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Responsibility of international organizations

Comments and observations received from international organizations

Contents

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I. Introduction

An additional written reply, containing comments and observations on the draft articles on the responsibility of international organizations adopted on first reading by the International Law Commission at its sixty-first session (2009), was received from the United Nations (14 February 2011).

II. Comments and observations received from international organizations

A. General comments

United Nations

1. The United Nations Secretariat ("the Secretariat") notes that full recognition of the "principle of speciality" is fundamental to the treatment of the responsibility of international organizations. As the International Court of Justice observed in its advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*

> "… international organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the 'principle of speciality', that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them."[1]

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

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

[1] I.C.J. Reports, 1996, p. 66, at p. 78, para. 25.

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

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

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

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

B. Specific comments on the draft articles

Part One
Introduction

1. Draft article 2
Use of terms

United Nations

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

2. Draft article 2, subparagraph (b), raises the difficulty of the double nature of the "rules of the organization", both as internal rules and rules of international law. While in its commentary on draft article 2 of the draft articles on the law of treaties between States and international organizations or between international organizations, of 1982, the Commission acknowledged the difficulty[2] and concluded that "[t]here would have been problems in referring to the 'internal law' of an organization, for while it has an internal aspect, this law also has in other respects an international aspect", there is little discussion of this difficulty in the present draft articles. As presently defined, and subject to draft article 9, the "rules of the organization", whether internal rules or rules of international law, could entail the international responsibility of the organization.

3. The Secretariat questions the propriety of transposing the definition of the "rules" under the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations to the field of international responsibility. It is furthermore of the view that the broad definition of the "rules of the organization" which includes instruments extending far beyond the constituent instruments of the organization, not only increases greatly the breadth of potential breaches of "international law" obligations for which the organization may be held responsible, but also, and more importantly, subject to draft article 9, could extend them to breaches of internal rules as well.

4. To fully appreciate the impact of the proposed definition on the scope of application of the draft articles to the United Nations, the Secretariat wishes to provide the Commission with a brief description of the United Nations instruments that would typically fall within the current definition of the "rules of the organization", and the nature of which, depending on the rule in question, may be either international or internal:

- The constituent instrument of the United Nations is the Charter of the United Nations. While most of its provisions are international in character, certain provisions, such as Article 101, also constitute internal law of the Organization.
- "Decisions" and "resolutions" are normally understood as decisions and resolutions of the principal organs of the United Nations, such as the General Assembly, the Security Council[3] and the Economic and Social Council. Some decisions or resolutions of Principal Organs, such as international conventions adopted by the General Assembly, are international law in character, while others, such as resolutions adopting the Staff Regulations and Rules or the Financial Regulations and Rules, constitute internal law of the Organization.
- "Acts of the organization" consist of a variety of very different instruments, that is, decisions and resolutions of all organs, including the Secretariat (Secretary-General's bulletins and other administrative issuances), exchange of letters between and among heads of United Nations organs, judicial decisions and rulings of United Nations-based international tribunals and internal United Nations tribunals, international agreements concluded between the Secretary-

[2] See *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 10* (A/37/10), para. 63, commentary on draft article 2, paragraph (25).

[3] The term "decision" of the Security Council now includes presidential statements adopted by the Security Council.

General and States or other international organizations, as well as contractual arrangements of all kinds.

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

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

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

> "any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the Organization with carrying out, or helping to carry out, *one of its functions* — in short, any person through whom it acts"[4] (emphasis added).

8. The proposed definition omits, however, the qualifying preceding clause from the advisory opinion of the International Court of Justice: "any person who … has been charged by an organ of the Organization with carrying out, or helping to carry out, *one of its functions*" (emphasis added). In its commentary on draft articles 5 and 7, the Commission notes that the term "agent" is "intended to refer not only to officials but also to other persons acting *for the United Nations on the basis of functions conferred by an organ of the organization*",[5] and that "organs and agents are persons and entities exercising the *functions* of the organization".[6] The nature of the functions performed, however, is not an express element of the Commission's definition.

9. In order to carry out its functions, the Organization acts through a wide variety of persons and entities in different ways. These may range from staff members carrying out core functions of the United Nations to individual or corporate contractors providing goods and services, whose functions are incidental or ancillary to the "functions of the Organization". This wide range of persons and entities, which goes far beyond the original categories of "staff" as envisaged by the Charter of the United Nations, or "officials" and "experts on mission" under the Convention on the Privileges and Immunities of the United Nations, has evolved in the 60-year practice of the Organization. These developments reflect the exponential

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[4] *Reparation for Injuries Suffered in the Service of the United Nations, I.C.J. Reports 1949*, p. 174 at p. 177.

[5] Commentary to draft article 5, para. (3).

[6] Commentary to draft article 7, para. (2).

growth in the number, diversity and complexity of United Nations mandates. Thus, the Organization routinely enters into partnerships and other collaborative arrangements with entities such as Governments and non-governmental organizations (NGOs), and engages contractors to provide goods and services.

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

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

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

> "the Contractor shall have the legal status of an independent contractor vis-à-vis the United Nations, and nothing … shall be construed as establishing … the relationship of employer and employee or of principal and agent. The officials, representatives, employees or subcontractors of each of the Parties shall not be considered in any respect as being the employees or agents of the other Party, and each Party shall be solely responsible for all claims arising out of or relating to its engagement of such persons or entities".
>
> The contract also requires the contractor to indemnify, hold harmless and defend the United Nations in respect of any claims regarding any acts or omissions of the contractor or any subcontractor employed by them in the performance of the contract. While such contracts may not be opposable vis-à-vis third parties, they set forth the position of the Organization as to the nature of the relationship between the parties.

11. The United Nations also routinely uses "executing agencies" and "implementing partners" to carry out certain aspects of its activities. The United Nations Development Programme (UNDP) regularly uses "executing agencies" to carry out aspects of its programmes of assistance. Under the UNDP Standard Basic Assistance Agreement, "executing agencies" are to be given privileges and immunities and are defined to include specialized agencies and the International Atomic Energy Agency (IAEA). They are given the status of an "independent contractor". "Implementing partners" may include NGOs and governmental bodies. Both UNDP and the Office for the Coordination of Humanitarian Affairs enter into agreements with NGOs to perform certain activities. Under the "Standard Project Cooperation Agreement between UNDP and an NGO", it is specified that NGO personnel shall *not be considered employees or agents of UNDP*, and that UNDP does not accept any liability for claims arising out of the activities performed under

the agreement. The agreement also requires that the NGO shall indemnify and hold harmless UNDP from all claims.

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

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

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

Part Two
The internationally wrongful act of an international organization

Chapter II
Attribution of conduct to an international organization

2. Draft article 5
General rule on attribution of conduct to an international organization

United Nations

1. In the introductory commentary on chapter II on Attribution of conduct to an international organization, the International Law Commission makes the point — otherwise self-evident — that

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

While this statement would not otherwise call for any comment on the part of the United Nations, in the light of the recent jurisprudence of the European Court of

Human Rights — which attributed to the United Nations responsibility for conduct of military forces operating under national or regional command and control — the Secretariat wishes to comment in some detail on the principles and practice of United Nations peacekeeping operations, which have developed over the past six decades.

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

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

3. In determining the attributability of an act or an omission of members of a military operation to the United Nations, the Organization has been guided by the principle of "command and control" over the operation or the action in question. Its position on the scope of its responsibility for the operational activities of military operations, including for combat-related activities, was set out in the report of the Secretary-General on the financing of the United Nations Protection Force and other peacekeeping operations, according to which:[7]

> "17. The international responsibility of the United Nations for combat-related activities of United Nations forces is premised on the assumption that the operation in question is under the exclusive command and control of the United Nations. Where a Chapter VII-authorized operation is conducted under national command and control, international responsibility for the activities of the force is vested in the State or States conducting the operation. [...]
>
> "18. In joint operations, international responsibility for the conduct of the troops lies where operational command and control is vested according to the arrangements establishing the modalities of cooperation between the State or States providing the troops and the United Nations. In the absence of formal arrangements between the United Nations and the State or States providing troops, responsibility would be determined in each and every case according to the degree of effective control exercised by either party in the conduct of the operation."

4. Questions about attribution of responsibility to a United Nations or a United Nations-authorized operation have arisen in the practice of the United Nations in only two cases: the operation in the Republic of Korea, and the Somalia operation.

[7] A/51/389.

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

5. The Korean operation in the 1950s was the first United Nations-authorized operation.[8] Conducted under United States unified command, it reported periodically, through the United States Government, to the Security Council. Claims against the operation were settled by the Unified Command or, as the case may have been, by the participating States pursuant to bilateral agreements concluded between the United States and the participating States. While the United Nations cannot say with confidence that all such claims were settled and compensated for by the Unified Command, it can say with certainty that none were settled by the United Nations.

6. In Somalia, between 1992 and 1994, a number of United Nations and United States-led operations were deployed for the most part simultaneously and within the same area of operation. They maintained a separate command and control structure, including in the conduct of joint or coordinated operations.[9] Claims commissions established by either operation settled third-party claims according to whether the United Nations or the United Nations-authorized operation had effective command and control over any given operation.

7. The practical arrangements put in place for settling third-party claims in Somalia, where multiple operations were conducted sequentially or simultaneously, reflects the principle that each State or organization is responsible for damage caused by forces under its command and control, regardless of the fact that in both cases the Security Council, as the "source of authority", had either mandated or authorized the operation. In settling a large number of third-party claims for damage caused by forces under its command and control, the United States as well as other States contributing troops have accepted responsibility and liability in compensation. In the case of Somalia, as in that of the Republic of Korea, while the United Nations cannot attest to the settlement of all such claims by the United States, it can confirm that no such claims were attributed to the United Nations, or otherwise compensated by the Organization.

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

[8] The operation in the Republic of Korea was established pursuant to Security Council resolution 83 (1950) (see S/1511 of 27 June 1950).

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

property to the extent that such claims arise from or in connection with, acts or omissions of that party or of its personnel or agents.[10]

9. The recent jurisprudence of the European Court of Human Rights, beginning with the *Behrami and Saramati*[11] case disregarded this fundamental distinction between the two kinds of operation for purposes of attribution. In attributing to the United Nations acts of a United Nations-authorized operation International Security Force in Kosovo (KFOR) conducted under *regional command and control*, solely on the grounds that the Security Council had "delegated" its powers to the said operation and had "ultimate authority and control" over it, the Court disregarded the test of "effective command and control" which for over six decades has guided the United Nations and Member States in matters of attribution.

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

Definition of an "organ"

11. Draft article 2 provides no definition of an "organ". This omission is presumably based on the assumption that, as in the case of article 4, paragraph (2), of the articles on the responsibility of States for internationally wrongful acts,[12] an

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[10] These include the Agreement between the United Nations Organization and the Government of the United States of America Concerning the Establishment of Security for the United Nations Assistance Mission for Iraq, 2005; the arrangement between the United Nations and the European Union concluded further to the Arrangement on the European Union Force in the Democratic Republic of the Congo (EUFOR RD Congo) support to the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC), 2006; the Technical Arrangement between the United Nations and the Government of Australia Concerning Cooperation with and Assistance to the United Nations Integrated Mission in Timor-Leste (UNMIT), 2007; and the Arrangements between the United Nations and the European Union Governing the Cooperation between the United Nations Mission in the Central African Republic and Chad (MINURCAT) and the European Union Force EUFOR Tchad/RCA, 2008. The case of the African Union/United Nations Hybrid Operation in Darfur (UNAMID) is the exception. Established by Security Council resolution 1769 (2007) as a joint operation, UNAMID is a joint subsidiary organ of both the United Nations and the African Union. Responsibility for third-party claims for personal injury, death and property damage attributable to UNAMID is "settled by the United Nations" only (para. 54 of the Agreement between the United Nations and the African Union and the Government of the Sudan Concerning the Status of the African Union/United Nations Hybrid Operation in Darfur, 2008).

[11] *Behrami and Saramati*, Application No. 71412/01, European Court of Human Rights, 2 May 2007. The *Behrami and Saramati* case was followed by a string of cases in which the question of attribution was similarly decided by the European Court. *Kasumaj v. Greece*, Application No. 6974/05, European Court of Human Rights, 5 July 2007; *Gajic v. Germany*, Application No. 31446/02, European Court of Human Rights, 28 August 2008; *Beric v. Bosnia and Herzegovina*, Application No. 36357/04, European Court of Human Rights, 16 October 2007.

[12] Article 4 (2) provides that "an organ includes any person or entity which has that status in accordance with the internal law of the State".

"organ" is that which the rules of the organization determine it to be, or that no distinction between an "organ" or an "agent" is necessary or relevant for the purpose of attribution of conduct to an international organization.

12. In the view of the Secretariat, "an agent" and "an organ" are not necessarily interchangeable. While an "agent" may or may not be contractually linked to the United Nations, an "organ" must maintain an "organic link" to the Organization to be considered as such by the Organization. A diversity of entities that are currently either "institutionally linked" to the United Nations or serviced by it,[13] or otherwise established by agreement between the United Nations and a Member State pursuant to a mandate by a principal organ,[14] are not considered United Nations organs, notwithstanding the degree of assistance to, or control over such entities. The Secretariat would thus favour a definition of an "organ" to read: "[a]ny entity which has that status in accordance with the rules of the organization".

3. Draft article 6
Conduct of organs or agents placed at the disposal of an international organization by a State or another international organization

United Nations

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

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

3. It has been the long-established position of the United Nations, however, that forces placed at the disposal of the United Nations are "transformed" into a United Nations subsidiary organ[15] and, as such, entail the responsibility of the Organization, just like any other subsidiary organ, regardless of whether the control exercised over all aspects of the operation was, in fact, "effective". In the practice of the United Nations, therefore, the test of "effective control" within the meaning of

[13] For example, human rights treaty bodies, or secretariats of environmental conventions.

[14] For example, the Special Court for Sierra Leone, the Special Tribunal for Lebanon or the International Commission against Impunity in Guatemala established by agreements between the United Nations and the Governments of Sierra Leone, Lebanon and Guatemala, respectively.

[15] Paragraph 15 of the 1990 model status-of-forces agreement for peacekeeping operations provides that, "[t]he United Nations peacekeeping operation, as a subsidiary organ of the United Nations, enjoys the status, privileges and immunities of the United Nations ..." (A/45/594, annex).

draft article 6 has never been used to determine the division of responsibilities for damage caused in the course of any given operation between the United Nations and any of its troop-contributing States. This position continued to obtain even in cases — such as UNOSOM II in Somalia — where the United Nations command and control structure had broken down.

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

5. Mindful of the realities of peacekeeping operations but keen to maintain the integrity of the United Nations operation vis-à-vis third parties, the United Nations has struck a balance, whereby it remains responsible vis-à-vis third parties, but reserves the right in cases of gross negligence or wilful misconduct to revert to the lending State. Under article 9 of the memorandum of understanding between the United Nations and the [participating State] contributing resources to [the United Nations peacekeeping operation],

> "[t]he United Nations will be responsible for dealing with any claims by third parties where the loss of or damage to their property, or death or personal injury, was caused by the personnel or equipment provided by the Government in the performance of services or any other activity or operation under this MOU. However, if the loss, damage, death or injury arose from gross negligence or wilful misconduct of the personnel provided by the Government, the Government will be liable for such claims".[16]

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

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[16] A/C.5/60/26, chap. 9, art. 9. In another context, administrative instruction ST/AI/1999/6 on gratis personnel provides in section 13, on third-party claims, as follows: "The United Nations shall be responsible for dealing with claims by third parties where the loss of or damage to their property, or death or personnel injury was caused by the actions or omissions of the gratis personnel in the performance of services to the United Nations under the agreement with the donor. However, if the loss, damage, death or injury arose from gross negligence or wilful misconduct of the gratis personnel provided by the donor, the donor shall be liable to the United Nations for all amounts paid by the United Nations to the claimants and all costs incurred by the United Nations in settling such claims."

4. Draft article 7
Excess of authority or contravention of instructions

United Nations

1. In paragraph (4) of its commentary on draft article 7, the International Law Commission notes that the "key element for attribution" in respect of *ultra vires* acts "is the requirement that the organ or agent acts 'in that capacity'", namely, in its official capacity. It explains that "[t]his wording is intended to convey the need for a close link between the *ultra vires* conduct and the organ's or agent's functions". The commentary further notes that the practice of the United Nations is consistent with the principle.

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

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

4. In this connection, the Secretariat notes that the 1986 opinion quoted by the Commission[17] does not reflect the consistent practice of the Organization. In 1974, the Office of Legal Affairs advised the Field Operations Service as to whether the United Nations Emergency Force (UNEF) Claims Review Board was authorized to handle and settle claims in respect of tortious acts committed during the Force members' off-duty periods. It advised that "there may well be situations involving actions by Force members off duty which the United Nations could appropriately recognize as engaging its responsibility", and made a distinction between off-duty acts of Force members in circumstances closely related to the functions of the Force member (i.e., the use of a Government-issued weapon), and actions entirely unrelated to the Force member's status as such. Accordingly, the test for the attribution of the act was whether it related to the functions of the Organization, irrespective of whether the Force member was on or off duty at the time.

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

[17] In para. (9) of the commentary.

organs of the organization, in the light of the fact that an agent may have a more remote institutional link to the organization than an organ.

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

5. Draft article 8
Conduct acknowledged and adopted by an international organization as its own

United Nations

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

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

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

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

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

Chapter III
Breach of an international obligation

6. Draft article 9
Existence of a breach of an international obligation

United Nations

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

2. The Commission states in its commentary that "[f]or an international organization most obligations are likely to arise from the rules of the organization", and that it is "preferable to dispel any doubt that breaches of these obligations are also covered by the present articles. The wording in paragraph 2 is intended to include any international obligation that may arise from the rules of the organization".[18]

3. In the debate over the nature of the "rules of the organization", the Commission did not take a stand. In paragraph (6) of its commentary, it stated that: "… paragraph 2 does not attempt to express a clear-cut view on the issue. It simply intends to say that, to the extent that an obligation arising from the rules of the organization has to be regarded as an obligation under international law, the principles expressed in the present article apply." The Secretariat takes this to mean that only breaches of international law obligations contained in the rules, and not breaches of the rules as such, would be considered breaches of an international obligation within the meaning of draft article 9. The question of whether any given rule entails an international obligation depends on the nature, object and purpose of the rule in question, and on whether it is intended to give rise to an international legal obligation. The Secretariat recalls in this connection that many of the rules of the Organization, including resolutions of its political organs, may not give rise to international law obligations.

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

Chapter IV
Responsibility of an international organization in connection with the act of a State or another international organization

7. Draft article 13
Aid or assistance in the commission of an internationally wrongful act

United Nations

1. The Secretariat is unaware of any case in which the United Nations has assisted a State or another international organization in the commission of an

[18] Commentary on draft article 9, para. (4).

internationally wrongful act, or where its international responsibility was otherwise invoked in connection with the behaviour of the recipient of its assistance. Recently, however, the possibility of United Nations aid or assistance being used to facilitate the commission of unlawful acts arose in the case of the United Nations Mission in the Democratic Republic of the Congo (MONUC).

2. Established by Security Council resolution 1279 (1999), MONUC was mandated both to protect civilians and to support Government forces in their operations to disarm foreign and Congolese armed groups.[19] In the course of MONUC-assisted operations it became apparent that elements of Government-led forces, notably the Armed Forces of the Democratic Republic of the Congo (FARDC) who were the beneficiaries of United Nations assistance, committed violations of human rights and international humanitarian law of the kind they were supposed to prevent with United Nations aid.[20] Faced with the dilemma of continuing to provide assistance to Government forces, as mandated by the Security Council, and the risk that by doing so the United Nations would be perceived as implicated in the commission of the wrongful act, the Security Council modified the MONUC mandate. By resolution 1856 (2008), it authorized MONUC to support only those operations of the FARDC that were jointly planned in accordance with international humanitarian, human rights and refugee law.

3. In implementing Security Council resolution 1856 (2008), the Secretary-General devised a "conditionality policy" setting out the conditions for MONUC assistance. Accordingly, the Mission was not to participate in or support operations with FARDC units if there were substantial grounds for believing that there was a real risk that such units would violate international humanitarian, human rights or refugee law in the course of the operation.[21]

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

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

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[19] Security Council resolutions 1565 (2004) and 1794 (2007).

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

[21] Thirtieth report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo (S/2009/623).

The Council also

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

5. The case of MONUC is an example of a policy decision taken by the Organization to avoid being implicated or being perceived to be implicated in facilitating the commission of a wrongful act. And while it remains a unique example, the United Nations Secretariat nevertheless supports the inclusion of an appropriate article addressing aid or assistance in the commission of an internationally wrongful act in the draft articles. In this connection, the Secretariat wishes to underscore the fundamental difference between States and international organizations, whose aid and assistance activities in an ever-growing number and diversity of areas, often constitute their core functions.

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

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

8. Draft article 14
Direction and control exercised over the commission of an internationally wrongful act

United Nations

1. The rule on "direction and control" finds its parallel in article 17 of the articles on the responsibility of States for internationally wrongful acts. An illustration of the principle in relation to international organizations or an example of "joined exercise" of "direction and control", in the view of the Commission, is the argument made by France in the case of the *Legality of Use of Force (Yugoslavia v. France)* before the International Court of Justice, whereby "NATO [was] responsible for the 'direction' of KFOR, and the United Nations, for 'control' of it".[22]

2. In its commentary on article 17 of the articles on the responsibility of States for internationally wrongful acts, the International Law Commission noted that "the

[22] Commentary on draft article 14, para. (2).

term ‘controls’ refers to cases of domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or concern”, and that “the word ‘directs’ does not encompass mere incitement or suggestion but rather connotes actual direction of an operative kind”.[23] An example of “direction and control” exercised by an international organization “in certain circumstances”[24] is a binding decision leaving no discretion to the State or the organization to which it is addressed to carry out the conduct mandated by the resolution.

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

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

5. In the light of the foregoing, the Secretariat has serious doubts about the existence of “certain circumstances” in which a binding decision could constitute “direction and control” within the meaning of draft article 14, and is of the view that the draft article has little practical effect for the Organization.

9. Draft article 15
Coercion of a State or another international organization

United Nations

1. In paragraph (2) of its commentary on draft article 15, the Commission points out that “between an international organization and its member States or international organizations, a binding decision by an international organization could give rise to coercion only under *exceptional circumstances*” (emphasis added). It reproduces the commentary on article 18 of the articles on the responsibility of States for internationally wrongful acts and its description of coercion as follows:

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[23] *Yearbook of the International Law Commission, 2001, vol. II (Part Two)*, as corrected, para. 77, commentary to art. 17, para. (7).

[24] Commentary on draft article 14, para. (3).

> "[c]oercion … has the same essential character as *force majeure* … Nothing less than conduct which forces the will of the coerced State will suffice, giving it no effective choice but to comply with the wishes of the coercing State".

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

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

10. Draft article 16
Decisions, authorizations and recommendations addressed to member States and international organizations

United Nations

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

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

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

4. The United Nations has on occasion received claims for damages resulting from the implementation of a Security Council sanctions regime. In cases where claims were submitted for financial loss or damage, or for costs otherwise incurred in implementing Security Council enforcement measures, the Secretariat has rejected the responsibility of the Organization and maintained the position that in

carrying out enforcement measures under Chapter VII, States are responsible for meeting the costs of their implementation actions.

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

> "… under international law it is clear that if the Security Council takes action under Chapter VII of the Charter, individuals or corporate entities that suffer financial loss as a consequence of such action do not have a claim against the United Nations".[25]

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

> "[t]he responsibility for carrying out embargoes imposed by the Security Council rests with Member States which are accordingly responsible for meeting the costs of any particular action they deem necessary for ensuring compliance with embargo."[26]

7. In the *Kadi* case decided before the European Court of Justice, the Court held that its judicial review was not of the legality of the Security Council resolution under international law, but that of its implementing Regulation within the European Union legal order. Its conclusion was premised on the assumption that States remain free to choose the particular model of implementation of Security Council resolutions in their domestic legal order, and that giving effect to Security Council resolutions must be in accordance with "the procedure applicable in that respect in the domestic legal order of each member of the United Nations".[27]

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

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[25] *United Nations Juridical Yearbook*, 1993, pp. 352-353.

[26] *United Nations Juridical Yearbook*, 1995, pp. 464-465.

[27] Joined cases C-402/05 P + C – 415/057, *Kadi + Al Basakaat v. Council of the European Union*, 3 C.M.L.R 41 (2008).

either States or international organizations, and suggests that the Commission reconsider this point.

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

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

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

Chapter V
Circumstances precluding wrongfulness

11. Draft article 19
Consent

United Nations

1. In its commentary on draft article 19, the Commission notes that the principle that consent precludes the unlawfulness of conduct is generally relevant in the case of an international organization when such consent is given "by the State on whose territory the organization's conduct takes place".[28] It cites the examples of a United Nations commission of inquiry conducting an investigation, or a United Nations verification or monitoring mission deployed in a State's territory.[29]

2. The Secretariat is of the view that in these examples the consent of the host State is not necessarily a circumstance precluding the wrongfulness of conduct, but rather a *condition* for that conduct, as it is, in fact, a condition for the deployment of any United Nations presence in a State's territory (i.e., a United Nations conference, a United Nations Office, a peacekeeping operation (other than a Chapter VII

[28] Para. (2).
[29] Para. (3).

operation), a political mission, a commission of inquiry or any other judicial or non-judicial accountability mechanism). A State's consent for the presence of the United Nations or for the conduct of its operational activities in its territory is thus the legal basis for the United Nations deployment, without which the conduct would not take place.

3. In traditional peacekeeping operations where consent has been withdrawn before the end of the mandate, the withdrawal of the United Nations operation has usually followed suit. The case of UNEF in 1967 is the most notable example. A more recent case is that of Eritrea, which in 2008 demanded the withdrawal of the United Nations Mission from its territory. In its resolution 1827 (2008), adopted on 30 July 2008, the Security Council "[regretted] that Eritrea's obstructions towards the United Nations Mission in Ethiopia and Eritrea (UNMEE) reached a level so as to undermine the basis of the Mission's mandate and compelled UNMEE to temporarily relocate from Eritrea", and decided "to terminate UNMEE's mandate effective on 31 July 2008".

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

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

12. Draft article 20
Self-defence

United Nations

1. In its commentary, the Commission notes that self-defence is an exception to the prohibition on the use of force; that its applicability to international organizations is likely to be relevant to only those international organizations "administering a territory or deploying an armed force", and that the "extent to which United Nations forces are entitled to resort to force depends on the primary rules concerning the scope of the mission …".[30]

[30] Paras. (2) and (3).

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

3. The use of force in self-defence in situations of armed conflict has not been uncommon in the practice of peacekeeping operations — the cases of the United Nations Protection Force (UNPROFOR) in Bosnia and Herzegovina, UNOSOM in Somalia, MONUC in the Democratic Republic of the Congo and the United Nations Mission in the Sudan (UNMIS) and UNAMID in the Sudan and in Darfur, respectively, are only some of the most recent examples. In the long practice of peacekeeping operations, including United Nations transitional administrations, however, there has never been a case where the responsibility of the Organization was invoked for the illegal (or "aggressive") use of force (*jus ad bellum*). However, the Organization has accepted liability in respect of certain types of damages incurred in the course of military operations, whether offensive or defensive in nature (*jus in bello*), normally through a third-party claims process implemented through the respective peacekeeping mission.

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

13. Draft article 21
Countermeasures

United Nations

1. The institution of countermeasures[31] as applicable to States is not easily transferable to international organizations. While countermeasures taken by States are intrinsically unlawful (but for the fact of the initial wrongfulness), countermeasures taken by international organizations are situated somewhere in the seam between legality and illegality, as they must be "not inconsistent" with the rules of the organization. Countermeasures undertaken by international organizations, therefore, cannot be specifically allowed, but they cannot be specifically prohibited either. The rules of the organization must be silent on the matter for the measure to be "not inconsistent" with the rules, and thus qualified as a "countermeasure" within the meaning of the draft articles of the International Law Commission. The question of what effect, if any, the silence of the rules has on the permissibility or otherwise of the measure, remains debatable.

2. In the practice of the United Nations, while decisions have occasionally been made to achieve a result other than by means expressly provided for under the Charter of the United Nations, none has been qualified as a countermeasure. One such example was the exclusion of South Africa at the time of apartheid, from participation in meetings of the General Assembly and in conferences convened by it. In a legal opinion on the "Procedures for the suspension of a Member State from an organ open to general membership — Article 5 of the Charter", the United

[31] Given the universal character of the United Nations, in which all States are presently members, the Secretariat has limited its comments to countermeasures taken by the Organization against its Member States.

Nations Legal Counsel expressed the view that any State upon admission to membership is entitled to expect that its obligations will not be increased and its rights not be entailed "except in the manner expressly laid down in the Charter"; that the only procedure by which a State might be denied the rights and benefits of membership are those laid down in Articles 5, 6 and 19 of the Charter of the United Nations, and that,

> "[h]ad the drafters of the Charter intended to curtail membership rights in a manner other than those provided for in Articles 5, 6 and 19 of the Charter they would have so specified in the Charter. It may therefore be concluded that procedures to suspend a Member State from any of the benefits, rights and privileges of membership which do not follow those laid down in Article 5 are *not consonant* with the legal order established by the Charter" (emphasis added).[32]

3. The principle that the exercise of powers or the employment of means not expressly provided for under the Charter of the United Nations (to achieve a result other than by the means provided for) are inconsistent with the Charter of the United Nations, was applied by the Office of Legal Affairs in subsequent years in other different contexts (i.e., rejection of the credentials of South Africa[33] or the case of the non-representation of the Federal Republic of Yugoslavia[34]). Based on the foregoing, it is highly likely that the questions of what legal effect should be attributed to the silence of the rules, and whether "not inconsistent with" necessarily means "not illegal", will remain debatable.

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

5. Equally overlooked is the principle of "cooperation and good faith" guiding the relations between the Organization and its Member States,[35] against which the institution of countermeasures should also be examined when applied by analogy from States.

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

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[32] *United Nations Juridical Yearbook*, 1968, p. 195.

[33] A/8160.

[34] A/47/485, annex.

[35] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, para. 43 at p. 93.

7. In the practice of the United Nations no measure taken, whether against a State or an organization, has ever been qualified as a countermeasure. Nevertheless, certain authors suggest that some instances could be considered countermeasures, such as the decision by the General Assembly to reject the credentials of South Africa in response to its policies of apartheid;[36] the expulsion of South Africa from the Universal Postal Union in 1979; the rejection of the Israeli credentials by IAEA in 1982 in the aftermath of the raid on the Osiraq reactor; the denial of ILO cooperation assistance from Myanmar in 1999 in response to its practice of forced labour; the suspension in 1962 of Cuba from membership in the Organization of American States; and the suspension of Egypt from the Organization of the Islamic Conference in 1979 in the aftermath of the peace agreement with Israel. In none of these cases, however, were the measures adopted qualified as countermeasures.

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

9. The Secretariat agrees with the Commission's conclusion that "sanctions, which an organization may be entitled to adopt against its members according to its rules, are per se lawful measures and cannot be assimilated to countermeasures".

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

14. Draft article 24
Necessity

United Nations

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

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[36] The legality of the measure under the rules of the Organization, however, was debatable. While some defended the legality of the measure, others argued that the action by the General Assembly interfered illegally with South Africa's rights of membership in the United Nations, and thus in violation of the Charter. See Dugard, John, "Sanctions against South Africa. An international law perspective", in Orkin, Mark (ed.), *Sanctions against Apartheid*, David Philip Publishers, 1989. See also Dopagne, Frederic, *Les contre-mesures des organisations internationales*, Anthemis, 2010, pp. 91-95.

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

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

> "(a) There must be a good-faith conviction on the part of the force commander that an "operational necessity" exists;
>
> (b) The operational need that prompted the action must be strictly necessary and not a matter of mere convenience or expediency. It must also leave little or no time for the commander to pursue another, less destructive option;
>
> (c) The act must be executed in pursuance of an operational plan and not the result of a rash individual action;
>
> (d) The damage caused should be proportional to what is strictly necessary in order to achieve the operational goal".[37]

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

Part Three
Content of the international responsibility of an international organization

Chapter I
General principles

15. Draft article 29
Cessation and non-repetition

United Nations

1. With respect to subparagraph (b) of the draft article, paragraph (4) of the commentary on article 29 states that "[e]xamples of assurances and guarantees of non-repetition given by international organizations are hard to find". In fact, the

[37] A/51/389, para. 14.

commentary provides no example of an assurance or guarantee of non-repetition provided by an international organization. The commentary continues, however, that "should an international organization be found in persistent breach of a certain obligation — such as that of preventing sexual abuses by its officials or members of its forces — guarantees of non-repetition would hardly be out of place".

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

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

16. Draft article 30
Reparation

United Nations

1. In applying the principle of full reparation to international organizations, the International Law Commission recognizes the inadequacy of financial resources often available to international organizations to respond in cases of international responsibility. In this connection, it suggests that compensation offered ex gratia by international organizations is not necessarily due to abundance of resources, but rather to their reluctance to admit their international responsibility.[38]

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

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

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

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

[38] Commentary on draft article 30, paras. (3) and (4).

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

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

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

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

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

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

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

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

17. Draft article 31
Irrelevance of the rules of the organization

United Nations

1. The Secretariat reiterates the importance of the dual nature of the rules of the organization and the distinction to be made between the international law rules and the internal law of the organization. The Secretariat also notes that, in the case of the United Nations, whose "rules" include the Charter of the United Nations, reliance on the latter would be a justification for failure to comply, within the meaning of draft article 31, paragraph 1.

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

18. Draft article 32
Scope of the international obligations set out in this Part

United Nations

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

2. The Secretariat recommends the deletion of paragraph (5) of the commentary, as it may create the misconception that the rules contained in the draft article apply with respect to entities and persons other than States and international organizations. The Secretariat notes that the terms and conditions of employment are governed by the internal rules of the Organization[39] and their violation would therefore not entail the international responsibility of the Organization. The Secretariat also notes that in the practice of peacekeeping operations, claims against the Organization have been, with few exceptions, of a private law nature. The Secretariat finally notes that under article VIII, section 29, of the Convention on the Privileges and Immunities of the United Nations, the Organization is duty-bound to provide alternative modes of settlement to address disputes of a private law character.

Chapter II
Reparation for injury

19. Draft article 36
Satisfaction

United Nations

1. In the commentary,[40] the Commission refers to pronouncements made by the United Nations Secretary-General in connection with the report of the independent inquiry into the acts of the United Nations during the 1994 genocide in Rwanda, and his report on the fall of Srebrenica (A/54/549) expressing "regret" and "remorse" at the failings of the United Nations.

2. Without in any way attempting to qualify the nature of those expressions of regret in relation to events still loaded with heavy moral and political implications, the Secretariat wishes to reiterate that, in the words of the Commission, those

[39] For example, United Nations Staff Regulations and Rules.

[40] Paras. (2) and (3).

"examples … do not expressly refer to the existence of a breach of an obligation under international law".

20. Draft article 37
Interest

United Nations

1. The Commission states in its commentary that the rules on interest "are intended to ensure application of the principle of full reparation" and that "[s]imilar considerations in this regard apply to international organizations".

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

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

Part Four
The implementation of the international responsibility of an international organization

Chapter I
Invocation of the responsibility of an international organization

21. Draft article 44
Admissibility of claims

United Nations

1. In its commentary on the draft article, the Commission acknowledges that effective remedies within international organizations exist in only a limited number of international organizations, and notes that "local remedies" within the meaning of draft article 44 includes such other remedies available before arbitral tribunals, national courts or administrative bodies when the international organization has accepted their competence to examine claims.[41]

2. From the perspective of the Secretariat, it is essential to clarify at the outset that the reference to "exhaustion of local remedies" should not be read to suggest any obligation on the part of international organizations in any context to open themselves up to the jurisdiction of national courts or administrative bodies. The Commission makes reference, for example, to the applicability of paragraph 2 in the context of "the treatment of an individual by an international organization while administering a territory".[42] The Secretariat notes, however, that insofar as the United Nations is concerned, when it has acted as an interim territorial administrator, no remedies in local courts or administrative bodies were available to

[41] Para. (9).
[42] Para. (6).

private persons with respect to actions taken by the Organization. In fact, the applicable rules have provided for a general immunity from the jurisdiction of local courts and tribunals. It is conceivable that the reference to "exhaustion of local remedies" in this context could create confusion and we suggest that it be made clear that no contradiction with the immunity regime of the United Nations or other organizations as appropriate is intended by the reference to local remedies.

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

4. Two types of "available and effective remedies" created by the Organization can be identified to illustrate the Organization's practice. First, there is the internal justice system available for United Nations staff members in all matters relating to their conditions of service. As presently restructured, it consists of a two-tier system of administration of justice (United Nations Dispute Tribunal and United Nations Appeals Tribunal) to hear cases against the Secretary-General in appeal of an administrative decision alleged to be in non-compliance with the terms of appointment or contract of employment.[43]

5. Second, there are the procedures established in cases of disputes of a private law character between the Organization and third parties, the establishment of which are mandated under article VIII, section 29, of the 1946 Convention on the Privileges and Immunities of the United Nations. These procedures would include those established to address claims arising in the context of United Nations peacekeeping and other missions, including cases in which the Organization has acted as a temporary territorial administrator, and contractual terms providing for recourse to final and binding arbitration in respect of claims arising under the contract.

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

Chapter II
Countermeasures

22. Draft article 50
Object and limits of countermeasures

United Nations

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

[43] Statute of the United Nations Dispute Tribunal, General Assembly resolution 63/253, annex I.

23. Draft article 52
Obligations not affected by countermeasures

United Nations

1. In its commentary on paragraph 1, subparagraph (a), of draft article 52, the International Law Commission suggests that "the use of force could be considered a countermeasure taken against an international organization only if the prohibition to use force is owed to that organization".[44] The Secretariat is of the view that the prohibition on the use of force should be stated unequivocally both in the text of the draft article and in the commentary.

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

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

24. Draft article 53
Proportionality

United Nations

In its commentary on draft article 53, the Commission states that when an international organization is injured it would be for the organization and not for its member States to take the countermeasures as a means to prevent an excessive impact.[45] In the realities of the United Nations, however, the distinction between the Organization and its Member States for this purpose is not always self-evident. If ever adopted, countermeasures would most likely be taken by means of a resolution and, as such, would be implemented by the Member States of the Organization.

Part Six
General provisions

25. Draft article 63
Lex specialis

United Nations

1. In its commentary on draft article 63, the International Law Commission explains that specialized rules may supplement or replace the general rules set out in the draft articles, in whole or in part.[46] The Commission notes that the draft article is modelled on article 55 of the articles on the responsibility of States for internationally wrongful acts, and is designed to make it unnecessary to add to many

[44] Para. (1).
[45] Para. (4).
[46] Para. (1).

of the draft articles a proviso such as "subject to special rules".[47] While the commentary focuses almost exclusively on the attribution to the European Community of the conduct of its member States when they implement binding acts of the Community, there is little discussion of how it may apply to international organizations not of a supranational character.

2. The most notable examples of *lex specialis* in the practice of the United Nations include the principle of "operational necessity", which precludes responsibility for property loss or damage caused in the course of United Nations peacekeeping operations under the conditions set out by the Secretary-General and endorsed by the General Assembly[48] (see the comments on draft article 24), and the temporal and financial limitations adopted in the same resolution for injury or damage caused in the course of the same operations. Resolution 52/247 on third-party liability: temporal and financial limitations, adopted on 26 June 1998, sets temporal and financial limitations on the liability of the United Nations in respect of third-party claims arising out of United Nations peacekeeping operations, and as such prevails over the duty to provide full reparation under draft article 33. The resolution specifies, inter alia, that "no compensation shall be payable by the United Nations for non-economic loss", and that the amount of compensation payable for injury, illness or death of any individual, including for medical and rehabilitation expenses, loss of earnings, loss of financial support etc., "shall not exceed a maximum of 50,000 United States dollars". Pursuant to paragraph 12 of General Assembly resolution 52/247, the Secretary-General consistently includes the limitations on liability in the status-of-force agreements concluded between the United Nations and the States where peacekeeping operations are deployed.

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

26. Draft article 66
Charter of the United Nations

United Nations

1. In its commentary on the draft article, the Commission notes that the reference to the Charter of the United Nations includes not only obligations stated in the Charter, but also those flowing from binding decisions of the Security Council which similarly prevail over other obligations under international law pursuant to Article 103 of the Charter of the United Nations.[49] In paragraph (3) of its commentary, the Commission notes further that "[t]he present article is not intended to affect the applicability of the principles and rules set forth in the preceding articles to the international responsibility of the United Nations".

2. Paragraph (3) of the commentary is unclear as to whether it is intended to exclude the United Nations from the scope of application of draft article 66. Since Article 103 of the Charter of the United Nations affects the responsibility of the Organization in the same way that it affects the responsibility of States and other

[47] Para. (6).

[48] In paragraph 6 of resolution 52/247 the General Assembly endorsed "the view of the Secretary-General that liability is not engaged in relation to third-party claims resulting from or attributable to the activities of members of peacekeeping operations arising from 'operational necessity', as described in paragraph 14 of the first report of the Secretary-General on third-party liability [(A/51/389)]".

[49] Para. (1).

international organizations, the Secretariat suggests that the statement in paragraph (3) of the commentary either be revised to clarify its intent, or be deleted.

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

4. The Secretariat notes that, in its commentary on article 59 of the articles on the responsibility of States for internationally wrongful acts, the Commission stated that "the articles cannot affect and are without prejudice to the Charter of the United Nations. The articles are in all respects to be interpreted in conformity with the Charter".[50] The Secretariat recommends that the same statement be included in the present context as well.

[50] *Yearbook of the International Law Commission, 2001, vol. II (Part Two)*, as corrected, para. 77, commentary to art. 59, para. (2).