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Eighth report on responsibility of international organizations*

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Contents

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I. General remarks

1. The present report is intended to provide a survey of the comments made by States and international organizations on the draft articles on responsibility of international organizations which were adopted at first reading by the International Law Commission at its sixty-first session.[1] In paragraph 5 of its resolution 64/114 of 16 December 2009, the General Assembly drew the attention of Governments to the importance for the International Law Commission of having their comments and observations by 1 January 2011 on the draft articles and commentaries on the topic "Responsibility of international organizations" adopted on first reading by the Commission at its sixty-first session. In paragraph 5 of resolution 65/26 of 6 December 2010, the Assembly once again drew the attention of Governments to the importance for the Commission of having their comments and observations by 1 January 2011. The Special Rapporteur is particularly grateful to States and international organizations that submitted their written comments within the deadline or soon afterwards. This timeliness has enabled him to prepare the present report by 4 March 2011, as required to make the report available in all six official languages at the start of the sixty-third session of the Commission. The report is intended to cover comprehensively all the statements and written comments that were made by 1 February 2011 on the first-reading articles and their commentaries. An effort has been made to take also into account written comments that arrived during the month of February.

2. The present report also covers some instances of practice that have become available after the first reading of the draft articles was completed. Moreover, certain views that have been expressed in the growing literature on the subject have been considered.

3. The overall structure of the draft articles as they were adopted at first reading has not been criticized. Moreover, there was only one proposal concerning the order in which the draft articles are presented. This was a suggestion by the Organization for Security and Cooperation in Europe (OSCE), echoed by the World Health Organization (WHO) and a group of other organizations. According to this proposal, which was designed to give more emphasis to "the principle of speciality" in its application to international organizations, the Commission should consider the possibility of including draft article 63 (*Lex specialis*) in part one (Introduction) of the draft articles, as a new draft article 3.[2] This proposal does not concern the substance of the draft articles, since changing the position of the provision on speciality would not affect its legal effects. The placement of this provision among the "general provisions" at the end of the draft articles is based on the idea that one should first set forth the rules that apply to international organizations generally and then refer to the possible existence of different rules for certain organizations,

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[1] The text of the draft articles adopted at first reading and the commentaries thereto is reproduced in A/64/10, paras. 50 and 51.

[2] A/CN.4/637, sect. II.B.26. The comments submitted by WHO were made also on behalf of the Comprehensive Nuclear-Test-Ban Treaty Organization, the International Civil Aviation Organization, the International Fund for Agricultural Development, the International Labour Organization, the International Maritime Organization, the International Organization for Migration, the International Telecommunication Union, the United Nations Educational, Scientific and Cultural Organization, the United Nations World Tourism Organization, the World Intellectual Property Organization, the World Meteorological Organization and the World Trade Organization.

especially in their relations with their members. Those rules may be of great practical importance, but cannot be expressed in the draft articles, which may only aspire to set forth the residual rules. Moreover, the placement of the provision on *lex specialis* corresponds to the one that was adopted in the articles on the responsibility of States for internationally wrongful acts;[3] the greater importance that the principle of speciality may have with regard to international organizations does not seem to require a change.

4. Some recurrent themes of a general nature have appeared in certain statements and written comments. One of these themes relates to the great variety of international organizations. For instance, the Secretariat of the United Nations pointed to the need to take into account the "specificities of the various international organizations" and quoted the following passage from the advisory opinion of the International Court of Justice on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*:

> "International organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the 'principle of speciality', that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them."[4]

The variety of international organizations is an undeniable fact which also contributes to explain why some draft articles do not offer precise answers to possible questions. It is also true that some draft articles are hardly relevant to certain organizations. For instance, a technical organization would be highly unlikely to be in a position to invoke certain circumstances precluding wrongfulness. The draft articles at issue would apply to an organization only if the required conditions are met.

5. Another recurrent theme is that the draft articles follow the articles on State responsibility too closely. The draft articles are certainly close with regard to various issues on which there is no reason to make a distinction between States and international organizations. When this conclusion is reached, it is based on a specific analysis and never on an uncritical assumption. It is noteworthy that no specific comments were addressed on most of the draft articles that closely correspond to articles on State responsibility. On the other hand, several draft articles contain significant changes in order to reflect the particular situation of international organizations. Moreover, various draft articles consider issues that were not dealt with in the articles on State responsibility.

6. A third theme is that some draft articles are based on limited practice. This could hardly be attributed to the lack of efforts deployed by the Commission to acquire knowledge of the relevant practice and take it into account. Unfortunately, only a few instances of unpublished practice have been contributed by States and international organizations in order to facilitate the Commission's study. Incidentally, it is significant that the recent flow of academic writings has not

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[3] The text of these articles is reproduced in the *Yearbook of the International Law Commission, 2001*, vol. II, Part Two (United Nations Publication, Sales No. E.04.V.17 (Part 2)), para. 76. Article 55 (*Lex specialis*) opens part four (General provisions).

[4] A/CN.4/637/Add.1, sect. II.A, para. 1. The quoted passage is taken from *I.C.J. Reports 1996*, p. 78, para. 25. It is already reproduced in paragraphs (8) and (11) of the commentary on draft article 2 in A/64/10, para. 51.

brought to light elements of relevant practice that the Commission did not consider. Practice concerning the responsibility of international organizations indeed appears to be limited, in particular because of the reluctance of most organizations to submit their disputes with States or other organizations to third-party settlement. While certain draft articles are based on scant practice, this is not a decisive reason for omitting their text. An omission would not only entail a gap in the draft articles, but affect the substance of the proposed rules. Should, for instance, a draft article on necessity be omitted from among the draft articles dealing with the circumstances precluding wrongfulness, the implication would be that an international organization could never invoke necessity for this purpose.

7. The following six sections correspond to the six parts of the draft articles adopted at first reading. Each section contains a survey of the comments concerning the relevant part and includes the related observations and suggestions to the Commission. These concern both the draft articles and their commentaries and call for views by members of the Commission. To facilitate the discussion, the end of each section contains a brief summary of the proposals made with regard to the text of the draft articles contained in the relevant part. The large number of suggested amendments concerning the commentaries are not to be summarized.

II. Part One (Introduction)

Draft article 1

8. In defining the scope of the draft articles, draft article 1, paragraph 1, says that the draft articles "apply to the international responsibility of an international organization for an act that is wrongful under international law". Paragraph 2 then adds that "[t]he present draft articles also apply to the international responsibility of a State for the internationally wrongful act of an international organization". This draft article reflects the content of article 57 on State responsibility, according to which the articles on State responsibility "are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization".

9. Coherently with draft article 1, paragraph 2, part five of the current draft only deals with the responsibility of a State in connection with the conduct of an international organization. Some questions relating to the responsibility of States towards international organizations are not considered, at least expressly, either in the present draft articles or the articles on State responsibility. The main question at issue is the invocation of the responsibility of a State by an international organization when the responsibility of a State is not connected with the conduct of an international organization: for instance, when a State infringes an obligation under a bilateral treaty concluded with an international organization. One point of view is that, since the articles on State responsibility only consider the invocation of responsibility by a State, the current draft articles should fill the gap. Another opinion is that this matter pertains to State responsibility and could be covered by analogy; if it was felt that it should be dealt with expressly, there would be the need to amend the articles on the responsibility of States for internationally wrongful acts. In that case, the chapeau of article 42 on State responsibility should, for instance, be amended to say, instead of "A State is entitled as an injured State to invoke the responsibility of another State", "A State or an international organization

is entitled as an injured State or organization to invoke the responsibility of another State". When the matter was discussed within the Commission, the second view prevailed, and was expressed in paragraph (10) of the commentary on article 1 (A/64/10, para. 51). However, it was considered useful to sound out the opinions of States and international organizations on this matter. Consequently, in the report of the Commission on its sixty-first session it was pointed out that "certain issues concerning international responsibility between States and international organizations have not been expressly covered either in the articles on the responsibility of States for internationally wrongful acts or in the draft articles on the responsibility of international organizations"; some examples of these issues were given; and the Commission asked for comments and observations from Governments and international organizations about the context in which these questions should be considered (A/64/10, paras. 27 and 28).

10. The response given by States has been divided. In the Sixth Committee, some States expressed the view that issues relating to the responsibility of States towards international organizations should be covered in the present text,[5] while other States considered that these issues did not belong to the current text.[6] The same division of opinions has appeared in the written comments subsequently made by States.[7]

11. The first opinion has been defended also by WHO and a group of other organizations in their joint comments (A/CN.4/637, sect. II.B.1). These organizations argued from an alleged inconsistency that the Commission would have incurred in considering issues of State responsibility towards international organizations. They maintained that "several draft articles do address such issues, explicitly or by implication". However, articles 57 to 61, which are mentioned on this point, are within the scope as defined in draft article 1, paragraph 2, while draft article 32, paragraph 2, and draft articles 39 and 49, to which the comments also refer, are all "without prejudice" clauses and therefore do not cover any additional matter.

12. The Commission could embark on a study of certain issues that have not been expressly dealt with in the articles on State responsibility and in the current draft articles. It could then discuss the preferred placement of any additional provision that it may wish to suggest. For the present purposes, since these additional provisions would not affect the content of the draft articles included in the current draft, taking the option of a further study would not require the Commission to postpone consideration of the draft articles adopted at first reading.

13. The Drafting Committee may wish to consider Ghana's suggestion that paragraph 2 of draft article 1 be reworded as follows: "The present draft articles also apply to the international responsibility of a State for an act by an international organization that is wrongful under international law" (A/C.6/64/SR.17, para. 9). This text would replicate the wording of paragraph 1. The term "internationally

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[5] Thus the statements by Switzerland (A/C.6/64/SR.16, para. 2), Mexico (para. 32), Spain (para. 82) and Malaysia (A/C.6/64/SR.21, para. 32).

[6] This was the opinion of Belarus (A/C.6/64/SR.15, para. 35), Italy (A/C.6/64/SR.16, para. 17), Netherlands (para. 55), Greece (paras. 60 and 61) and Ghana (A/C.6/64/SR.17, para. 9). See also the statement by France (A/C.6/64/SR.15, para. 68).

[7] Austria (A/CN.4/636, sect. II.B.20) expressed concern about the resulting gap. The first view was defended by Portugal (sect. II.A, para. 2), while the opposite opinion was expressed by Germany (sect. II.B.1).

wrongful act", which appears in draft article 1 as adopted at first reading, has been used in articles 1, 2 and 3 on State responsibility.

Draft article 2

14. With regard to draft article 2 (Use of terms), only a few comments were made on the definition of "international organization" in subparagraph (a). Two States expressed their preference for defining international organizations as "intergovernmental organizations",[8] according to the definition which traditionally appears in international conventions. Paragraph (3) of the commentary on draft article 2 gives the reason for seeking in the present draft articles a more detailed definition which in particular takes into account the fact that "an increasing number of international organizations include among their members entities other than States as well as States".[9]

15. One State queried whether the qualifier "possessing its own international legal personality" was necessary, because "international organizations possess international legal personality as a result of being such organizations".[10] The reference in the definition to the existence of a separate legal personality is explained by the fact that this is an essential precondition for international responsibility to arise for the international organization concerned. Moreover, it seems preferable to leave the question open whether all the international organizations possess legal personality.

16. In paragraph (4) of the commentary on draft article 2 (A/64/10, para. 51), it would be preferable to specify that the current status of OSCE is controversial. OSCE itself noted in a written comment that "there is no consensus among the OSCE participating States that OSCE should fulfil either of the two listed conditions: whether OSCE possesses its own legal personality, or whether the founding documents of OSCE (in the first place the Helsinki Final Act and the Charter of Paris for a New Europe) are governed by international law".[11]

17. By using the plural "States", subparagraph (a) does not imply that an international organization within the definition may be established only by a plurality of States. The commentary could specify, as suggested by the Secretariat, that "a (single) State and an international organization can, by agreement, establish an international organization" and give as examples the Special Court for Sierra Leone and the Special Tribunal for Lebanon (A/CN.4/637/Add.1, sect. II.B.1, para. 1).

18. With regard to the definition of "rules of the organization" in subparagraph (b) of draft article 2, and more particularly the part of the definition which refers to "other acts of the organization", one State welcomed this reference "bearing in mind the great variety of acts that constituted such rules".[12] Another State wished the commentary to "clarify in greater detail the substance, form and nature of such

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[8] China (A/C.6/64/SR.15, para. 43) and Cuba (A/CN.4/636, sect. II.B.2).

[9] A/64/10, para. 51. ILO "supports the idea of not using the expression of 'inter-governmental organization'"; on the other hand, ILO finds that the addition of "other entities" in the draft article "does not add a significant element to what is already covered by the first part of the definition, which seems broad enough to include different possibilit[ies] of membership of entities other than States" (A/CN.4/637, sect. II.B.2, para. 1).

[10] Austria (A/CN.4/636, sect. II.B.2, para. 2).

[11] A/CN.4/637, sect. II.B.2. The same two queries were raised by the Russian Federation (A/C.6/64/SR.16, para. 7) and Austria (A/CN.4/636, sect. II.B.2, para. 2).

[12] Hungary, A/C.6/64/SR.16, para. 37.

'other acts'" and questioned "the unqualified statement that the rules of an organization might include agreements concluded by the organization with third parties and judicial or arbitral decisions binding the organization".[13] However, one could say that the statement in the commentary is already qualified by the use of the verb "may". It is difficult to envisage a detailed definition that would accommodate a great number of international organizations. This also applies to including a "hierarchy among the rules of the organization", as wished by WHO and a group of other organizations in their joint comments (A/CN.4/637, note 12). The Secretariat questioned "the broad definition of the 'rules of the organization' which includes instruments extending far beyond the constituent instruments of the organization" (A/CN.4/637/Add.1, sect. II.B.1, para. 3). On the other hand, the North Atlantic Treaty Organization (NATO) noted in its comments that NATO itself is an example of an organization where "the fundamental internal rule governing the functioning of the organization — that of consensus decision-making — is to be found neither in the treaties establishing NATO nor in any formal rules and is, rather, the result of the practice of the organization" (A/CN.4/637, sect. II.B.26). The European Union provides an example of the inclusion of both agreements concluded by the organization and judicial decisions within the rules of the organization.

19. According to the Secretariat of the United Nations, the definition of "rules of the organization" should also make clear that a violation of the rules of the organization entails its responsibility, not for the violation of the "rule", as such, but for the violation of the international law obligation it contains (A/CN.4/637/Add.1, sect. II.B.1, para. 6). This distinction among the rules of the organization is made later in the draft articles, in draft article 9, which seems the appropriate location since it deals with the "existence of a breach of an international obligation". The wider definition of the rules of the organization is justified by the fact that in the draft articles they play a larger role than that of determining when there is a breach of an obligation under international law. The rules of the organization are for instance relevant for identifying who is competent to express the consent of the organization or to make a claim for the organization.

20. While subparagraph (c) of draft article 2 contains a definition of "agent", the draft articles do not include any definition of "organ". The Organization for Economic Cooperation and Development (OECD), the World Bank, the Secretariat of the United Nations and Belgium proposed in their comments to introduce one.[14] This would have the advantage of clarifying the relation between organs and agents in the draft articles. The appropriate place for a definition of "organ" would be a new subparagraph (c). The articles on State responsibility do not include a provision on the use of terms, but they do contain, in article 4, paragraph 2, the following text concerning the meaning of organ of a State: "An organ includes any person or entity which has that status in accordance with the internal law of the State." A definition could be provided in the present draft articles on the same line. The Secretariat suggested: "any entity which has that status in accordance with the rules of the organization" (A/CN.4/637/Add.1, sect. II.B.2, para. 12). Taking the same approach, the subparagraph could read:

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[13] Russian Federation, A/C.6/64/SR.16, para. 6.

[14] Respectively A/CN.4/637, sects. II.B.26 and II.B.2, A/CN.4/637/Add.1, sect. II.B.2, para. 11, and A/CN.4/636, sect. II.B.2, para. 2.

(c) "Organ of an international organization" means any person or entity which has that status in accordance with the rules of the organization.

This proposal takes into account a suggestion by the World Bank to replace "includes" in article 4 on State responsibility with "means" (A/CN.4/637, sect. II.B.2). Although there are various approaches to the definition of organ in the constitutive instruments and other rules of international organizations, it seems preferable not to superimpose a concept of organ that does not find a counterpart in the rules of the organization concerned. This also reflects the limited significance that the distinction between organs and agents has in the draft articles.

21. If the proposal to include a definition of "organ" in draft article 2 is accepted, the definition of "agent" would have to be redesignated as subparagraph (d). According to draft article 2, "'agent' includes officials and other persons or entities through whom the organization acts". Two States and the International Labour Organization (ILO) would like to complete this definition by specifying that the person or entity concerned has been "charged by an organ of the organization with carrying out, or helping to carry out, one of its functions".[15] This would follow more closely the wording of the advisory opinion of the International Court of Justice on *Reparation for Injuries Suffered in the Service of the United Nations*.[16] Although the majority of the Commission expressed its preference for a shorter version when it examined a similar proposal that had been made in my seventh report (A/CN.4/610, para. 23), the question could be reconsidered. A possible intermediate solution would be to omit the words "an organ of" in the suggested addition. The omission would be justified by the great variety of approaches to the use of the term "organ" in the rules of different organizations.

22. The proposal made at the end of the preceding paragraph would seem to meet part of the concern of the Secretariat that "the definition of an 'agent' in the draft articles should, at the very least, differentiate between those who perform the functions of an international organization, and those who do not perform such functions" (A/CN.4/637/Add.1, sect. II.B.1, para. 13). The Secretariat also pointed out the importance of other factors such as the status of the person or entity and the relationship and degree of control that exists between the organization and any such person or entity (para. 12). These elements may be considered as implied in the requirement that agents of an international organization are "persons or entities through whom the organization acts". This point could usefully be developed in the commentary.

23. The World Bank and ILO suggested that the word "includes" instead of "means" in the definition of "agent" is inappropriate insofar as this definition also contains a reference to "other persons or entities" (A/CN.4/637, sect. II.B.2). The use of the word "includes" would be justified if the definition of agent contained a reference to the rules of the organization. In that case, the term "includes" would suggest that, as noted in paragraphs (8) and (10) of the commentary on draft article 5 (A/64/10, para. 51), a person or entity could in exceptional cases be considered an agent even if not so regarded under the rules of the organization. Since the

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[15] Portugal (A/C.6/64/SR.16, para. 44 and A/CN.4/636, sect. II.B.2), Austria (A/CN.4/636, sect. II.B.2, para. 3) and ILO (A/CN.4/637, sect. II.B.2, para. 2). A different proposal for a possible rewording of the current subparagraph (c) was made by Belgium (A/CN.4/636, sect. II.B.2, para. 3).

[16] *I.C.J. Reports 1949*, p. 177.

definition of "agent", unlike that of "organ" proposed in paragraph 20 above, does not contain a reference to the rules of the organization, the suggested replacement of "includes" by "means" does seem more appropriate.

24. If the idea of including a definition of "organ" is retained, it would be preferable to avoid an unnecessary overlap between the categories of organs and agents. This could be achieved by making it clear that only persons and entities other than organs of an international organization may be regarded as agents of that organization. The definition could then be reworded as follows:

> (d) "Agent" means an official or other person or entity, other than an organ, through whom the organization acts and who is charged by the organization with carrying out, or helping to carry out, one of its functions.

Recommendation

25. In conclusion to this section, the following proposals concerning part one are made: a new subparagraph (c), concerning the definition of "organ", should be introduced in draft article 2, as suggested in paragraph 20 above, and the current subparagraph (c), as reworded according to the proposal made in paragraph 24, should become subparagraph (d).

III. Part Two (The internationally wrongful act of an international organization)

Draft article 4

26. One State would like to see damage included among the elements of an internationally wrongful act set forth in draft article 4.[17] This question was discussed with regard to State responsibility. It was then considered that the requirement of damage "depends on the content of the primary obligation, and there is no general rule in this respect".[18] The need for coherence among the instruments on international responsibility prepared by the Commission suggests that the same approach should be taken with regard to responsibility of international organizations.

27. Another State requested clarification of the statement in the commentary that "the responsibility of an international organization may in certain cases arise also when conduct is not attributable to that international organization".[19] This may happen not only, as the same State suggested, when "an international organization has expressly (for example via a treaty clause) assumed such responsibility";[20] it may also occur when an international organization is responsible, according to chapter IV of part two, in connection with the act of a State or another international organization.

28. The fact that draft article 4 refers to international law in order to determine when an act is attributable to an international organization was found ambiguous by

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[17] Cuba, A/CN.4/636, sect. II.B.4.

[18] See *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, para. 77, commentary on article 2, para. (9).

[19] Germany (A/CN.4/636, sect. II.B.3), referring to paragraph (1) of the commentary on chapter I of part two (A/64/10, para. 51).

[20] Ibid.

one State, because international law is "unclear in that regard".[21] The reference to international law in draft article 4 has to be appraised in its context. An attempt to elucidate the rules of international law on attribution has been made in draft articles 5 to 8.

Draft article 5

29. Paragraph 2 of draft article 5 sets forth that "[r]ules of the organization shall apply to the determination of the functions of the organs and agents". Generally an agent will have "acted on the instruction or under the control of the organization in question" as the World Bank would like the text to specify (A/CN.4/637, sect. II.B.4, para. 1). However, when an international organization confers functions on an agent without giving instructions or exercising control, the organization would still act through the agent and should not be exempted from having the agent's conduct attributed to it. The same conclusion also applies to the case, referred to by one State, of "semi-autonomous entities on which the creator organizations conferred significant powers, but whose conduct they could not control, at least not in an 'effective' manner".[22]

30. Another State would like to see "private conduct" included in draft article 6. This proposal concerns the attribution of conduct of private persons "acting under the effective control of an organization and exercising functions of the organization".[23] These persons would appear to be included in the definition of agents. Therefore their conduct would be attributed to the international organization according to draft article 5, as explained in paragraph (10) of the commentary on this draft article (A/64/10, para. 51). Draft article 6 is a less appropriate placement for a rule on attribution of the conduct of private persons, since it concerns the conduct of organs and agents placed at the disposal of an international organization by a State or another international organization.

31. On the other hand, the Nordic countries would like the commentary to clarify that "civilian or military experts, advisers or other personnel" who are seconded to an international organization "fall within the general rule contained in draft article 5" rather than under draft article 6.[24] Paragraph (1) of the commentary on the latter draft article makes the point that, when an organ is "fully seconded" to an organization, "the organ's conduct would clearly be attributable only to the receiving organization".[25] The commentary on draft article 5 could also make the same point.

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[21] Mexico (A/C.6/64/SR.16, para. 30), which went on to say that the "key criterion for the attribution of responsibility to international organizations, particularly in cases where the constituent instrument of the organization contained no express provision on the matter, continued to be that of effective control of the acts in question".

[22] Hungary (A/C.6/64/SR.16, para. 37), which favoured a different solution.

[23] Austria (A/CN.4/636, sect. II.B.7, para. 2).

[24] Denmark on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), A/C.6/64/SR.15, para. 26.

[25] A/64/10, para. 51. This paragraph appears to meet a criticism expressed by ILO with regard to draft article 6, concerning the need to take into account the "modalities in the law of international civil services under which national officials are put at the disposal of international organizations" (A/CN.4/637, sect. II.B.5).

Draft article 6

32. Various views were expressed on draft article 6 and in particular on the "effective control" over the conduct of the organ of a State or an international organization put at the disposal of another organization as the criterion for the attribution of conduct to the latter organization. Austria would like to "add to the criterion of control also that of the exercise of functions of the organization" (A/CN.4/636, sect. II.B.7, para. 1). This additional criterion may be taken as implied, but could be expressly stated in the commentary.

33. Greece expressed the opinion that, in accordance with the judgment of the European Court of Human Rights in Behrami and Saramati,[26] "conduct should be attributed to the international organization exercising ultimate control and not to the State exercising operational control" (A/C.6/64/SR.16, para. 58). On the other hand, the United Kingdom observed that, "[i]n the absence of judicial criticism of the effective control test" in the decision of the European Court, "no change to draft article 6 was required" (A/C.6/64/SR.16, para. 23). The Nordic countries "agreed with the view expressed in the commentary to draft article 6 that the international responsibility of an international organization must be limited to the extent of its effective operational control, and not merely according to the criterion of ultimate authority and control".[27] Germany endorsed the view expressed in the commentary that "conduct of military forces of States or international organizations is not attributable to the United Nations when the Security Council authorizes States or international organizations to take necessary measures outside a chain of command linking those forces to the United Nations".[28] The same conclusion was expressed in detailed comments by the Secretariat reviewing United Nations practice (A/CN.4/637/Add.1, sect. II.B.2, paras. 2-10).

34. In order to settle the issue of where the effective control lies, one needs to consider the "full factual circumstances and particular context in which international organizations and their members operated", as was stressed by the United Kingdom in a statement.[29] This implies that, with regard to a United Nations peacekeeping force, while in principle the conduct of the force should be attributed to the United Nations, effective control of a particular conduct may belong to the contributing

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[26] This decision was examined in paragraph (9) of the commentary on draft article 6 (A/64/10, para. 51). To the writings listed in the commentary that criticize the application by the European Court of the criterion of effective control (A/64/10, note 102), one may add C. A. Bell, "Reassessing multiple attribution: the International Law Commission and the *Behrami and Saramati* decision", *New York University Journal of International Law and Politics*, vol. 42 (2010), p. 501; C. Laly-Chevalier, "Les opérations militaires et civiles des Nations Unies et la Convention européenne des droits de l'homme", *Revue Belge de Droit International*, vol. 40 (2007), p. 627 at pp. 642-644; F. Messineo, "The House of Lords in Al-Jedda and Public International Law: Attribution of Conduct to UN-Authorized Forces and the Power of the Security Council to Displace Human Rights", *Netherlands International Law Review*, vol. 56 (2009), p. 35 at pp. 39-43; and L.-A. Sicilianos, "L'(ir)responsabilité des forces multilatérales?", in *International Law and the Quest for its Implementation*; Liber Amicorum *Vera Gowland-Debbas*, L. Boisson de Chazournes and M. Kohen, eds. (Leiden/Boston: Brill, 2010), p. 95 at pp. 98-106.

[27] A/C.6/64/SR.15, para. 27. A similar view was expressed by Belgium (A/CN.4/636, sect. II.B.7).

[28] A/CN.4/636, sect. II.B.6, referring to paragraph (5) of the commentary on chapter II of part two (A/64/10, para. 51).

[29] A/C.6/64/SR.16, para. 23. It is not clear why this part of the statement was intended as a criticism of the approach taken by the Commission.

State rather than to the United Nations. One example from practice showing the same approach was recently provided by a judgment of 8 December 2010 of the Court of First Instance of Brussels which found that the decision by the commander of the Belgian contingent of the United Nations Assistance Mission for Rwanda (UNAMIR) to abandon a de facto refugee camp at Kigali in April 1994 was "taken under the aegis of Belgium and not of UNAMIR".[30]

35. The Secretariat recalled that for a number of reasons, notably political, the practice of the United Nations had been to maintain the principle of United Nations responsibility vis-à-vis third parties in connection with peacekeeping operations". Nevertheless, the Secretariat supported "the inclusion of draft article 6 as a general guiding principle in the determination of responsibilities between the United Nations and its Member States with respect to organs or agents placed at the disposal of the Organization, including possibly in connection with activities of the Organization in other contexts" (A/CN.4/637/Add.1, sect. II.B.3, para. 6).

Draft article 7

36. According to draft article 7, ultra vires acts are attributable to an international organization under conditions similar to those applying to States according to article 7 on State responsibility. One State expressed doubts about this criterion.[31] It was also questioned by WHO together with a group of other international organizations, who stated that "the rules and established practices applicable to privileges and immunities of international organizations and their agents might constitute a check on the nature of the acts in question" (A/CN.4/637, sect. II.B.6). However, these rules address a different issue. There may be a reason for not extending immunities to ultra vires acts, but to restrict them within the bounds of the functions that an organization has been admitted to exercise in the territory of the State granting immunity. The same reason does not necessarily apply when the international responsibility of the organization is invoked with regard to a wrongful act.

37. The Secretariat maintained that "there is practice to suggest that when an organ or an agent identified as such by the Organization acts in its official capacity and within the overall functions of the Organization, but outside the scope of the authorization, such act may nevertheless be considered an act of the Organization" (A/CN.4/637/Add.1, sect. II.B.4, para. 2). Regrettably, no examples of that practice were supplied. The United Nations Secretariat suggested that attribution to the United Nations "could exist only where an organ or agent 'acts in an official capacity and within the overall functions of the organization'" (para. 5). The point that the organ or agent acts in an official capacity is implicitly made in the text of draft article 7 and expressly set forth in paragraph (4) of the commentary (A/64/10, para. 51). A reference to the "overall functions of the organization" could be added.

38. The Secretariat also noted that the 1986 opinion quoted by the Commission in paragraph (a) of the commentary (A/64/10, para. 51) "does not reflect the consistent practice of the organization".[32] However, the Secretariat cited one example, an opinion of the Office of Legal Affairs, dated 1974, which advised that "there may

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[30] Unpublished judgment, *Mukeshimana-Ngulinzira and others* v. *Belgian State and others*, para. 38. In the original French the quoted passage reads: "une décision prise sous l'égide de la Belgique et non de l'UNAMIR".

[31] Russian Federation, A/C.6/64/SR.16, para. 8.

[32] A/CN.4/637/Add.1, sect. II.B.4, para. 4.

well be situations involving actions by Force members off-duty which the United Nations could appropriately recognize as engaging its responsibility".[33] This passage should be included in the commentary.

Draft article 8

39. With regard to draft article 8, relating to conduct acknowledged and adopted by an international organization as its own, one State suggested that the commentary mention de facto conduct of an official who has been suspended from duty or whose appointment has been terminated.[34] This may be one instance when an organization may wish to acknowledge its responsibility. However, it seems preferable not to attempt to set forth in the commentary a typology of cases in which acknowledgement of responsibility would be considered appropriate.

40. The Secretariat wished for some clarifications on "the form of the acknowledgement, and whether the act of acknowledging should be made in full knowledge of the unlawful character of the conduct, and of the legal and financial consequences of such acknowledgement".[35] These would be wise precautions that an organization should take, but cannot be viewed as requirements for a valid acknowledgement of attribution of conduct. The form of acknowledgement depends on the specific circumstances and cannot be precisely defined. It would also seem inappropriate to attempt to make some general remarks on "the question of the competence of the organization or of any of its agents or organs to acknowledge or adopt the conduct in question".[36] These are matters that would seem to be covered by the rules of the organization concerned.

41. The European Commission considered that an example given in paragraph (3) of the commentary on draft article 8 (A/64/10, para. 51) was "misplaced". This example concerns a statement made by the European Community to the effect that the Community 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 European Community level or at the level of Member States". The European Commission pointed out that the basis of this statement was that the European Community "was exclusively competent for the subject matter concerned and thus the only entity in a position to repair the possible breach" (A/CN.4/637, sect. II.B.7). This remark leaves the question open whether an acknowledgement of attribution of conduct was in fact involved. An acknowledgement of attribution of conduct would be in line with the position often taken by the European Commission and referred to in the commentaries on draft article 63 (A/64/10, para. 51).

Draft article 9

42. Two States expressly endorsed the wording of draft article 9, paragraph 2, according to which a breach of an international obligation by an international organization "includes the breach of an international obligation that may arise under the rules of the organization".[37] As was said in paragraph (4) of the commentary on draft article 9, "the practical importance of obligations under the rules of the

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[33] Ibid.

[34] El Salvador, A/CN.4/636, sect. II.B.8, para. 2.

[35] A/CN.4/637/Add.1, sect. II.B.5, para. 1.

[36] Ibid.

[37] Hungary (A/C.6/64/SR.16, para. 38) and Portugal (A/CN.4/636, sect. II.B.9).

organization makes it preferable to dispel any doubt that breaches of these obligations are also covered by the present articles" (A/64/10, para. 51). The World Bank maintained that "retaining paragraph 2 may wrongly lead to an unsubstantiated conclusion (expressly denied in the Commission's commentary) that the breach of any rule of the organization is necessarily a breach of an international obligation" (A/CN.4/637, sect. II.B.8, para. 2). On the other hand, while seeking further clarifications in the commentary, the Secretariat correctly noted that "only breaches of international law obligations contained in the rules, and not breaches of the rules as such, would be considered breaches of an international obligation within the meaning of draft article 9" (A/CN.4/637/Add.1, sect. II.B.6, para. 3).

43. The European Commission drew from its remark that the law of the European Union is "separate from international law" the conclusion that "the relationship between the Union and its member States is not governed by international law principles, but by European law as a distinct source of law".[38] This seems to go too far. While no doubt there exist rules of international law that are discarded by European Union law in the relationship between the Union and its members, the application of international law is not entirely excluded even in areas covered by European Union law.[39]

44. The European Commission also questioned the pertinence of the reference to a judgment of the European Court of Justice in the last lines of paragraph (9) of the commentary on draft article 9 (A/CN.4/637, sect. II.B.8, para. 3) Some additional sentences could explain the reason why this text is quoted here. However, since the same passage also appears in the commentary on draft article 47 and the reason for the reference is clearer at that place, it seems preferable to delete this reference from the commentary on draft article 9.

Draft article 13

45. The commentary on draft article 13 on aid or assistance by an international organization in the commission of an internationally wrongful act is very short and clearly needs to be supplemented. Various elements that were incorporated in the commentary on article 16 on State responsibility could be transposed here. For instance, although it may be considered as incoherent from a policy perspective,[40] a de minimis criterion would allow one to discard responsibility when the contribution by the international organization is negligible. As stated in the commentary on article 16, there "is no requirement that the aid or assistance should have been

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[38] A/CN.4/637, sect. II.B.3, paras. 2 and 4. Although this remark was made with regard to draft article 4, draft article 9, which considers the legal nature of the rules of the organization, appears to be the more appropriate context for examining it.

[39] The European Court of Justice noted for instance in *Van Duyn* v. *Home Office* that, in the relations among member States, certain principles of international law continued to apply to the free movement of their nationals within the European Community. Judgment of 4 December 1974, Case 41/74, *European Court of Justice Reports*, 1974, p. 1337, para. 22. The Court said that "it is a principle of international law, which the EEC Treaty cannot be assumed to disregard in the relations between Member States, that a State is precluded from refusing its own nationals the right of entry or residence".

[40] This was argued by A. Reinisch, "Aid or assistance and direction and control between States and international organizations in the commission of internationally wrongful acts", *International Organizations Law Review*, vol. 7 (2010), p. 63 at pp. 71-72.

essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that end".[41]

46. Another clarification that could be given in the commentary on draft article 13 concerns the requirement under (a) of "knowledge of the circumstances of the internationally wrongful act". The commentary on article 16 on State responsibility noted that by "providing material or financial assistance or aid" a State "does not normally assume the risk that its assistance or aid may be used to carry out an internationally wrongful act"; "if the assisting or aiding State is unaware of the circumstances in which its aid or assistance is intended to be used by the other State, it bears no international responsibility".[42] One could state that an international organization contributing financially to a project undertaken by a State would normally not be responsible for the way the project is run. However, the organization could be aware of the implications that the execution of a certain project would have for the human rights, including the right to life, of the affected individuals. That issue has arisen, for instance, in relation to compliance with the World Bank's operational policies.[43]

47. In this context reference should be made to an internal document issued on 12 October 2009 by the United Nations Legal Counsel. This concerned the support given by the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) to the Forces armées de la République démocratique du Congo (FARDC), and the risk, to which an internal memorandum had referred, of violations by the latter forces of international humanitarian law, human rights law and refugee law. The Legal Counsel wrote:

> If MONUC has reason to believe that FARDC units involved in an operation are violating one or the other of those bodies of law and if, despite MONUC's intercession with the FARDC and with the Government of the DRC, MONUC has reason to believe that such violations are still being committed, then MONUC may not lawfully continue to support that operation, but must cease its participation in it completely. […] MONUC may not lawfully provide logistic or "service" support to any FARDC operation if it has reason to believe that the FARDC units involved are violating any of those bodies of law. […] This follows directly from the Organization's obligations under customary international law and from the Charter to uphold, promote and encourage respect for human rights, international humanitarian law and refugee law.[44]

48. The Secretariat requested the Commission to specify in its commentary on draft article 13 that "knowledge of the *circumstances of the wrongful act* should be taken to include knowledge of the *wrongfulness of the act*" (A/CN.4/637/Add.1, sect. II.B.7, para. 6). Since subparagraph (b) requires, for responsibility to arise for an assisting international organization, that "the act would be internationally wrongful if committed by that organization", an additional requirement of knowledge of wrongfulness of the act does not seem warranted.

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[41] Paragraph (5) of the commentary on article 16, *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, para. 77.

[42] Ibid., para. (4) of the commentary on article 16. The World Bank insisted on the need to reproduce this idea in the commentary on draft article 13 (A/CN.4/637, sect. II.B.10, paras. 1 and 2).

[43] One of these cases concerned the West African Gas Pipeline Project and its effects on the individuals who were subjected to involuntary resettlement.

[44] The documents were published in the *New York Times*, 9 December 2009, www.nytimes.com.

49. Although the text of article 16 on State responsibility does not convey that responsibility arises only when the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful act, this is the view expressed in the related commentary.[45] With regard to draft article 13, the European Commission suggested that one should add in the commentary some limitative language (intent) in line with the commentaries of the articles on State responsibility (A/CN.4/637, sect. II.B.10). The Secretariat suggested that the commentary specify that "the assistance should be intended for the wrongful act".[46] On the other hand, Cuba proposed that there be no reference to intention and moreover that, as a matter of progressive development, a presumption of knowledge of the circumstances be established.[47] In view of these conflicting comments and of the difficulty of reconciling the requirement of intent with the text of the provision, it seems preferable not to include in the commentary on draft article 13 a discussion of the relevance of intention on the part of the assisting or aiding international organization.

Draft article 14

50. The commentary on draft article 14 should also be developed. This draft article concerns direction and control exercised over the commission of an internationally wrongful act. One could thus include, as suggested by the World Bank (A/CN.4/637, sect. II.B.11, para. 2), the observation that control "refers to cases of domination over the commission of wrongful conduct and not simply the exercise of oversight", as stated in the commentary on article 17 on State responsibility.[48]

51. Paragraph (4) of the commentary on draft article 14 points out that there may be a partial overlap between this draft article and draft article 16 (A/64/10, para. 51). Such an overlap may be limited because, as was observed by the Secretariat, "to the extent that 'direction and control' takes the form of a binding resolution it is difficult to envisage a single resolution controlling or directing a State" (A/CN.4/637/Add.1, sect. II.B.8, para. 3). The possibility of a similar overlap between draft articles 16 and 15 was envisaged in paragraph (3) of the commentary on the latter draft article (A/64/10, para. 51). Moreover, a partial overlap between draft articles 13 and 16 could also be envisaged. One State suggested that the Commission "should consider ways of eliminating such overlaps".[49] This could be done by inserting at the beginning of draft article 16 the words "subject to articles 13 to 15". However, this is not strictly necessary because there is no inconsistency in the fact that responsibility may arise in some circumstances under different draft articles when the conditions set out by each draft article are fulfilled.

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[45] Paragraph (5) of the commentary on article 16, *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, para. 77.

[46] A/CN.4/637/Add.1, sect. II.B.7, para. 7. The same point was made in the written comments by Switzerland, A/CN.4/636/Add.1.

[47] A/CN.4/636, sect. II.B.11, para. 2. In the perspective of progressive development, Cuba also proposed the deletion of the requirement under (b) that the act be internationally wrongful if committed by the assisting or aiding organization. Both proposals concerning progressive development would widen the responsibility of an international organization in relation to that of a State acting under similar circumstances.

[48] Paragraph (7) of the commentary on article 17, *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, para. 77.

[49] Russian Federation, A/C.6/64/SR.16, para. 9.

Draft article 15

52. One State suggested to specify in paragraph 3 of the commentary on draft article 15 that "only where a binding decision is accompanied by additional and illegal action such as a threat or use of force may article 15 become applicable".[50] However, one could also envisage an act of coercion which is not per se unlawful.

Draft article 16

53. Draft article 16 covers responsibility of an international organization for decisions, authorizations and recommendations addressed to member States and international organizations to commit an act that would be wrongful if committed by the former organization. It might be more accurate to refer throughout this draft article to "members" in general rather than to "member States or international organizations", because of the possibility that an international organization avails itself of the conduct of a member which is not a State or an international organization.[51] Were some legal consequences provided in draft article 16 for the member because of its conduct following a decision, authorization or recommendation, the reference to members that are States or international organizations would be in line with the scope of the present draft articles. Since no such consequence is envisaged in draft article 16, it would be preferable to omit this reference.

54. OECD queried the rationale of draft article 16, because a member State to whom a decision or recommendation is addressed "should be responsible for the manner in which it implements, or not, a decision or recommendation" (A/CN.4/637, sect. II.B.12). While the responsibility of the member State concerned is considered in the "without prejudice" clause in draft article 18, draft article 16 seeks to prevent an international organization from taking advantage of its separate legal personality in order to circumvent one of its obligations. While finding that "the term 'circumvent' lacked clarity", the United Kingdom "supported the rationale behind draft article 16".[52]

55. It may be worth considering whether it is necessary to mention "circumvention" in the text of draft article 16.[53] The last words in paragraph 1 ("and would circumvent an international obligation of the former organization") are more an explanation than an addition of a condition. This is clarified by paragraph (4) of the commentary, which states that "a specific intention of circumventing is not required" (A/64/10, para. 51). However, according to one State there should be "an intentional misuse of an organization's powers in order to evade responsibility".[54] Since such an intention would be difficult to prove in practice, the requirement suggested by this State would make responsibility according to draft article 16 problematic.

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[50] Germany, A/CN.4/636, sect. II.B.13, para. 2.

[51] This amendment was suggested by N. Blokker, "Abuse of the members: questions concerning draft article 16 of the draft articles on responsibility of international organizations", *International Organizations Law Review*, vol. 7 (2010), p. 35 at pp. 40-41.

[52] A/C.6/64/SR.16, para. 24. The United Kingdom also made some remarks with regard to the distinction between the two categories outlined in paragraphs 1 and 2 of draft article 16. Singapore sought clarification on "the element of circumvention" (A/C.6/64/SR.15, para. 76).

[53] This point was made by N. Blokker, note 51 above, pp. 42-43. A proposal to suppress the last words in paragraph 1 was also made by Belgium (A/CN.4/636, sect. II.B.14, paras. 1 and 2), but for the different reason that they introduce a subjective element that would be too strict.

[54] Germany, A/CN.4/636, sect. II.B.14: "Germany would understand and support a reading which interprets an act of circumvention to mean an intentional *misuse* of an organization's powers in order to evade responsibility."

56. Paragraph 1 of draft article 16 considers the case where an international organization addresses a binding act to one or more members. Paragraph 2 concerns non-binding acts, the denomination of which varies according to the different international organizations. It may be expedient here to use "recommendation" as a generic term. The idea that an international organization may be responsible when it recommends a certain action to a member is based on the assumption that members are unlikely to ignore recommendations systematically. At least some of the members may be prompted to follow the recommendation. On the other hand, given the large number of recommendations that international organizations make, paragraph 2 widens their responsibility considerably.

57. While one State found that paragraph 2 (b) "struck the right balance between the need to pursue an effective practical criterion and the need for a more restrictive approach",[55] certain States and international organizations were more critical of paragraph 2. The International Monetary Fund (IMF) emphasized that this was "an attempt at progressive development" (A/CN.4/637, note 7). According to the Secretariat, "at least in respect of the proposal to extend responsibility to international organizations in certain cases in connection with *recommendations* that they may make to States or other international organizations, this would appear to extend the concept of responsibility well beyond the scope of previous practice with regard to either States or international organizations" (A/CN.4/637/Add.1, sect. II.B.10, para. 8). The European Commission expressed the view that "to hold that an international organization incurs responsibility on the basis of mere 'recommendations' made to a State or an international organization appears to go too far".[56] A similar view was expressed by ILO, which noted that in the case of a recommendation "there needs to be an intervening act — the decision of the State or another international organization to commit that act. The chain of causation would be thus broken".[57] The Nordic countries expressed their concern "at the suggestion […] that recommendations by international organizations might give rise to the international responsibility of the organization concerned".[58] Several States stressed the need to require in paragraph 2 a stronger link between the recommendation and the conduct of the member.[59]

58. In view of all these critical comments, it may be appropriate for the Commission to reconsider whether draft article 16 should include the current

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[55] Hungary, A/C.6/64/SR.16, para. 38.

[56] A/CN.4/637, sect. II.B.12.

[57] Ibid.

[58] Thus a statement by Denmark on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), A/C.6/64/SR.15, para. 28. Although this concern was expressed with regard to the commentary, it clearly applies also to the text of draft article 16.

[59] Austria (A/CN.4/636, sect. II.B.14, para. 1) suggested requiring "a very close connection between the authorization or recommendation and the relevant act of the member State". The Russian Federation (A/C.6/64/SR.16, para. 10) and Switzerland (A/CN.4/636/Add.1) went in the same direction. Singapore (A/C.6/64/SR.15, para. 77) noted that the commentary "left open the question of whether a mere factual link, or a further element such as predominant purpose, was required". South Africa (para. 72) observed that the "draft article would place a heavy obligation on an organization's member States to resist even the powerful in their midst". However, draft article 16 does not add to the responsibility of members. The proposal by Germany, note 54 above, also covers paragraph 2.

paragraph 2.[60] Should this paragraph be deleted, paragraph 3 would have to be modified. It could read as follows:

> Paragraph 1 applies whether or not the act in question is internationally wrongful for the member or members to which the decision is directed.

Draft article 19

59. One State noted that in draft article 19, which considers consent as a circumstance precluding wrongfulness, the "qualification of the consent by the term 'valid' does not solve the problem" of whether a recommendation by an international organization "already constitutes consent".[61] This would depend on the circumstances. In any event, there is no attempt in draft article 19 or the related commentary to establish when consent exists under specific circumstances. However, the commentary could specify, as the same State appears to suggest,[62] that consent given by an international organization cannot affect the rights that its members may have towards the international organization committing what would be, but for consent, an internationally wrongful act.

60. The Secretariat observed that in the examples given in the commentary on draft article 19, "the consent of the host State is not necessarily precluding the wrongfulness of conduct, but rather a *condition* for that conduct".[63] As with regard to States, consent generally provides a justification of conduct, but may exceptionally be a circumstance precluding wrongfulness. As the Secretariat also noted, in the latter scenario, "the act must be unlawful or already in breach of an international obligation for the responsibility of an international organization to be precluded by the consent of a State or another international organization".[64] The fact that such an event seldom occurs does not render draft article 19 superfluous.

Draft article 20

61. Draft article 20, on self-defence, had a mixed reception. Two States suggested the deletion of draft article 20, one of them on the basis of the argument that Article 51 of the Charter of the United Nations applies only to States and not to international organizations.[65] It was also stated that "the very general reference to international law at the end of the draft article should be clarified to avoid any possible violation of the Charter of the United Nations".[66] As paragraph (5) of the commentary on draft article 20 explains (A/64/10, para. 51), the reference here to international law replaces the reference to the Charter in article 21 on State responsibility because international organizations are not members of the United Nations. No attempt has been made to widen the possibility for international organizations to resort to self-defence. The reference to international law in draft

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[60] Paragraph 2 was also criticized by N. Blokker, note 51 above, pp. 43-46.

[61] Austria, A/CN.4/636, sect. II.B.15, para. 2.

[62] Ibid., para. 1.

[63] A/CN.4/637/Add.1, sect. II.B.11, para. 2.

[64] Ibid., para. 4.

[65] The Islamic Republic of Iran (A/C.6/64/SR.16, para. 50) suggested that the draft article "should be deleted", while Belarus (A/C.6/64/SR.15, para. 37) said that it "could be omitted".

[66] Brazil, A/C.6/64/SR.17, para. 3. A similar concern was expressed by Ghana, para. 13.

article 20 is only designed to align the text of the draft article with the rules that international law may contain on the matter.[67]

62. It would be difficult to provide a detailed analysis of the state of the law, including, as one State suggested, the issue how self-defence on the part of an international organization relates to the sovereignty of the host State.[68] At any event, consistency with the Charter is ensured by draft article 66. As one State noted, "it would be risky to make too general an inference concerning the analogy between the State's natural right to self-defence against armed aggression […] and any right of any international organization or of its organs or agents to resort to force in a variety of circumstances. The wording of draft article 20 was nonetheless sufficiently general to leave the question open".[69] According to another State, "draft article 20 constituted an appropriate compromise solution".[70] Also the Secretariat expressed the view that self-defence should be included in the text of the draft articles among the circumstances precluding wrongfulness (A/CN.4/637/Add.1, sect. II.B.12, para. 3).

63. The issue of whether self-defence should be included among the circumstances precluding wrongfulness was already discussed in my seventh report, where I had proposed to delete the draft article (A/CN.4/610, paras. 58 and 59). This proposal was not accepted by the majority of the Commission. There does not seem to be sufficient reason for reiterating the same proposal here.

Draft article 21

64. Draft article 21 considers countermeasures that an international organization may take both against another international organization and against a State. This is because an international organization could invoke this circumstance precluding wrongfulness in order to justify the breach of an obligation owed to a State.[71]

65. Paragraph 1 sets forth a general rule concerning countermeasures that are taken by international organizations, while paragraph 2 addresses the special case of countermeasures taken by an organization against one of its members. Some States suggested the need for a "cautious approach"[72] or even "extreme caution",[73] but did not propose the deletion of draft article 21 or the inclusion of some additional

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[67] There is some merit in the observation by Japan (A/C.6/64/SR.16, para. 71) that the "substance" of the right of self-defence "with respect to international organizations was not well established under international law, and its scope and the conditions for exercising it were far less clear than in the case of States".

[68] This is one of the questions that Austria would like to see elucidated (A/CN.4/636, sect. II.B.16). The question of the invocability of self-defence by a State when its peacekeeping force is the object of an attack by the host State was recently discussed by the Independent International Fact-Finding Mission on the Conflict in Georgia (see report of the Mission, vol. II, pp. 263-283; available from www.ceiig.ch).

[69] France, A/C.6/64/SR.15, para. 66.

[70] Hungary, A/C.6/64/SR.16, para. 39.

[71] The view that "the question of countermeasures by international organizations against States should better be excluded from the scope of the draft articles" was expressed by Germany, A/CN.4/636, sect. II.B.17, para. 1. This view rests on the main argument that "as a general rule there is […] no room for countermeasures between an international organization and its members". However, one could envisage cases which involve non-compliance of obligations by States that are not members.

[72] China, A/C.6/64/SR.15, para. 44, and India, A/C.6/64/SR.16, para. 73.

[73] Islamic Republic of Iran, A/C.6/64/SR.16, para. 50.

conditions. Another State stressed the "need for further clarification with regard to countermeasures taken by international organizations, owing to the scarcity of practice, the uncertainty surrounding the relevant legal regime and the risk of abuse".[74] Some other States expressed their approval of the text.[75] While OSCE expressed its agreement "with the possibility of countermeasures by and against international organizations" (A/CN.4/637, sect. II.B.21), the Secretariat recommended that "the Chapter on countermeasures not be included" in the draft articles;[76] presumably this should apply also to draft article 21.

66. Measures taken by an international organization against its members in case of non-compliance are not necessarily countermeasures. A distinction should be made between, on the one hand, non-compliance by a State with its obligations as a member of the organization and, on the other, non-compliance with obligations that the member State may have otherwise acquired, for instance through a headquarters agreement or a bilateral agreement on immunities and privileges of the organization and its agents. While countermeasures could be envisaged in the latter case, in the former case the rules of the organization may provide for sanctions that cannot be assimilated to countermeasures, as was noted in paragraph (3) of the commentary on draft article 21 (A/64/10, para. 51) and emphasized by one State.[77]

67. Paragraph 2 considers countermeasures that an international organization may take against members, whether they are States or international organizations. The expression "member State or international organization" is intended to cover all the States and international organizations that are members.[78] One State "supported the restrictive approach taken with regard to countermeasures in draft article 21, paragraph 2".[79] Another State suggested excluding countermeasures altogether in the relations between an international organization and its members, or at least "to make it very clear that countermeasures have to be deemed *inconsistent* with the rules of the organization unless there are clear indications that the internal rules of the organization (potentially also including sanctions) were *not* meant to exclusively govern the relationship between an international organization and its members".[80] While this may be how the rules of several international organizations have to be understood, the current exercise does not purport to offer criteria for interpreting the rules of the organization in general or the rules of a particular organization.

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[74] Malaysia, A/C.6/64/SR.21, para. 31.

[75] See the statements by Italy, A/C.6/64/SR.16, para. 16, and Hungary, para. 39. The view that international organization should be assimilated to States for the purposes of countermeasures was expressed by F. Dopagne, *Les contre-mesures des organisations internationales* (Louvain-la-Neuve: Anthemis, 2010).

[76] A/CN.4/637/Add.1, sect. II.B.13, para. 10. The elements of practice which are examined by the Secretariat (paras. 2 and 3) do not concern cases where the United Nations may be regarded as "injured" (within the meaning of draft articles 42 and 50) by the non-compliance of an obligation by a State.

[77] Portugal, A/CN.4/636, sect. II.B.17, para. 2.

[78] Austria suggested in its written comments "to clarify that the qualifier 'member' relates also to international organizations which are members of the organization in question" (A/CN.4/636, sect. II.B.17, para. 2). The Drafting Committee may wish to look on this matter.

[79] Brazil, A/C.6/64/SR.17, para. 3. There is some similarity to the opinion expressed by Switzerland, A/CN.4/636/Add.1, according to which countermeasures may be taken against member States only if the purpose and mandate of the organization envisage that possibility or, at least, are not against it.

[80] Germany, A/CN.4/636, sect. II.B.17, para. 2.

Draft article 24

68. Draft article 24 considers necessity among the circumstances precluding wrongfulness. The Secretariat supported "the inclusion of the rule on 'necessity' in the proposed draft articles" (A/CN.4/637/Add.1, sect. II.B.14, para. 4). One State criticized the inclusion of this draft article, stressing in particular the difficulty in understanding the terms "essential interest of the international community" and "seriously impair [an] essential interest of the State".[81] However, these terms already appear in article 25 on State responsibility. Another State, while agreeing on the content of draft article 24, maintained that the term "essential interest" should be defined and suggested references to the protection of the environment and the preservation of the very existence of a State or its population at the time of public emergency.[82] The consideration of a more specific definition would be more appropriate with regard to the articles on State responsibility, where the commentary took however the view that "the extent to which a given interest is 'essential' depends on all the circumstances, and cannot be prejudged".[83]

69. One State favoured the opinion of some members of the Commission which was referred to at the end of paragraph (4) of the commentary on draft article 24, "according to which an international organization may invoke necessity where it is the only means for the organization to safeguard an essential interest of its member States that the organization has the function to protect against a grave and imminent peril".[84] Although this opinion is not without merit, it would lead to widen the scope of necessity considerably.

70. With regard to the relations between an international organization and its members, another State "would prefer if the principle of necessity were invocable only if the act in question constitutes the only means for the organization to fulfil its mandate".[85] In the draft articles, the possibility that the scope of necessity in the relations with the members reflects particular principles is left to the rules of the organization as special rules.

71. It was suggested that the "international practice of NATO, the United Nations, the Organization of American States, etc. shows that international organizations consider the operational/military necessity principle as a rule based first and foremost on customary law".[86] A reference to this practice could be included in the commentary, although it may appear to concern the content of primary rules on the conduct of armed conflict rather than the circumstance precluding wrongfulness now under consideration.

Recommendation

72. The proposals concerning amendments to the text of the draft articles discussed in this section relate to draft article 16. These proposals are outlined in paragraphs 51, 55 and 58. On the basis of these proposals draft article 16 would read as follows:

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[81] Belarus, A/C.6/64/SR.15, para. 38.

[82] Cuba, A/CN.4/636, sect. II.B.18.

[83] Paragraph (15) of the commentary on article 25, *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, para. 77.

[84] Germany, A/CN.4/636, sect. II.B.18.

[85] Austria, A/CN.4/636, sect. II.B.18, para. 3.

[86] Ibid., para. 4.

"1. Subject to articles 13 to 15, an international organization incurs international responsibility if it adopts a decision binding a member to commit an act that would be internationally wrongful if committed by the organization.

"2. Paragraph 1 applies whether or not the act in question is internationally wrongful for the member or members to which the decision is directed."

IV. Part Three (Content of the international responsibility of an international organization)

Draft article 29

73. The Secretariat queried whether draft article 29 (b), concerning assurances and guarantees of non-repetition, should be included, "in view of the complete absence of cited practice with respect to the provision of assurances and guarantees of non-repetition by international organizations" (A/CN.4/637/Add.1, sect. II.B.15, para. 2). This subparagraph is identical to article 30 (b) on State responsibility. It is difficult to see why international organizations should be exempted from giving assurances and guarantees of non-repetition when, as subparagraph (b) sets forth, "circumstances so require".

Draft article 30

74. WHO, in the comments it submitted together with a group of other organizations, criticized the principle set forth in draft article 30 that a responsible international organization is required to make "full reparation for the injury caused by the internationally wrongful act". The reason given is that the principle "could lead to excessive exposure taking into account that international organizations in general do not generate their own financial resources".[87] A similar point was made by ILO.[88] The difficulty or even impossibility of facing the obligation to provide full reparation does not concern only international organizations. Paragraphs (1) and (2) of the commentary recall that the principle "seeks to protect the injured party from being adversely affected by the internationally wrongful act", but that "it is often applied in practice in a flexible manner" (A/64/10, para. 51). It is to be noted that the only State that made a comment on reparation "supported the draft articles on reparation for injury contained in part three, chapter II, in particular draft article 35", relating to compensation.[89]

75. The Secretariat called attention to the financial limitations applying to claims against the United Nations resulting from peacekeeping operations, but acknowledged that "in order to ensure the opposability of such limitations to third parties, the United Nations concludes agreements with member States in whose territories peacekeeping missions are deployed" (A/CN.4/637/Add.1, sect. II.B.16, para. 6).

Draft article 31

76. According to paragraph 1 of draft article 31, "the responsible international organization may not rely on its rules as justification for failure to comply with its

[87] A/CN.4/637, sect. II.B.13.
[88] Ibid., paras. 1-3.
[89] Islamic Republic of Iran, A/C.6/64/SR.16, para. 53.

obligations". This paragraph refers to the obligations under part three, but since draft article 31 directly concerns the relations between obligations under international law and the rules of the organization, it has been the focus of criticism by several international organizations.

77. The Council of Europe noted that "it would seem difficult to hold an international organization responsible for provisions contained in its constituent treaty which are wrongful under international law".[90] Clearly, the international organization is not the author of its constituent treaty and cannot be responsible for this. However, it may be responsible for conduct taken in accordance with its constituent treaty. The IMF expressed in a modified form its long-standing view that an international organization cannot be held responsible unless it has breached its "constituent document (i.e., its charter) which, along with the rules and decisions adopted thereunder, constitute the *lex specialis* […] or has otherwise breached a peremptory norm of international law or another obligation that it has voluntarily accepted".[91] A similar view was expressed by OECD, though without making an exception with regard to obligations voluntarily accepted.[92] There may not be many rules of general international law that apply to international organizations. Insofar as they do, these rules and the agreements concluded with other subjects of international law could conceivably be modified by the rules of the organization only in the relations between the international organization and its members. Thus, with regard to non-members, including persons and entities which may benefit from obligations under general international law, international organizations cannot be relieved by their rules from complying with their obligations. In the relations with non-members the constituent instrument of an international organization cannot exempt the organization from responsibility arising under the otherwise applicable rules of international law.[93]

78. The European Commission considered that "it is not consistent for the draft articles to state on the one hand, that a responsible international organization may not rely on its internal law ('its rules') to justify its failure to comply its obligations (draft article 31 (1)), and, on the other hand, state that a breach of the internal law of the organization may amount to a breach of international law (draft article 9 (1))".[94] Consistency is in fact ensured by the fact that, in the relations between an international organization and its members, the general rules of international law do not apply to the extent that they have been modified by the rules of the organization. This also covers the rules on the responsibility of international organizations, which are specifically mentioned in paragraph 2 of draft article 31 with regard to the provisions contained in part three. In this context, the Secretariat recalled that, since the rules of the United Nations "include the United Nations Charter, reliance on the latter would be a justification for failure to comply, within the meaning of article 31, paragraph 1" (A/CN.4/637/Add.1, sect. II.B.17, para. 1). The wider significance of the Charter results from draft article 66.

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[90] A/CN.4/637, sect. II.B.14.

[91] Ibid., sect. II.A, para. 2.

[92] Ibid., sect. II.B.26, para. 1

[93] ILO (A/CN.4/637, sect. II.B.14) maintained that constituting instruments take "precedence" without distinguishing between relations that an international organization may have with members and those with non-members.

[94] Ibid.

Draft article 32

79. Draft article 32, paragraph 1, states that the obligations owed according to part three "may be owed to one or more other international organization, to one or more States, or to the international community as a whole". Paragraph (5) of the commentary adds that "while the consequences of […] breaches with regard to individuals, as stated in paragraph 1, are not covered by the draft, certain issues of international responsibility arising in these contexts are arguably similar to those that are examined in the draft" (A/64/10, para. 51). The Secretariat recommended the deletion of paragraph (5) of the commentary because "it may create a misconception that the rules contained in the draft article apply with respect to entities and persons other than States and international organizations" (A/CN.4/637/Add.1, sect. II.B.18, para. 2). Such a misconception would arise from ignoring the statement that breaches with regard to individuals are not covered. However, if it was felt more appropriate, the last part of the quoted passage could be omitted.

Draft article 36

80. With regard to draft article 36 on satisfaction, ILO suggested "to add a qualifier at the end of the second paragraph of draft article 36, such as 'made in accordance with the rules of the organization concerned' or a reference to a 'competent organ'" (A/CN.4/637, sect. II.B.16). It is to be assumed that the rules of the organization will apply to determining the organ of the international organization that is competent to give satisfaction. They will also be relevant for many other articles. As was noted in paragraph (7) of the commentary on draft article 63, "the rules of the organization may, expressly or implicitly, govern various aspects of the issues considered in parts two to five" (A/64/10, para. 51). There does not seem to be sufficient reason for adding a specific reference to the rules of the organization in draft article 36.

Draft article 37

81. According to the Secretariat, draft article 37 on interest, "like others in this part, should be subject to the 'rules of the organization', and the principle of *lex specialis* within the meaning of article 63 of the present draft articles".[95] While there may exist special rules on interest applying to particular international organizations, and possibly to the United Nations because it "does not pay interest" "as a matter of policy",[96] this does not seem to be a sufficient reason for making a specific reference to special rules in draft article 37. These rules, to the extent that they modify the general rule on interest, would be applicable on the basis of draft article 63.

Draft article 39

82. WHO and the organizations making joint comments with it suggested, as "an exercise in progressive development", to modify draft article 39 in order "to state the obligation of member States to provide sufficient financial means to

[95] A/CN.4/637/Add.1, sect. II.B.20, para. 3.
[96] Ibid., para. 2.

organizations with regard to their responsibility".[97] ILO would like to see draft article 39 "reinforced even further".[98]

83. The text of draft article 39 and its commentary clearly imply that member States have no obligation under international law, other than the obligation that may exist under the rules of the organization, to provide the organization with the means for effectively making reparation. Several States endorsed this approach, some of them wishing to see this idea stated more explicitly.[99] This may not be necessary in view of what is stated in draft article 61 on the responsibility of member States; however, the term "in accordance with the rules of the organization" in draft article 39 may be the source of some ambiguity which could be removed. There is also merit in the proposal made by one State to modify the commentary when it suggests that a requirement to contribute is "generally implied in the rules of the organization".[100] A more nuanced commentary would be in line with the approach of restraint generally maintained in the commentaries when the rules of the organization are considered.

84. Paragraph (4) of the commentary on draft article 39 includes a text that had been proposed by some members of the Commission. According to this text, "the 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 this chapter" (A/64/10, para. 51). The commentary noted that this obligation for the organization may be considered as "implied in the obligation to make reparation". Two States suggested including the proposed text in the draft article.[101] An attempt could be made to combine the draft article with the text proposed by the minority. A tentative text, which also tries to meet the concern referred to in paragraph 83 above, could run as follows:

> 1. The members of a responsible international organization shall take all the appropriate measures that may be required by the rules of the organization in order to enable the organization to fulfil its obligations under this chapter.
>
> 2. The responsible international organization shall take all appropriate measures in accordance with its rules to ensure that its members provide it with the means for effectively fulfilling its obligations under this chapter.

Draft article 41

85. The only comment on draft article 41, concerning the consequences of a serious breach of an obligation arising under a peremptory norm, was made by a State to the effect that "international organizations should have the obligation,

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[97] A/CN.4/637, sect. II.B.17.

[98] Ibid.

[99] See the statements by Belarus (A/C.6/64/SR.15, para. 36), Hungary (A/C.6/64/SR.16, para. 40), Portugal (para. 46) and Greece (para. 62) and the written comments by Germany (A/CN.4/636, sect. II.B.19, para. 3) and the Republic of Korea (A/CN.4/636/Add.1). A similar position was taken by Austria, A/CN.4/636, sect. II.B.19, para. 4. The Islamic Republic of Iran (A/C.6/64/SR.16, para. 53), while sharing the same view, maintained that "the brunt of responsibility in such cases should be borne by those members which, on account of their decision-making role or overall position within the organization, had contributed to the injurious act".

[100] Germany, A/CN.4/636, sect. II.B.19, para. 2.

[101] India (A/C.6/64/SR.16, para. 74) and Austria (A/CN.4/636, sect. II.B.19, para. 4).

similar to that incumbent on States, to cooperate, within the framework of their constituent instruments, in putting an end to a serious breach committed by another organization".[102] This is in substance an endorsement of paragraph 1 of draft article 41.

Recommendation

86. In conclusion to this section, the only proposal of amendment concerning the text of the draft articles included in part three concerns draft article 39. This amendment is suggested in paragraph 84 above.

V. Part Four (The implementation of the international responsibility of an international organization)

Draft article 44

87. One State suggested rewording paragraph 1, concerning the admissibility of claims against an international organization, especially in order to make it clear that the protection of human rights is not subject to the requirement of the nationality of claims.[103] Paragraph 1 states that "an injured State may not invoke the responsibility of an international organization if the claim is not brought in accordance with any applicable rule relating to nationality of claims". Given that obligations concerning human rights are obligations *erga omnes*, any State other than the State of nationality would be entitled to invoke responsibility as a non-injured State. The fact that nationality is irrelevant for such a claim already results from draft article 48, paragraph 5, according to which paragraph 1 of draft article 44 does not apply to claims put forward by States which are entitled to invoke responsibility other than as injured States.

88. The present draft articles do not specifically address questions relating to the exercise of functional protection. OSCE suggested that the Commission consider functional protection specifically (A/CN.4/637, sect. II.B.19). Another State noted that the "present text leaves open the question of whether an international organization can exercise functional protection on behalf of its officials that were injured by a different organization".[104] A specific consideration of these issues would not seem necessary, also in view of the fact that functional protection will only rarely be exercised by an international organization against another international organization.

89. Paragraph 2 of draft article 44 concerns the exhaustion of local remedies in relation to a claim by an injured State or international organization against another international organization. The Secretariat stressed that "it is essential to clarify at the outset that the reference to 'exhaustion of local remedies' should not be read to suggest any obligation on the part of international organizations in any context to open themselves up to the jurisdiction of national courts or administrative

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[102] Cuba, A/C.6/64/SR.17, para. 15.

[103] El Salvador, A/CN.4/636, sect. II.B.21, para. 4. The suggested rewording is intended to remove any ambiguity that paragraph 1 could have in making the requirement of nationality of claim applicable in all circumstances. While the English text does not seem ambiguous, the Spanish text of the draft articles may be improved to meet this concern.

[104] Austria, A/CN.4/636, sect. II.B.21.

tribunals".[105] Since paragraph 2 requires the exhaustion of remedies "provided by that organization", the point already seems sufficiently clear. Moreover, the commentary on draft article 44 explains that the term "local remedies" has been used as a "term of art" and that remedies to be exhausted before national courts are only required when "the international organization has accepted their competence to examine claims".[106]

Draft article 47

90. The last sentence of paragraph 3 of the commentary on draft article 47, concerning plurality of responsible States or international organizations, considers subsidiary responsibility and reads: "Subsidiarity does not imply the need to follow a chronological sequence in addressing a claim."[107] One State found this sentence to be inconsistent with paragraph 2 of draft article 47, according to which subsidiary responsibility "may be invoked insofar as the invocation of the primary responsibility has not led to reparation".[108] However, the sentence included in the commentary is not intended to imply that the State or international organization which has only subsidiary responsibility should provide reparation before the condition set forth in paragraph 2 has been fulfilled. The sentence in question is only designed to allow flexibility when presenting claims. This could be further explained in the commentary.

Draft article 48

91. One State considered that in draft article 48 the concepts of "obligations owed to the international community as a whole" and "responsibility towards the international community" were "problematic".[109] However, these concepts were already used in article 48 on State responsibility and appear to keep the same meaning when they are applied with regard to international organizations.

92. In respect of the breach of an obligation owed to the international community as a whole, two States expressed their support for the solution adopted in paragraph 3 of draft article 48.[110] This restricts the entitlement to make a claim to those international organizations which have the function to safeguard "the interest of the international community underlying the obligation breached". One of these States considered that it would be "too far-reaching to grant an entitlement to all international organizations, regardless of the functions entrusted to them by their members".[111]

Draft article 50

93. Draft article 50 opens the chapter on countermeasures. The divided views offered by States and international organizations on whether international organizations are entitled to take countermeasures or may be targeted by countermeasures have been examined above, in relation to draft article 21.

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[105] A/CN.4/637/Add.1, sect. II.B.21, para. 2. The Secretariat added that "the reference to 'exhaustion of local remedies' in this context could create confusion".

[106] Paragraphs (7) and (9) of the commentary, A/64/10, para. 51.

[107] Ibid.

[108] Germany, A/CN.4/636, sect. II.B.22.

[109] Belarus, A/C.6/64/SR.15, para. 39.

[110] Czech Republic (A/C.6/64/SR.15, para. 58) and Germany (A/CN.4/636, sect. II.B.23).

[111] Germany, A/CN.4/636, sect. II.B.23.

94. Non-performance of international obligations may be justified as a countermeasure only insofar as it is directed against a responsible international organization. As suggested by OSCE, the commentary could include some developments on "the issue of the impact of countermeasures on non-targeted entities" (A/CN.4/637, sect. II.B.21).

95. One State considered that "an international organization may resort to countermeasures only if such measures are in conformity with its constituent instrument".[112] While it may be expected that an international organization will comply with its rules when adopting countermeasures, compliance with the rules of the organization cannot represent a general condition for the lawfulness of countermeasures in relation to non-members. The same State suggested that, in order to take countermeasures, an international organization "must be endowed with the competence to take such measures under its rules".[113] The existence of particular requirements under the rules of the organization would seem to depend on the specific rules of the organization concerned.

96. The European Union Commission noted that, given the specific regime of countermeasures in the World Trade Organization (WTO) system, "to the extent that these countermeasures are authorized by treaty it is arguable that these do not provide genuine examples of countermeasures under general international law" (A/CN.4/637, sect. II.B.21). This is meant as a criticism of the fact that paragraph (4) of the commentary on draft article 50 (A/64/10, para. 51) included a reference to a decision taken by a WTO panel. However, the commentary quoted a passage of that decision because it contains remarks concerning the regime of countermeasures under general international law.

Draft article 51

97. When considering countermeasures by members of an international organization, draft article 51 sets forth two conditions, one of which is that "countermeasures are not inconsistent with the rules of the organization". It may well be that with regard to many international organizations, as one State suggested, the requirement that countermeasures should not be inconsistent with the rules of the organization would imply the need for "a clear indication that the rules were *not* meant to fully regulate their subject matter, i.e. the legal relationship between a member State and the organization".[114] Another State observed that "the Commission might wish to give further consideration to the case of organizations that did not have [a dispute resolution] mechanism and/or had either constitutive agreements or rules that either prohibited countermeasures or were silent on their use".[115] However, as has already been observed, it is not the task of the Commission to state a general presumption concerning the content of the rules of international organizations or to interpret the rules of any particular international organization.

Draft article 52

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[112] Austria, A/CN.4/636, sect. II.B.24, para. 2.
[113] Ibid.
[114] Germany, A/CN.4/636, sect. II.B.25, para. 2.
[115] Ireland, A/C.6/64/SR.16, para. 65.

98. Draft article 52 concerns the international obligations existing towards international organizations which cannot be the object of countermeasures. Paragraph (1) of the commentary on draft article 52 (A/64/10, para. 51) explains the concept of countermeasures as implying "the existence of an obligation towards the targeted entity"; in this context the commentary gives the example of the prohibition of the use of force. Contrary to an observation of the Secretariat (A/CN.4/637/Add.1, sect. II.B.23, para. 1), the Commission never suggested that force could be lawfully used against an international organization as countermeasure. Moreover, subparagraph 1 (a) expressly sets forth that countermeasures shall not affect "the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations". It might nevertheless be preferable, in order to avoid further misunderstandings, for the commentary to give a different example of an "obligation towards the target entity".

99. One State suggested the deletion of the term "fundamental" as a qualifier of "human rights" in draft article 52, subparagraph 1 (b).[116] This proposal was made in view of developments in the protection of human rights. However, these developments are not specific to international organizations. Moreover, the extent to which norms of general international law apply to the protection of human rights by international organizations is still unclear. It is therefore preferable to retain the wording "fundamental human rights", which was used in article 50, subparagraph 1 (b) on State responsibility.

100. According to the Secretariat, subparagraph 2 (b) of draft article 52 "should be redrafted to accurately reflect the privileges and immunities enjoyed by international organizations" (A/CN.4/637/Add.1, sect. II.B.23, para. 2). As explained in paragraph (2) of the commentary on draft article 52 (A/64/10, para. 51), subparagraph 2 (b) is not intended to cover all the privileges and immunities of international organizations. Its purpose is to set forth a restriction to countermeasures which is parallel to the one contained in article 50, subparagraph 2 (b) on State responsibility. This refers to "the inviolability of diplomatic or consular agents, premises, archives and documents".

Draft article 56

101. Draft article 56 is a saving clause, which is similar to article 54 on State responsibility. Thus, draft article 56 does not purport to provide a solution of the controversial issue concerning measures taken by an entity other than an injured State or international organization. One State endorsed draft article 56 while alleging the existence of a grammatical error in the French text.[117] Another State suggested that the current formulation be deleted and replaced by a text referring to collective security under the Charter of the United Nations.[118] An explanation may be added to the commentary to the effect that the measures envisaged in draft article 56 are *a fortiori* subject to the restrictions set forth for countermeasures in the preceding draft articles, including respect for the prohibition to the threat or use of force according to draft article 52, subparagraph 1 (a).

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[116] El Salvador, A/CN.4/636, sect. II.B.26, para. 11.

[117] Written comments by Belgium (on file with the Codification Division).

[118] Cuba, A/CN.4/636, sect. II.B.27.

Recommendation

102. Part four of the draft articles has been the object of relatively few comments. No proposal of amendment to the text of the draft articles has been made in this section.

VI. Part Five (Responsibility of a State in connection with the act of an international organization)

Draft article 57

103. Draft article 57 concerns aid or assistance given by a State to the commission of an internationally wrongful act by an international organization. According to ILO, this draft article and the two following ones "seem to deny a distinct legal personality of international organizations" (A/CN.4/637, sect. II.B.23, para. 2). Similarly, a State expressed concern about the possibility that "the distinction between the acts of the State and those of international organizations" could be blurred and "the separate legal personality of international organizations" be called into question.[119] Paragraph (2) of the commentaries on draft articles 57 and 58 pointed to the need to distinguish "between participation by a member State in the decision-making process of the organization according to its pertinent rules", on the one hand, and aid or assistance, or direction and control, which would trigger the application of draft articles 57 and 58, on the other hand.[120] Two States sought clarification on this point.[121] Another State suggested that "the character of an international organization, its function, its powers and its internal rules of decision-making make a decisive difference in clarifying the 'repartition' of international responsibility for a wrongful act between a State and an organization".[122] The commentary could explain that, while a member State is not relieved of its own obligations when it acts within an international organization, it cannot be held responsible for the conduct of an international organization to which it contributed according to the rules of the organization. Only the conduct of a member State which goes beyond what is required from it by the rules of the organization could amount to aid or assistance, or direction and control, in an internationally wrongful act of the international organization.

Draft article 58

104. One State found that in draft article 58 the words "directs and controls" were "ambiguous".[123] These words appear in article 17 on State responsibility in relation to the responsibility of a State for directing and controlling another State in the commission of an internationally wrongful act. It seems reasonable to use the same words when a State directs and controls an international organization, although the modalities may be different.

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[119] South Africa, A/C.6/64/SR.15, para. 71.

[120] A/64/10, para. 51. A similar point was made in paragraph (2) of the commentary on draft article 59 on coercion.

[121] China (A/C.6/64/SR.15, para. 45) and Belgium (A/CN.4/636, sect. II.B.28).

[122] Austria, A/CN.4/636, sect. II.B.29.

[123] South Africa, A/C.6/64/SR.15, para. 71.

Draft article 59

105. The point was made by one State that "the circumstances under which a State would be deemed to have coerced an international organization should be clarified".[124] Another State suggested that coercion should be further qualified, to the effect that "there must be a direct link between the coercive act of the State and the activity of the international organization".[125] Here again, the concept of coercion cannot reasonably differ from the one used in article 18 on State responsibility with regard to the coercion exercised by one State over another for the commission of an act that would, but for the coercion, be an internationally wrongful act of the coerced State. The requirement that "the act would, but for the coercion, be an internationally wrongful act" of the coerced international organization appears with the same wording in draft article 59, subparagraph (a). This requirement would seem to imply the existence of a "direct link" between the act of the coercing State and the act of the coerced international organization. This point could be further developed in the commentary.

Draft article 60

106. Various States approved the approach taken by the Commission in adopting draft article 60 on the responsibility of a member State for seeking to avoid compliance, although some of these States sought certain clarifications or amendments.[126] On the other hand, the European Commission reaffirmed its view that it saw no "need for this provision".[127] Two States suggested that paragraph (7) of the commentary on draft article 60 be modified so as to include the requirement of a specific intent of circumvention.[128] Another State considered that responsibility should be conditional on an abuse of rights, an abuse of the separate legal personality of the organization or bad faith.[129] According to yet another State, "a requirement of specific intent to circumvent obligations and of proof of such intent might make it difficult to establish responsibility in practice".[130] While the latter point is well taken, the wording of draft article 60, which considers that a State "seeks to avoid complying with one of its own international obligations by taking advantage of the fact that the organization has competence in relation to the subject

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[124] Ibid.

[125] Austria, A/CN.4/636, sect. II.B.30.

[126] Reference may be made to the positions taken by France (A/C.6/64/SR.15, para. 65), Germany (A/CN.4/636, sect. II.B.31, para. 1), Hungary (A/C.6/64/SR.16, para. 39), Ireland (A/C.6/64/SR.15, para. 66) and Singapore (A/C.6/64/SR.15, paras. 75-78). The latter State approved draft article 60 as a matter of progressive development and requested an elaboration of the words "seeking to avoid compliance".

[127] Comments of the European Commission, on file with the Codification Division.

[128] See the statement of France (A/C.6/64/SR.15, para. 65) and the written comments by Germany (A/CN.4/636, sect. II.B.31, para. 2). Also, the European Commission expressed the view that "some basic or general level of intent on the part of the member State should be required" (A/C.6/64/SR.17, para. 22). Paragraph (7) of the commentary on draft article 60 (A/64/10, para. 51) includes the following sentence: "An assessment of a specific intent on the part of the member State of circumventing an international obligation is not required."

[129] This is the position taken by Belgium (A/CN.4/636, sect. II.B.31, para. 2), although this State also criticized the draft article because of the presence of some subjective elements which in its opinion should not be included (para. 1).

[130] Ireland, A/C.6/64/SR.16, para. 66.

matter of that obligation", implies the existence of a subjective element which at present is not adequately reflected in the commentary.

107. A State raised various questions concerning the role of member States in relation to the modalities of voting within the international organization concerned.[131] The observations made in paragraph 103 above seem pertinent also with regard to draft article 60. Thus, a State would not incur responsibility for conduct as a member within an international organization when that conduct is in accordance with the rules of that organization. On the other hand, there may be an overlap between draft article 60 and draft articles 57 to 59, as the same State implicitly suggested.[132] As has been suggested in paragraph 51 above, with regard to draft article 16, the overlap could be avoided by introducing at the beginning of draft article 60 the words "subject to articles 57 to 59".

108. Paragraphs (3) and (4) of the commentary on draft article 60 (A/64/10, para. 51) consider two decisions by the European Court of Human Rights concerning the obligations of States parties to the European Convention of Human Rights when they transfer functions to an organization of which they are members. A State suggested that the Commission also consider some more recent decisions by the same Court.[133] A reference could be made in the commentary to the decision of 12 May 2009 in *Gasparini* v. *Italy and Belgium*. An application had been made against these two States in view of the alleged inadequacy of the settlement procedure concerning employment disputes with NATO. The Court said that States, when they transfer part of their sovereign powers to an organization of which they are members, are under an obligation to see that the rights guaranteed by the Convention receive within the organization an "equivalent protection" to that ensured by the Convention mechanism. As in previous decisions, the Court found that this obligation had not been breached, in this case because the procedure within NATO was not tainted with "manifest insufficiency".[134]

Draft article 61

109. Draft article 61 concerns the responsibility of a State member of an international organization for the internationally wrongful act of that organization. Subparagraph 1 (a) considers acceptance of responsibility by a member State. This has been rightly understood as implying an acceptance expressed vis-à-vis the party invoking a State's responsibility.[135] The European Commission suggested to add in subparagraph 1 (a) the requirement that acceptance is made "in conformity with the rules of the organization" (A/CN.4/637, sect. II.B.25, para. 1). However, when a State accepts responsibility, what may be relevant in order to establish the validity of acceptance is the internal law of that State rather than the rules of the organization.

110. The European Commission criticized subparagraph 1 (b), which considers a member State responsible when "it has led the injured party to rely on its

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[131] Austria, A/CN.4/636, sect. II.B.31.

[132] Ibid.

[133] Written comments by Belgium (A/CN.4/636, sect. II.B.31, para. 3), which expressed some criticism of the decisions by the European Court of Human Rights. As this State noted, draft article 60 is not intended to codify the jurisprudence of that Court.

[134] European Court of Human Rights, application No. 10750/03, decision of 12 May 2009. Issued in French; text available at www.rtdh.eu/pdf/20090512_gasparini_c_italie.pdf.

[135] Germany, A/CN.4/636, sect. II.B.32, para. 2.

responsibility", as insufficiently supported by practice.[136] One State queried the pertinence of certain references in the commentary to judicial decisions which dealt with "responsibility or liability under a domestic legal order".[137] However, these references concern passages in which national courts either made some remarks on the issue whether member States were responsible under international law or expressed some general views that seem applicable also under the perspective of international law.[138]

111. Another State, apart from suggesting the deletion of the reference in paragraph (10) of the commentary on draft article 61 to the size of membership, suggested adding in subparagraph 1 (b) a qualifier of reliance such as "legitimate".[139] The rationale of this subparagraph is to protect third parties when they have been prompted by certain States to deal with an international organization of which they are members on the understanding that the same States would ensure that the organization complies with its obligations. One could say that the third parties then legitimately rely on this implied guarantee, but the adverb does not seem to add significantly to the text.

112. One State queried as "unusual" the assertion in paragraph 2 of draft article 61 that member States are presumed to have only a subsidiary responsibility.[140] Given the fact that in the case in hand it is the international organization that committed an internationally wrongful act, it seems likely that member States intend to acquire an obligation to make reparation only when the organization fails to meet its obligations.

Recommendation

113. In the present section the only amendment suggested to the text of the draft articles concerns the opening words of draft article 60, as proposed in paragraph 107.

VII. Part Six (General provisions)

Draft article 63

114. Some aspects of the role of the *lex specialis* within the draft articles were considered above, particularly in paragraph 3. International organizations emphasized in their comments the importance of draft article 63. Both ILO and the World Bank described it as a "key provision" in the draft articles.[141] ILO suggested that "the scope of draft article 63 […] be understood broadly, not just as relevant to the determination of responsibility of an international organization, but also as pre-empting any general international law rules where they coexist, following the principle *lex specialis derogat generali*" (A/CN.4/637, sect. II.B.26, para. 2). On the other hand, one State found that draft article 63 was extremely wide in scope;[142] another State cautioned against the possible invocation by an organization of its

[136] A/CN.4/637, sect. II.B.25, para. 2.
[137] Austria, A/CN.4/636, sect. II.A, para. 6.
[138] Paragraphs (4), (7) and (9) of the commentary, A/64/10, para. 51.
[139] Germany, A/CN.4/636, sect. II.B.32, para. 3.
[140] Austria, A/CN.4/636, sect. II.B.32.
[141] A/CN.4/637, sect. II.B.26, paras. 1 and 2 of the respective comments.
[142] Belgium, A/CN.4/636, sect. II.B.33.

internal rules in order to justify the breach of an international obligation;[143] yet another State considered that "no *lex specialis* should be contemplated apart from the internal law of the international organization concerned".[144] To complete the picture, one State found draft article 63 "satisfactory".[145]

115. Most of the special rules that prevail over general rules are likely to be contained in the rules of the organization. As draft article 63 sets forth, the rules of the organization would be "applicable to the relations between the international organization and its members". For instance, they may regulate the entitlement of a State to invoke the responsibility of an international organization of which it is a member.[146] There may also be special rules that apply to a group of international organizations or to a particular international organization also in their relations to non-members. A possible example is given in paragraphs (2) to (5) of the commentary on draft article 63 (A/64/10, para. 51).

116. The example in question relates to the attribution to the European Union of conduct of member States when they implement binding acts of the European Union.[147] Paragraph (5) referred to two decisions of the European Court of Human Rights. One could add to the commentary a reference to the decision of 20 January 2009 in *Kokkelvisserij* v. *Netherlands*.[148] In this decision, which concerned "the guarantees offered by the European Community — especially the European Court of Justice — in discharging its own jurisdictional tasks" with regard to a preliminary reference by a court in the Netherlands, the European Court of Human Rights reiterated its position that the conduct of an organ of a member State should at any event be attributed to that State. The Court said:

> A Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations.

117. As has been noted in the two preceding paragraphs, draft article 63 admits the possibility that special rules may govern the relations between a particular international organization and non-members. One State suggested going further and including a "provision requiring the special characteristics of a particular organization to be taken into account in applying the draft articles".[149] On the other hand, another State approved the fact that "the Commission had refrained from adding a new provision on the specific characteristics and variety of international organizations, since such a provision could have jeopardized the draft articles as a whole by allowing organizations leeway to sidestep them".[150]

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[143] Ghana, A/C.6/64/SR.17, para. 14.

[144] Belarus, A/C.6/64/SR.15, para. 41.

[145] France, A/C.6/64/SR.15, para. 67.

[146] See United Kingdom, A/C.6/64/SR.16, para. 26.

[147] The view that conduct should then be attributed to the European Union was recently restated by F. Hoffmeister, "Litigating against the European Union and its member States: who responds under the ILC's draft articles on international responsibility of international organizations?", *European Journal of International Law*, vol. 21 (2010), p. 723.

[148] Application No. 13645/05.

[149] United Kingdom, A/C.6/64/SR.16, para. 28.

[150] Hungary, A/C.6/64/SR.16, para. 40.

Draft article 65

118. Draft article 65 is a saving clause, concerning "any question of the individual responsibility under international law of any person acting on behalf of an international organization or State". One State suggested that it should be "made clear in draft article 65 that individual responsibility included both civil and criminal matters".[151] The commentary on article 58 on State responsibility, which is a parallel provision to draft article 65, only refers to criminal responsibility.[152] While only criminal responsibility is likely to arise for individuals under international law, criminal responsibility may also entail civil responsibility towards the victims of a crime. This point may be added in the commentary.

Draft article 66

119. Four States queried the need for a provision such as draft article 66.[153] This opinion was expressed for different reasons. For instance, one State found the provision superfluous,[154] while another State cast doubts over the idea that international organizations are generally bound by the Charter of the United Nations.[155] Views were expressed also in defence of keeping draft article 66. A State considered that "the specific reference to the Charter in draft article 66 was also a step in the right direction".[156] The Secretariat suggested that the commentary should also include, like the commentary on the parallel provision in the articles on State responsibility,[157] the statement that "the articles are in all respects to be interpreted in conformity with the Charter" (A/CN.4/637/Add.1, sect. II.B.26, para. 4).

120. Since draft article 66 is a saving clause, it may not be necessary for the Commission to dwell on the effects that the Charter has on the responsibility of international organizations. The view expressed in paragraph (2) of the commentary (A/64/10, para. 51), that "practice points to the existence of a prevailing effect [of the Charter] also with regard to international organizations", does not need to be stated. This view was criticized by one State,[158] which referred to the judgment of the European Court of Justice in *Kadi and Al Barakaat* v. *Council and Commission*.[159] However, this judgment did not adopt the perspective of international law when considering the relations between the Charter of the United Nations and the EC Treaty.

121. Paragraph (3) of the commentary on draft article 66 (A/64/10, para. 51) points out that "the present article is not intended to affect the applicability of the principles and rules set forth in the preceding articles to the international responsibility of the United Nations". The Secretariat found that this paragraph was

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[151] Islamic Republic of Iran, A/C.6/64/SR.16, para. 51.

[152] *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, para. 77.

[153] See the statements by Ghana (A/C.6/64/SR.17, para. 12), the Islamic Republic of Iran (A/C.6/64/SR.16, para. 51) and Portugal (A/C.6/64/SR.16, para. 47) and the written comments by Portugal (A/CN.4/636, sect. II.B.34) and Switzerland (A/CN.4/636/Add.1).

[154] This appears to be the position of Ghana, A/C.6/64/SR.17, para. 12.

[155] See the comments by Switzerland, A/CN.4/636/Add.1.

[156] Brazil, A/C.6/64/SR.17, para. 5.

[157] Paragraph (2) of the commentary on article 59, *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, para. 77.

[158] Switzerland, A/CN.4/636/Add.1.

[159] Judgment of 3 September 2008, *European Court of Justice Reports*, 2008, p. I-6351.

"unclear, as to whether it is intended to exclude the United Nations from the scope of application of article 66" (A/CN.4/637/Add.1, sect. II.B.26, para. 2). This is certainly not the meaning of the paragraph in the commentary. As the Secretariat noted, "the United Nations could invoke the Charter and Security Council resolutions — to the extent that they reflect an international law obligation — to justify what might otherwise be regarded as non-compliance" (A/CN.4/637/Add.1, sect. II.B.26, para. 3). This could be explained in the commentary.

Recommendation

122. No proposal of amendment to the text of the draft articles is made in this section.