparation are considered to apply to a responsible international organization. Concerning the "international responsibility of the Agency in relation to safeguards", he wrote on 24 June 1970:

> "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."[2]

It has to be noted that, according to the prevailing use, which is reflected in article 34 on State responsibility and the article above, reparation is considered to include satisfaction.

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.

Commentary

The concept of restitution and the related conditions, as defined in article 35 on responsibility of States for internationally wrongful acts,[3] appear to be applicable also to international organizations. There is no reason that would suggest a different approach with regard to the latter. The text above therefore reproduces article 35 on State responsibility, with the only difference that the term "State" is replaced by "international organization".

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[2] 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).

[3] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10 and Corr.1), p. 237.

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.

Commentary

(1) Compensation is the form of reparation most frequently made by international organizations. The most well-known instance of practice concerns the settlement of claims arising from the United Nations operation in the Congo. Compensation to 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".[4]

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,[5] and also with the International Committee of the Red Cross.[6]

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

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

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

(2) The fact that such compensation was 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."[7]

(3) A reference to the obligation on the United Nations to pay compensation was also made by the International Court of Justice in its Advisory Opinion on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*.[8]

(4) With regard to compensation there would not be any reason for departing from the text of article 36 on responsibility of States for internationally wrongful acts,[9] apart from replacing the term "State" with "international organization".

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[7] *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.

[8] *I.C.J. Reports 1999*, pp. 88-89, para. 66.

[9] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10 and Corr.1), p. 243.

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.

Commentary

(1) Practice offers some examples of satisfaction on the part of international organizations, 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.

(2) 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."[10]

(3) On 16 December 1999, upon receiving the report of the independent inquiry 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

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

> 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."[11]

(4) 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."[12]

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

(5) The modalities and conditions of satisfaction that concern States are applicable also to international organizations. A form of satisfaction intended to humiliate the responsible international organization may be unlikely, but is not unimaginable. A theoretical example would be that of the request of a formal apology in terms that would be demeaning to the organization or one of its organs. The request could also refer to the conduct taken by one or more member States or organizations within the framework of the responsible organization. Although the request for satisfaction might then specifically target one or more members, the responsible organization would have to give it and would necessarily be affected.

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

[12] http://www.ess.uwe.ac.uk/kosovo/Kosovo-Mistakes2.htm.

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

(6) Thus, the paragraphs of article 37 on responsibility of States for internationally wrongful acts[14] may be transposed, with the replacement of the term "State" with "international organization" in paragraphs 1 and 3.

Article 41

Interest

1. Interest on any principal sum due 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.

Commentary

The rules contained in article 38 on responsibility of States for internationally wrongful acts[15] with regard to interest are intended to ensure application of the principle of full reparation. Similar considerations in this regard apply to international organizations. Therefore, both paragraphs of article 38 on State responsibility are here reproduced without change.

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.

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[14] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10 and Corr.1), p. 263.

[15] *Ibid*., p. 268.

Commentary

(1) No apparent reason would preclude extending to international organizations the provision set out in article 39 on responsibility of States for internationally wrongful acts.[16] Such an extension is made in two directions: first, international organizations are also entitled to invoke contribution to the injury in order to diminish their responsibility; second, the entities that may have contributed to the injury include international organizations. The latter extension would require the addition of the words "or international organization" after "State" in the corresponding article on State responsibility.

(2) One instance of possibly relevant practice in which contribution to the injury was invoked concerns the shooting of a civilian vehicle in the Congo. In this case compensation by the United Nations was reduced because of the contributory negligence by the driver of the vehicle.[17]

(3) This article is without prejudice to any obligation to mitigate the injury that the injured party may have under international law. The existence of such an obligation would arise under a primary rule. Thus, it does not need to be discussed here.

(4) The reference to "any person or entity in relation to whom reparation is sought" has to be read in conjunction with the definition given in article 36 of the scope of the international obligations set out in Part Two. This scope is limited to obligations arising for a responsible international organization towards States, other international organizations or the international community as a whole. The above reference seems appropriately worded in this context. The existence of rights that directly accrue to other persons or entities is thereby not prejudiced.

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[16] *Ibid*., p. 275.

[17] See 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), at p. 606.

Article 43

Ensuring the effective performance of the obligation of reparation

The members of a responsible international organization are required to take, in accordance with the rules of the organization, all appropriate measures in order to provide the organization with the means for effectively fulfilling its obligations under the present chapter.

Commentary

(1) When an international organization is responsible for an internationally wrongful act, States and other organizations incur responsibility because of their membership in a responsible organization according to the conditions stated in articles 28 and 29. The present article does not envisage any further instance in which States and international organizations would be held internationally responsible for the act of the organization of which they are members.

(2) Consistent with the views expressed by several States that responded to a question raised by the Commission in its 2006 report to the General Assembly,[18] no subsidiary obligation of members towards the injured party is considered to arise when the responsible organization is not in a position to make reparation.[19] The same opinion was expressed in statements by the International Monetary Fund and the Organization for the Prohibition of Chemical Weapons.[20]

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

[19] The delegation of the Netherlands noted that there would be "no basis for such an obligation" (A/C.6/61/SR.14, para. 23). Similar views were expressed by Denmark, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (A/C.6/61/SR.13, para. 32); Belgium (A/C.6/61/SR.14, paras. 41-42); Spain (*ibid*., paras. 52-53); France (*ibid*., para. 63); Italy (*ibid*., para. 66); United States of America (*ibid*., para. 83); Belarus (*ibid*., para. 100); Switzerland (A/C.6/61/SR.15, para. 5); Cuba (A/C.6/61/SR.16, para. 13); 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.14, 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 circumstances of each case".

[20] A/CN.4/582, sect. II. U.1.

This approach appears to conform to practice, which does not show any support for the existence of the obligation in question under international law.

(3) Thus, the injured party would have to rely only on the fulfilment by the responsible international organization of its obligations. It is expected that in order to comply with its obligation to make reparation, the responsible organization would use all available means that exist under its rules. In most cases this would involve requesting contributions by the members of the organization concerned.

(4) A proposal was made in the Drafting Committee to state expressly that "[t]he responsible international organization shall take all appropriate measures in accordance with its rules in order to ensure that its members provide the organization with the means for effectively fulfilling its obligations under the present chapter". This proposal received some support. However, the majority of the Drafting Committee considered that such a provision was not necessary, because the stated obligation would already be implied in the obligation to make reparation.

(5) The majority of the Drafting Committee was in favour of including the present article, which had not been proposed in the Special Rapporteur's report. This article is essentially of an expository character. It intends to remind members of a responsible international organization that they are required to take, in accordance with the rules of the organization, all appropriate measures in order to provide the organization with the means for effectively fulfilling its obligation to make reparation.

(6) The reference to the rules of the organization is meant to define the basis of the requirement in question.[21] While the rules of the organization may not necessarily consider the matter in an express manner, an obligation for members to finance the organization as part of the general duty to cooperate with the organization may be taken as implied under the relevant rules.

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[21] See the statements by the delegations of Denmark, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (A/C.6/61/SR.13, para. 32); Belgium (A/C.6/61/SR.14, para. 42); Spain (*ibid*., para. 53); France (*ibid*., para. 63); and Switzerland (A/C.6/61/SR.15, para. 5). Also the Institut de Droit International held that an obligation to put a responsible organization in funds only existed "pursuant to its Rules" (*Annuaire de l'Institut de Droit International*, vol. 66-II (1996), p. 451).

As was noted by Judge Sir Gerald Fitzmaurice in his separate opinion relating to the Advisory Opinion of the International Court of Justice on *Certain Expenses of the United Nations*:

> "Without finance, the Organization could not perform its duties. Therefore, even in the absence of Article 17, paragraph 2, a general obligation for Member States collectively to finance the Organization would have to be read into the Charter, on the basis of the same principle as the Court applied in the *Injuries to United Nations Servants* case, namely 'by necessary implication as being essential to the performance of its [i.e. the Organization's] duties' (*I.C.J. Reports 1949*, at p. 182)."[22]

(7) Some members of the Commission expressed the view that a duty for members to take all appropriate measures to provide the responsible organization with the means for fulfilling its obligation to make reparation should be regarded as part of general international law or be stated by the Commission as a rule of progressive development. This obligation would supplement any obligation existing under the rules of the organization.

CHAPTER III

SERIOUS BREACHES OF OBLIGATIONS UNDER PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW

Article 44 [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.

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.

[22] *I.C.J. Reports 1962*, p. 208.

Commentary

(1) The scope of Chapter III corresponds to the scope defined in article 40 on responsibility of States for internationally wrongful acts.[23] The breach of an obligation under a peremptory norm of general international law may be less likely on the part of international organizations than on the part of States. However, the risk that such a breach takes place cannot be entirely ruled out. If a serious breach does occur, it calls for the same consequences that are applicable to States.

(2) The two paragraphs of the present article are identical to those of article 40 on the responsibility of States for internationally wrongful acts,[24] but for the replacement of the term "State" with "international organization".

Article 45 [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 44 [43].

2. No State or international organization shall recognize as lawful a situation created by a serious breach within the meaning of article 44 [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.

Commentary

(1) This article sets out that, should an international organization commit a serious breach of an obligation under a peremptory norm of general international law, States and international organizations have duties corresponding to those applying to States according to article 41 on

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[23] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10 and Corr.1), p. 282.

[24] *Ibid*.

responsibility of States for internationally wrongful acts.[25] Therefore, the same wording is used here as in that article, with the only additions of the words "and international organizations" in paragraph 1 and "or international organization" in paragraph 2.

(2) In response to a question raised by the Commission in its 2006 report to the General Assembly,[26] several States expressed the view that the legal situation of an international organization should be the same as that of a State having committed a similar breach.[27] Moreover, several States maintained that international organizations would also be under an obligation to cooperate to bring the breach to an end.[28] 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."[29]

(3) The Organization for the Prohibition of Chemical Weapons made the following observation:

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[25] *Ibid*., p. 286.

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

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

[28] Thus the interventions by Denmark, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (A/C.6/61/SR.13, para. 33); Argentina (*ibid*., para. 50); the Netherlands (A/C.6/61/SR.14, para. 25); Belgium (*ibid*., para. 45); Spain (*ibid*., para. 54); France (*ibid*., para. 64); Belarus (*ibid*., para. 101); Switzerland (A/C.6/61/SR.15, para. 8); and the Russian Federation (A/C.6/61/SR.18, para. 68).

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

> "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."[30]

With regard to the obligation to cooperate on the part of international organizations, the same Organization noted that an international organization "must always act within its mandate and in accordance with its rules".[31]

(4) It is clear that the present article is not designed to vest international organizations with functions that are alien to their respective mandates. On the other hand, some international organizations may be entrusted with functions that go beyond what is required in the present article. This article is without prejudice to any function that an organization may have with regard to certain breaches of obligations under peremptory norms of general international law, as for example the United Nations in respect of aggression.

(5) While practice does not offer examples of cases in which the obligations stated in the present article were asserted in respect of a serious breach committed by an international organization, it is not insignificant that these obligations were considered to apply to international organizations when a breach was allegedly committed by a State.

(6) In this context it may be useful to recall that in the operative part of its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* the International Court of Justice first stated the obligation incumbent upon Israel to cease the works of construction of the wall and the obligation for all States "not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction".[32] The Court then added:

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[30] A/CN.4/582, sect. II U.2.

[31] *Ibid*. The International Monetary Fund went one step further in saying that "any obligation of international organizations to cooperate would be subject to, and limited by, provisions of their respective charters" (*ibid.*).

[32] See subparagraph (3) B and D of the operative paragraph, *I.C.J. Reports 2004*, pp. 201-202, para. 163.

> "The United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion."[33]

(7) Some instances of practice relating to serious breaches committed by States concern the duty of international organizations not to recognize as lawful a situation created by one of those breaches. For example, 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".[34] 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."[35]

(8) The present article concerns the obligations set out for States and international organizations in case of a serious breach of an obligation under a peremptory norm of general international law by an international organization. It is not intended to exclude that similar obligations also exist for other persons or entities.

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[33] Subparagraph (3) E of the operative paragraph, *I.C.J. Reports 2004*, p. 202, para. 163. The same language appears in paragraph 160 of the Advisory Opinion, *ibid.*, p. 200.

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

[35] European Community, Declaration on Yugoslavia and on the Guidelines on the Recognition of New States, 16 December 1991, reproduced in *International Legal Materials*, vol. 31 (1992), p. 1485, at p. 1487.