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Responsibility of international organizations

Comments and observations received from international organizations

Contents

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I. Introduction

1. At its sixty-first session (2009), the International Law Commission adopted, on first reading, the draft articles on the responsibility of international organizations (A/64/10, para. 50). In paragraph 48 of its report, the Commission decided, in accordance with articles 16 to 21 of its Statute, to request the Secretary-General to transmit the draft articles to Governments[1] and international organizations for comments and observations, requesting also that such comments and observations be submitted to the Secretary-General by 1 January 2011. The Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed a communication, dated 13 January 2010, to 51 international organizations and entities bringing to their attention the first reading text of the draft articles on the responsibility of international organizations, and inviting their comments in accordance with the request of the Commission.

2. As at 11 February 2011, written comments had been received from the following 21 entities (dates of submission in parentheses): Council of Europe (24 January 2011); Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO) (joint submission of 11 January 2011[2]); European Commission (22 December 2010); International Civil Aviation Organization (ICAO) (joint submission of 11 January 2011); International Fund for Agricultural Development (IFAD) (joint submission of 11 January 2011); International Labour Organization (ILO) (joint submission of 11 January 2011 and individual submission of 20 January 2011); International Monetary Fund (IMF) (5 January 2011); International Maritime Organization (IMO) (joint submission of 11 January 2011); International Organization for Migration (IOM) (joint submission of 11 January 2011); International Telecommunication Union (ITU) (joint submission of 11 January 2011); North Atlantic Treaty Organization (NATO) (20 December 2010); Organization for Economic Cooperation and Development (OECD) (23 December 2010); Organization for Security and Cooperation in Europe (OSCE) (20 December 2010); United Nations Educational, Scientific and Cultural Organization (UNESCO) (joint submission of 11 January 2011); International Institute for the Unification of Private Law (UNIDROIT) (19 December 2010); United Nations World Tourism Organization (UNWTO) (joint submission of 11 January 2011); World Health Organization (WHO) (joint submission of 11 January 2011); World Intellectual Property Organization (WIPO) (joint submission of 11 January 2011); World Meteorological Organization (WMO) (joint submission of 11 January 2011); World Bank (29 December 2010); and World Trade Organization (WTO) (joint submission of 11 January 2011). Those comments are reproduced in section II below, organized thematically, starting with general comments and continuing with comments on specific draft articles. In a submission dated 12 January 2011, the Asian Development Bank indicated its support for the comments of the World Bank of 29 December 2010.

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[1] Comments received from Governments are to be found in document A/CN.4/636.

[2] The Secretariat received a joint submission, dated 11 January 2011, from the following international organizations: CTBTO; ICAO; IFAD; ILO; IMO; IOM; ITU; UNESCO; UNWTO; WHO; WIPO; WMO; and the World Trade Organization.

II. Comments and observations received from international organizations

A. General comments

Council of Europe

1. The Council of Europe has had so far no specific practice regarding wrongful acts under international law involving the organization's responsibility. In these circumstances, any possible comments would not be based on relevant experience of breaches of international obligations and would have to be rather theoretical in nature. In addition, the Council of Europe has never been confronted with problems in relation to the *ius gestionis*.

2. The Council of Europe welcomes the fact that the present draft articles draw inspiration from the draft articles on the responsibility of States for internationally wrongful acts and considers this approach as a wise starting point.

3. The Council of Europe looks forward to future discussions of the draft articles by the Commission which would permit to explore further the draft articles' applicability to different international organizations, taking into account the variety of their respective natures and the specificity of the legal system governing the different international organizations: the constituent treaty, the headquarters agreement and general international law.

European Commission

1. A principal general comment which has been highlighted throughout previous comments is the need for the draft articles to allow sufficient room for the specificities of the European Union. Most multilateral conventions today are open for the European Union to become a Contracting Party, alongside States. The significant impact which the European Union has on international treaty practice and law is due to its special characteristics, as a regional (economic) integration organization. The Union's member States have transferred competences and decision-making authority on a range of subject matters to the Union,[3] which as a result participates in the international arena on its own behalf and in its own name. The large number of international treaties concluded by the European Union forms part of European Union law. These agreements are binding not only on the European Union's institutions but also on its member States. Moreover, unlike traditional international organizations, the European Union acts and implements its international obligations to a large extent through its member States and their authorities, and not necessarily through "organs" or "agents" of its own. Consequently, there are significant differences between traditional international organizations on the one hand, and organizations such as the European Union, on the other hand, a regional (economic) integration organization which has important law-based foreign relations powers that have a tendency to develop over time.

[3] With the entry into force on 1 December 2009 of the Treaty of Lisbon, the areas of integrated Union policies have further been expanded (with the exception of the Common Foreign and Security Policy); See the categories and areas of Union competences listed in arts. 2-6 of the Treaty on the Functioning of the European Union.

2. Because of the regularity with which it is admitted to participate in multilateral treaties alongside States, the European Union has, as a regional (economic) integration organization, shaped treaty law and practice in a significant manner. Yet the foregoing is currently reflected only to a very limited extent in the draft articles on the responsibility of international organizations as they stand now. This is a concern as the European Union is the international organization which is potentially most impacted by the draft rules of responsibility of international organizations. No other international organization is in that situation. For now, the European Union remains unconvinced that the draft articles and the commentaries thereto adequately reflect the diversity of international organizations. Several draft articles appear either inadequate or even inapplicable to regional integration organizations such as the European Union, even when account is taken of some of the nuances now set out in the commentaries. In addition, some commentaries show that there is very little or no relevant practice to support the suggested provisions. For such cases the question remains whether there is a sufficient basis for the International Law Commission to propose the rule in question.

3. In view of these comments the European Commission considers that the International Law Commission should give further thought as to whether the draft articles and the commentaries, as they stand now, are apt for adoption by the Commission on second reading or whether further discussion and work is needed.

International Labour Organization

1. The draft articles rely excessively on the articles on the responsibility of States for internationally wrongful acts. It is considered that a parallelism between States and international organizations regarding the question of responsibility is not justified in the light of important differences between the two subjects of international law. While States exercise general jurisdiction, international organizations exercise jurisdiction specific to the competencies granted — explicitly or implicitly — by their constituent instruments.

2. International organizations, contrary to States, act necessarily within the territory of several States. As a consequence, many constituent instruments of international organizations contain a provision on juridical personality and legal capacity of international organizations within member States. Some examples are article 39 of the ILO Constitution; article 9, section 2 of the Articles of Agreement of the International Monetary Fund, Chapter 9, article 27, of the Constitution of the International Organization for Migration; article 5 of the International Agreement on Olive Oil and Table Olives, 2005; article 5 of the European Patent Convention, and so forth.

3. It is important to distinguish between acts committed by international organizations that are internationally wrongful, which represent a violation of international law, and those that are wrongful under national law. While the Commission makes clear that the latter acts are not covered by the draft articles (para. (3) to the commentary to draft art. 1), some examples quoted in the documents remain ambiguous. One of the main arguments of the Special Rapporteur in favour of the international responsibility of international organizations was that the International Court of Justice stated in the advisory opinion on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the*

Commission on Human Rights,[4] that the United Nations may be required to bear responsibility for the damage arising from "such act".[5] It is important to recall that "such act" refers to statements considered defamatory by two commercial companies, which are normally violations of national law. As they are committed by the United Nations or its agents acting in their official capacity, the immunity from legal process applies but "the act" for which international organizations may be required to bear responsibility are still those that violated national law and not internationally wrongful acts.

4. When international organizations act within the national legal systems, including when they do not honour a commercial contract or a peacekeeper drives incorrectly, that is, commit acts that are contrary to law, these violations of law do not represent acts that are internationally wrongful. They are simple violations of national law that are covered by the immunity from legal process. If this immunity were waived, international organizations would be subject to the jurisdiction of national courts. Consequently, such examples cannot serve directly as a basis for consideration of the topic under discussion by the Commission but only serve to support the general principle that international organizations may be required to bear responsibility for the damage arising from acts considered wrongful under national law. The ILO would therefore urge the Commission to review the examples quoted in the commentaries, such as a car accident in Somalia quoted in paragraph (5) of the general commentary to chapter II of Part Two or situations leading to compensation by the United Nations quoted in the commentary to draft article 35 (see A/64/10, para. 51).

International Monetary Fund

1. The primary concern of IMF is one of approach and the Commission's reliance on the articles on the responsibility of States for internationally wrongful acts in preparing the draft articles. We believe this approach to be misguided for two reasons.

2. First, there is a fundamental difference between a State and an international organization. Unlike States, international organizations do not possess a general competence.[6] Rather, an organization's legal competence is circumscribed by its constituent document which, along with the rules and decisions adopted thereunder, constitute the *lex specialis*. The organization's responsibility for actions taken towards its members should be determined by assessing whether it has acted in accordance with this legal framework or has otherwise breached a peremptory norm of international law or another obligation that it has voluntarily accepted. In their present form, the draft articles wrongly suggest that an international organization can incur responsibility with respect to its members even when it is in compliance with its constituent instrument, peremptory norms, and other obligations it has

[4] *I.C.J. Reports 1999*, p. 62.

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

[6] In the Nuclear Weapons advisory opinion, the International Court of Justice stated that "international organizations do not, unlike States, possess a general competence, but are governed by the 'principle of specialty', 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." *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 66 at 78, para. 25.

specifically accepted. This approach is not consistent with the principle *lex specialis derogat legi generali*.

3. Secondly, many of the draft articles do not lend themselves to universal application. There are significant differences between the legal frameworks of different international organizations and it is very difficult to formulate principles that apply to all such organizations. While States all possess the same attributes, international organizations have different purposes, mandates, and powers. The draft articles fail to take these differences into account and, as a result, include provisions that would appear to be of limited relevance for at least some international organizations (e.g., the international financial institutions). We would question whether it is appropriate to include such provisions within the draft.

4. There would also appear to be many features of the draft articles that go beyond generally accepted views on the responsibility of international organizations. We recognize that article 1, paragraph 1, of the Commission's Statute provides that the "Commission shall have for its object the promotion of the progressive development of international law and its codification." While the Commission has not provided guidance on the extent to which the draft articles constitute the codification or the progressive development of international law, it is clear that the majority are an attempt at progressive development.[7] This point should be made explicit in the commentary.

Joint submission of the Comprehensive Nuclear-Test-Ban Treaty Organization, the International Civil Aviation Organization, the International Fund for Agricultural Development, the International Labour Organization, the International Maritime Organization, the International Organization for Migration, the International Telecommunication Union, the United Nations Educational, Scientific and Cultural Organization, the United Nations World Tourism Organization, the World Health Organization, the World Intellectual Property Organization, the World Meteorological Organization and the World Trade Organization

1. Our main concerns relate to: the excessive alignment of the draft articles with the articles on the responsibility of States for internationally wrongful acts; the uncertainty as to the scope of the draft articles, in particular with regard to the responsibility of States vis-à-vis that of international organizations; the ambiguous interplay of the *lex specialis* principle with the role devoted to the "rules of the organization" and the appearance of not having sufficiently taken into account the different types of existing international organizations with very diverse structures, functions and mandates; the limited attention paid to the special situation of international organizations in relation to the obligation to compensate; and the solutions proposed in respect of ultra vires acts of an agent or organ of an international organization.

2. The methodology followed by the Commission is a source of concern mainly from two points of view: first, the draft articles are based on a very limited body of practice — largely originating from the activities of very few international organizations; second, they take limited account of the special situation of

[7] One example is draft article 16, paragraph 2, which provides that an international organization can incur responsibility by merely authorizing or recommending that a member State commit an act that would be internationally wrongful if committed by the organization.

international organizations compared with that of States in regard to responsibility under international law in general and, more particularly, to reparation. These issues originate from the method followed by the Commission, which retained the articles on the responsibility of States for internationally wrongful acts as the point of departure for its draft articles on the responsibility of international organizations even though the two situations are extremely different and raise largely distinct legal issues. International organizations and States have very different legal personalities and the Commission's approach risks creating practical problems since the specific characteristics of international organizations are only taken into account in a limited manner. In particular, the fact that international organizations act necessarily within the territory of States, and the fact that they exercise their mandates through the principle of speciality should receive more consideration by the Commission.

3. The Commission should have followed a more practical approach and only focused on areas where there is a space for rules common to all international organizations, where there is practice upon which to base such rules and where there is a practical need for codification or progressive development of international law arising from the activities and experience of international organizations.

4. It could also be envisaged, at least if the draft articles were eventually to be adopted in the form of an international convention, to provide for a mechanism analogous to the one embodied in the Convention on the Privileges and Immunities of the Specialized Agencies of 21 November 1947, whereby the standard clauses and annexes were first submitted to the approval of the international organizations concerned before being opened to acceptance by member States. Moreover, a practice has developed under the same Convention to subject the deposit of reservations to the consent of concerned agencies. An even clearer option to safeguard the interests of international organizations would be that the latter may become parties to an international convention dealing with the responsibility of international organizations and creating obligations for them as it was the case with the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 21 March 1986.

North Atlantic Treaty Organization

1. NATO would like to express a general concern that the draft articles and associated commentary do not always appear fully to contemplate the specific situation of organizations in which, owing to the nature of the activity in which it is engaged or other factors, the member States retain virtually all decision-making authority and participate on a daily basis in the governance and functioning of the organization.

2. The following comments relate to the structure of the organization, its decision-making procedures and its practice with respect to claims. NATO is an international organization within the meaning of draft article 2(a) of the draft articles, and as such a subject of international law. It possesses international legal personality as well as treaty-making power.

3. The North Atlantic Council is the principal policy and decision-making institution of the Alliance. The Council consists of representatives of all member States of the Alliance, meeting together in permanent session. The Council most frequently meets at the level of permanent representatives, who are stationed at NATO headquarters, but also meets, normally twice per year, at the level of foreign

or defence ministers and less frequently, at the level of Heads of State and Government. The Council acts with the same authority and powers of decision-making, and its decisions have the same status and validity, at whatever level it meets.

4. NATO decisions are taken on the basis of consensus, after discussion and consultation among the representatives of member States. There is no voting or majority decision. All member nations of the Alliance have an equal right to express their views at the Council, and decisions are not made until all nations are prepared to join consensus in their support. Decisions are thus the expression of the collective will of the sovereign member States, arrived at by common consent and supported by all. Each member State retains full responsibility for its decisions, and is expected to take those measures necessary to ensure that it has the domestic legal and other authority required to implement the decisions which the Council, with its participation and support, has adopted. The principle of consensus decision-making is applied throughout the Alliance, reflecting the fact that it is the member States that decide and that each of them is or has full opportunity to be involved at every stage of the decision-making process. This principle is applied at every level of the organization; all member States may, and as a matter of practice do, participate on an equal basis in all committees and other subordinate bodies within NATO.

5. With regard to NATO missions, each NATO or NATO-led operation requires a mandate from the North Atlantic Council. It is in the power of the nations represented in the Council to decide on NATO-led operations on their own authority but, in practice, its decisions are normally made on the basis either of relevant resolutions of the United Nations Security Council or in response to the request of a specific State or group of States seeking NATO participation or support. Each mandate indicates the purpose and aim of the operation. NATO nations agree in the North Atlantic Council on the exact content of a given mission and request from the NATO military authorities information on the military requirements to successfully carry out the mission. Following a decision by the North Atlantic Council to initiate a NATO-led operation, the NATO military authorities establish an operational plan that must in turn be approved by the Council; this operational plan includes, inter alia, rules of engagement (including provisions on the use of force); jurisdiction and claims. Both the mandate of the North Atlantic Council and the military operational plan normally expressly reaffirm the nation’s intention to execute the operation with full respect for applicable international public law, including international humanitarian law and, as appropriate, principles and norms of international human rights law.

6. With respect to contractual claims that might arise in the framework of a NATO operation or other activity, it should be noted that a standard arbitration clause is included in all contracts to which the Organization is a party. Disputes that might arise in the framework of a contractual relationship, if not settled amicably, may be submitted to arbitration in accordance with the terms of this provision.

7. Finally to be noted, but perhaps of most direct relevance to the question of legal responsibility, are the NATO procedures for settlement of claims. The procedures applicable to claims arising among NATO member States are set forth in article VIII of the Agreement between the Parties to the North Atlantic Treaty regarding the Status of Their Forces of 19 June 1951. Through the Agreement among the States Parties to the North Atlantic Treaty and the Other States

Participating in the Partnership for Peace regarding the Status of Their Forces of 19 June 1995, its provisions also apply, mutatis mutandis, to all States participating in the Partnership for Peace programme.

8. In the event of operations conducted in conjunction with States which are neither members of NATO nor participants in the Partnership for Peace programme, claims provisions are normally contained in a status or similar agreement entered into between NATO and that State or States, and covering participating non-NATO States as well as NATO member States.

9. The NATO claims provisions and procedures have been implemented successfully by NATO and its member States for some six decades, in conjunction with NATO partners for a shorter but significant period of time and has served as a model for similar relationships elsewhere in the international community.

Organization for Economic Cooperation and Development

1. The articles on the responsibility of States for internationally wrongful acts may not always be applicable to international organizations, and therefore should not constitute the basis for the drafting of the articles on their responsibility. Indeed, while international organizations have international legal personality, they do not possess, unlike States, a general competence and are instead limited by the scope of their mandate as reflected in their constituent instruments. Thus, we share the view that the Commission should consider explaining in its commentaries the extent to which the draft articles may or may not be regarded as codifying existing law on the basis of actual practice.

2. The current draft articles do not identify the mechanism for their enforcement nor the entities that would be responsible for their interpretation. Would the Commission anticipate an international body or a domestic court to have this general competence over organizations? As recalled by IMF,[8] both approaches could be inconsistent with the constituent instruments of some international organizations that precisely identify interpretation or enforcement mechanisms for certain issues such as dispute settlement.

International Institute for the Unification of Private Law

1. The purposes of UNIDROIT are to examine ways of harmonizing and coordinating the private law of States and of groups of States, and to prepare gradually for the adoption by the various States of uniform rules of private law. To that end, UNIDROIT prepares drafts of laws and conventions with the object of establishing uniform internal law; prepares drafts of agreements with a view to facilitating international relations in the field of private law; undertakes studies in comparative private law; follows projects already undertaken in any of these fields by other institutions with which it may maintain relations as necessary; organizes conferences and publishes works which the Institute considers worthy of wide circulation. UNIDROIT also exercises the function of depositary of some of the instruments adopted under its auspices and undertakes a number of information and technical assistance activities.

[8] See IMF, general remarks, document A/CN.4/545.

2. Apart from decisions taken by its organs on purely institutional or financial matters (approval of the budget, assessment of contributions, appointment of agents), UNIDROIT does not take decisions binding on its member States. Instruments adopted under its auspices only bind those States that have accepted, ratified, or acceded to them. Furthermore, UNIDROIT is not a member of any other organization, nor is any other organization a member of UNIDROIT.

3. We have examined the draft articles carefully and come to the conclusion that the activities of UNIDROIT are not likely to offer occasion for acts or omissions that involve the type of responsibility that the draft intends to regulate.

World Bank

1. In its initial report, the Commission's Working Group on Responsibility of International Organizations clarified that the term "responsibility", as used both in this project and in the earlier one on State responsibility, refers only to the "consequences under international law of internationally wrongful acts" (see A/CN.4/L.622, para. 4). From this, it follows that the draft articles are secondary rules, with no attempt on the part of the Commission to define the content of the international obligations which, once breached, give rise to responsibility. Defining the content of these obligations belongs in fact to primary, not secondary, rules. Moreover, given the diversity among international organizations with respect also to the different legal sources of their international obligations, it would practically be impossible for the Commission to elaborate rules of responsibility that would take into account the obligations incumbent on international organizations as a result of primary rules.

2. To avoid the risk that the Commission's draft articles and accompanying commentaries may offer the pretext for invoking imaginary primary obligations of international organizations, the Commission may want to consider stating expressly, in its commentaries to the general principles (Chapter I), that all references to primary obligations, either in the draft articles or in the accompanying commentaries, are mere examples and do not reflect any finding by the Commission on such primary obligations, a task which does not belong to the Commission for the purposes of this project.

3. While the commentaries to a good number of the draft articles contain clear warnings regarding the scarcity of available practice (hence the use of such terms as "similarly", "analogy", "would seem"), it may be appropriate for the Commission to consider explaining, in its commentary, the extent to which it regards the draft articles as codifying existing law and, whenever this is the case, identify relevant instances of actual practice.

B. Specific comments on the draft articles

Part One
Introduction

1. Draft article 1

Scope of the present draft articles

Council of Europe

The Council of Europe also looks forward to further consideration by the International Law Commission of the correlation between the scope of the application of the draft articles as contained in their draft article 1 (international responsibility for an act that is wrongful under international law) and the commentaries referring frequently to the *ius gestionis*.

International Labour Organization

1. Draft article 1 provides that the draft articles "apply" to the international responsibility of an international organization. The question that this formulation triggers is on what legal basis the draft articles are intended to "apply". If the intention is to propose a new international treaty, the first question is who should be invited to negotiate and finally conclude that treaty. Should it be a treaty concluded only by international organizations, or only by States, or by both? If the draft articles are to be ratified only by States, the relationship between the existing constituent instruments and the new treaty needs to be addressed thoroughly. If the draft articles are to "apply" to international organizations as a matter of treaty law, it would appear to be more appropriate that these organizations and not only States become bound by these provisions. This would, in that case, represent a new legal obligation for which international organizations would need to obtain the consent of their supreme organs normally those composed of most if not all of their member States. In this case, international organizations should be at least permitted to fully participate in the process of elaborating such a treaty, and their comments should carry greater weight in the deliberations of the International Law Commission. One may want to find some inspiration in the way international organizations had been involved in the elaboration and implementation of the Convention on the Privileges and Immunities of the Specialized Agencies 1947, or preferably, the way they can become bound by the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986.

2. If the idea is that the draft articles codify existing customary law, they would need to rely on both general practice and *opinio juris*. From the examples quoted by the Commission, it is difficult to detect any general practice. Furthermore, the views expressed by international organizations reflect not only the lack of *opinio juris* but rather a clear opposition to the existence of any customary law in the field except for a very narrow set of norms that may be recognized as jus cogens in international law. The draft articles do not thus appear to represent a codification of the existing law and their transformation into legally binding norms could be done only through an international treaty with an important level of involvement of international organizations.

3. Even if draft articles are only to be endorsed by the United Nations General Assembly, it is important that they are developed "under general rules of

international law, under [the organizations'] constitutions or under international agreements to which [the organizations] are parties", as the International Court of Justice put it in the advisory opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*.[9]

4. Furthermore, it may be prudent to see what result may arise from the practical implementation of the articles on the responsibility of States for internationally wrongful acts before proceeding with the debate on the responsibility of international organizations. Nine years after their adoption by the Commission, those articles still remain under consideration by the United Nations General Assembly, with no call for an international treaty to be negotiated.

Joint submission of the Comprehensive Nuclear-Test-Ban Treaty Organization, the International Civil Aviation Organization, the International Fund for Agricultural Development, the International Labour Organization, the International Maritime Organization, the International Organization for Migration, the International Telecommunication Union, the United Nations Educational, Scientific and Cultural Organization, the United Nations World Tourism Organization, the World Health Organization, the World Intellectual Property Organization, the World Meteorological Organization and the World Trade Organization

1. We also share some concerns regarding the scope of the draft articles. In particular, we find it difficult to understand why the International Law Commission has included provisions concerning some issues related to the responsibility of States in relation with that of international organizations while excluding others. Either, having in mind the distinct legal personality of international organizations, the Commission should have adhered to the title of the topic entrusted to it, which is limited to "responsibility of international organizations"; otherwise, it should have followed consistently a more flexible approach by including in the draft articles all the aspects of State responsibility related to international organizations (including the responsibility of States vis-à-vis international organizations).

2. Unfortunately, the draft articles do not choose consistently between those two approaches: on the one hand, in paragraph (10) of the commentary to draft article 1, the Commission explains that "[t]he present articles do not address issues relating to the international responsibility that a State may incur towards an international organization" (see also draft art. 18). On the other hand, however, several articles do address such issues, explicitly or by implication (in particular draft arts. 1(2), 32(2), 39, 49 and 57-61).

3. The Commission should follow this second approach and deal with all aspects of the responsibility of States related to international organizations. Contrary to what the Commission states in the aforementioned commentary to draft article 1, it does not appear that the articles on State responsibility effectively cover all issues related to the responsibility of States in connection with international organizations. If that were the case, it should be formally stated in a provision of the draft articles rather than solely in a commentary. Nevertheless, we have doubts that this is the case and we are of the view that the approach initiated in the draft articles listed above should be completed in order to definitely and comprehensively address the

[9] *I.C.J. Reports 1980*, p. 73 at pp. 89-90, para. 37.

interaction of the responsibility of States and international organizations under international law. Should the draft articles deal with the responsibility of States vis-à-vis international organizations as suggested here, we urge the Commission and the Special Rapporteur to give due consideration to the different positions of member States of an international organization and non-member States.

2. Draft article 2

Use of terms

European Commission

The European Commission notes that draft article 2, subparagraph (c), refers to the term "agent" without, however, defining this. It might be appropriate for the International Law Commission to re-examine this definition and perhaps to link it with draft article 5, which sets out a general rule of attribution relating to the conduct of an "organ" or an "agent".

International Labour Organization

1. The definition of "international organizations" proposed by the International Law Commission in draft article 2 adds to the existing definitions that the members of organizations could be "other entities". This addition does not seem to add a significant element to what is already covered by the first part of the definition, which seems broad enough to include different possibility of membership of entities other than States. The variation in membership does not appear to have any impact on the issue of responsibility of international organizations. ILO notes that an organization already suggested deleting this text.[10] ILO, however, fully supports the idea of not using the expression of "inter-governmental organization", considering that it does not accurately reflect the tripartite structure of the members' representation within ILO.

2. Previous comments of ILO (see A/CN.4/568/Add.1) had already presented certain reservations regarding the wide definition of term "agent". The Commission used only the last part of the definition of this term given by the International Court of Justice. By doing this, important qualifications such as "charged by an organ of the Organization"[11] were lost, leaving it open for an entity external to the organization to determine if the organization acted through a person or entity other than its officials. Such an approach disregards the rules of the organization and the finding can be even contrary to those rules in situations where agreements are made between parties that expressly exclude agency relationships. The understanding of "agent" proposed in the draft articles does not exist in the current practice of international organizations to our knowledge, nor in general principles of agency law and would trigger a considerable change in the way organizations act, leading to excessively cautious behaviour to the detriment of discharge of their mandates. For example, the term "agent" should not cover external collaborators (consultants) or subcontractors such as companies or non-governmental organizations, that may be contracted to assist in performing some institutional tasks. A clause excluding

[10] A/CN.4/556, para. 5 (comment by the International Criminal Police Organization).

[11] *Reparations for injuries suffered in the service of the United Nations, Advisory Opinion, ICJ Reports 1949*, p. 174 at 177.

liability of the organization for acts of external collaborators or service providers has been systematically included in contracts concluded by ILO.

3. The Commission may also want to pay attention to the situation of State representatives performing temporarily functions for the organization but in their national capacity, such as the chairpersons of meetings and organs; the members of various bodies, such as the Commission itself, or judges of administrative and international criminal tribunals. Should all these persons be considered as agents that could trigger the responsibility of the organization concerned?

4. ILO raised in its 2006 comments (A/CN.4/568/Add.1) the issue of "entities", such as private companies. In the light of an increased trend of private-public partnership in international organizations, such a wide definition of "agent" may have far-reaching negative consequences for further development of such new trends.

Joint submission of the Comprehensive Nuclear-Test-Ban Treaty Organization, the International Civil Aviation Organization, the International Fund for Agricultural Development, the International Labour Organization, the International Maritime Organization, the International Organization for Migration, the International Telecommunication Union, the United Nations Educational, Scientific and Cultural Organization, the United Nations World Tourism Organization, the World Health Organization, the World Intellectual Property Organization, the World Meteorological Organization and the World Trade Organization

We are unsure about the role which the "rules of the organization" — as defined in draft article 2, subparagraph (b),[12] — are called to play in the draft articles. We have difficulty in particular in understanding how the emphasis put on the rules of the organization is articulated with the principle of the irrelevance of the rules of the organization expressed in draft article 31.

Organization for Security and Cooperation in Europe

In paragraph (4) of the commentary to draft article 2, the Commission appears to consider that OSCE, though not established by treaty, fulfils the two criteria provided for in draft article 2, subparagraph (a), defining international organizations. For the time being, there is no consensus among the OSCE participating States that OSCE should fulfil either of the two listed conditions: whether OSCE possesses its own legal personality, or whether the founding documents of OSCE (in the first place the Helsinki Final Act and the Charter of Paris for a New Europe) are governed by international law. These issues are currently under discussion by the deliberative and decision-making bodies of OSCE, and the OSCE secretariat stands ready to inform the International Law Commission on the progress or finalization of these deliberations.

[12] Several advisers had concerns in respect of the definition of the "rules of the organization", which they considered as incomplete and proposed that a hierarchy among the rules of organization should be in draft article 2 or, at least, stressed in its commentary.

World Bank

The draft articles contain no definition of an "organ", while they provide, in draft article 2(c), a definition for "agent". The current text may be improved. In particular:

- As the Commission has not defined the term "organ", does the definition of an "agent" include also organs? On the one hand, one would be induced to give a negative answer to this question by the Commission's use of the expression "organ or agent" (thus clearly distinguishing the two terms) in several draft articles; on the other hand, one may be tempted to give a positive answer to the same question by the Commission's remark that "[t]he distinction between organs and agents does not appear to be relevant for the purpose of attribution of conduct to an international organization".[13] To avoid any misunderstanding on this point, we would deem it preferable that the Commission provide, in the draft articles, a definition of an "organ" by reference to the rules of the organization, by analogy with the definition of the term provided in the articles on the responsibility of States for internationally wrongful acts.[14]
- As to the definition of an "agent", we understand that the term "includes" has been preferred to "means" as a way also of addressing the concern that attribution of conduct not be unduly restricted. However, for the sake of certainty, our definite preference is for the use of the term "means" instead of "includes" in any definition of both "agent" and "organ".

Part Two
The internationally wrongful act of an international organization

Chapter I
General principles

3. Draft article 4

Elements of an internationally wrongful act of an international organization

European Commission

1. The European Commission notes that the International Law Commission decided not to include into the project a provision equivalent to article 3 of the articles on the responsibility of States for internationally wrongful acts ("Characterization of an act of a State as internationally wrongful"). The reasons for not including an equivalent provision in the draft on responsibility of international organizations have been set out in the commentaries to draft article 4, in particular, in paragraphs (4) and (5). In relation to the second sentence of article 3 of the articles on the responsibility of States for internationally wrongful acts, these commentaries state that the internal rules of an international organization cannot be sharply differentiated from international law. However, while this comment may be correct for traditional international organizations, they do not appear to correspond to the situation of the European Union. It is a general interpretation in the latter, including in its judicial practice, that its internal order is separate from international law.

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[13] See para. (5) of the commentary to draft article 5.

[14] Article 4 (2) ("Conduct of organs of a State").

2. Already in the landmark case *Van Gend en Loos v Nederlandse Adminsitratie der Belastingen*, the Court of Justice of the European Union held that the Treaty on the European Economic Community established a new legal order which is distinguished from general international law:

> "(...) the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community."[15]

3. More recently, the Court of Justice of the European Union underlined, in an infringement proceeding brought by the European Commission against Ireland involving the 1982 United Nations Conventions on the Law of the Sea, the "Mox Plant" case, that:

> "... an international treaty cannot affect the allocation of responsibilities defined in the Treaties and, consequently, the autonomy of the Community legal system, compliance with which the Court ensures".[16]

Further, in the *Kadi and Al Barakaat* appeals judgment of 3 September 2008 the Court of Justice of the European Union held that even the Charter of the United Nations could not prevail over constitutional rules set out in the founding treaties of the European Union ("the European Union's primary law"), relating to the general principles of European Union law which includes the protection of fundamental rights.[17]

4. It follows that the relationship between the Union and its member States is not governed by international law principles, but by European law as a distinct source of law. This may also have repercussions on potential conflicts between Union law and the international agreements of the member States, either concluded with third States or between themselves, insofar as such agreements touch upon matters governed by European Union law.[18] For example, under European Union law, the international legal principle of "*pacta sunt servanda*" applies to international agreements entered into with non-European Union member States, but not necessarily to agreements concluded between European Union member States as European Union law has primacy.

5. The European Union does not contest that there are international organizations that are undoubtedly more "permeable" to international law than the European

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[15] Case 26/62, *Van Gend and Loos v NederlandseAdministratie der Belastingen*, [1963] *European Court Reports*, p. 1.

[16] Case C-459/03, *Commission v Ireland* (Mox Plant Case), Judgment of 30 May 2006 [2006] *European Court Reports*, p. 1-4635, para. 123.

[17] Case C-402/05P and C-4 l5/05P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] *European Court Reports*, p. 1-6351, para. 308.

[18] See art. 351 (2) of the Treaty on the Functioning of the European Union.

Union, and that for these more traditional international organizations, the commentaries set out in paragraphs 4 and 5 of draft article 4 may be relevant. However, the commentaries should make clear that they do not apply to the European Union.

International Labour Organization

Draft article 4 provides that an internationally wrongful act may exist in the case of omission. On this point the difference between States and international organizations seems important. While the decision of a State to act depends on its own organs, and can therefore be justified as the basis of responsibility in case of omission to act, the situation of international organizations is different. Its executive organs act upon a mandate given by governing organs composed of States. The organization itself cannot act without the will of member States, and the ability of member States to make decisions depends on compromise that is difficult to reach. Should the United Nations be held responsible for a failure of the Security Council to perform its assigned function regarding international peace and security? The question of omission when put in the context of what should have been an appropriate decision to act is a concept unsuitable for most if not all decisions taken by an international organization; in such context, draft article 58 would impede a finding of responsibility on the part of the organization. Furthermore, where decisions to act have already been taken by governing organs and an alleged omission occurs at the hand of the executive organs, the act would violate the internal rules of the organization and the matter would be governed under *lex specialis* (draft art. 63).

Chapter II
Attribution of conduct to an international organization

4. Draft article 5

General rule on attribution of conduct to an international organization

Organization for Economic Cooperation and Development

Draft article 5 is based on a functional criterion of attribution in that the official is acting as “agent” of the organization. Such criterion should be consistent, in our view and in line with the comments previously mentioned by IMF,[19] with the criteria used to determine whether or not the conduct of OECD officials constitutes an act performed in their official capacity that would fall within the purview of the immunities of OECD. Indeed, the respect of an organization’s immunity provided for in its constituent instruments or within its agreements on immunities is essential to the fulfilment of its mission as it protects the organization from proceedings in national courts that may have diverging views on its international obligations. However, the draft articles and accompanying commentaries as currently drafted could be interpreted as overriding the organization’s constituent instruments or immunities agreements.

[19] See IMF, comment on rules for attribution of conduct, document A/CN.4/545; see also ILO, comments on excess of authority or contravention of instructions, document A/CN.4/568/Add.1.

World Bank

1. Draft article 5, which contains the general rule on the attribution of conduct, provides in its first paragraph that the conduct or an organ or agent "in the performance of functions of that organ or agent shall be considered as an act of that organization". Is this formulation meant to imply that the exclusive criterion of attribution is functional? If so, one may question whether something more is not, in practice, required for attribution, namely that the agent has not only factually performed functions of the organization but that it has also acted on the instruction and under the control of the organization in question.

2. The second paragraph of draft article 5 confines the relevance of the "rules of the organization" to determining the functions of organs and agents. However, elsewhere in its commentary to the draft articles, the Commission acknowledges that the rules of the organization "may also affect the application of the principles and rules set out in Part Two in the relations between an international organization and its members, for instance in matter of attribution".[20] In light of this pertinent remark, the Commission may want to revisit the question of the relevance of the rules of the organization to attribution of conduct, and revise draft article 5 accordingly.

5. Draft article 6

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

European Commission

1. The key provision proposed is an "effective control" standard, which is ultimately predicated on factual control, and follows equivalent articles from the articles on the responsibility of States for internationally wrongful acts. The European Commission notes that the commentaries to this draft article are largely devoted to United Nations practice and to a discussion of the case law of the European Court of Human Rights. As the commentaries show, the latter court has by now rendered several further judgments confirming the controversial line adopted earlier in *Behrami and Behrami v France* and *Saramati v France, Germany and Norway*, and with which the Special Rapporteur, the International Law Commission and many academics, disagree.

2. Regardless of the merits of the disagreements, the question must be asked whether the international practice is presently clear enough and whether there is identifiable *opinio juris* that would allow for the proposed standard of the International Law Commission (which thus far has not been followed by the European Court of Human Rights) to be codified in the current draft. There is no doubt that this remains a controversial area of international law, in relation to which one can expect a steady stream of case law not only from the European Court of Human Rights, but also from domestic courts, in addition to voluminous academic writings.

3. Part of the reasoning behind the rule set out in draft article 6 and the commentary thereto may be the perception that international organizations tend to "escape" accountability for international wrongs. It should be noted that as far as the European Union is concerned, pursuant to express provisions of the founding

[20] Para. (4) of the commentary to draft article 31.

treaties, the European Union's institutions are fully accountable vis-à-vis each other and European Union member States for acts and failure to act.[21] In addition, non-European Union States may by virtue of express provisions in international agreements concluded with the Union have the possibility of seizing European Union courts with cases of alleged breaches of the agreement by the Union. Such agreements may also provide for participation of non-European Union contracting parties to preliminary reference proceedings, which is one of the main activities of the Court of Justice of the European Union.[22] Moreover, the European Union has standing before several dispute settlement bodies (including the World Trade Organization dispute settlement bodies and the International Tribunal for the Law of the Sea) which allow non-European Union States to bring proceedings against European Union acts. In addition, unlike other international organizations, the Union does not invoke jurisdictional immunity when European Union acts are challenged by private parties, as long as this is done in European Union courts.[23] Any natural or legal person (regardless of nationality or residence) may institute proceedings against a decision addressed to him or her or which is of direct and individual concern.[24]

International Labour Organization

Draft article 6 does not seem to take into account the fact that there are two modalities in the law of international civil services under which national officials are put at the disposal of international organizations. These two modalities, formerly defined as "loan" and "secondment", distinguish clearly the level of responsibilities for acts of such officials, denying any responsibility for their acts under the arrangement of "loan". ILO has already presented its comment on this issue and respectfully requests the Commission to take into account the 2006 ILO comments regarding draft article 5 (see A/CN.4/568/Add.1).

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[21] See arts. 260, 263 and 265 of the Treaty on the Functioning of the European Union.

[22] See for instance the Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2007, concluded between the European Union, Switzerland and other European Free Trade Association States, which provides in, Protocol 2, art. 2, that non-European Union States may participate through statements of case or written observations in proceedings concerning preliminary reference proceedings referred to by courts of European Union member States to the European Court of Justice.

[23] The European Union invokes jurisdictional immunity when it is challenged in courts of non-European Union States. The immunity invoked is based on the principle of functionality: namely, immunity that encompasses all acts needed for the execution of the official functions and activities of the organization. Insofar as Common Foreign and Security Policy actions are concerned, specific provisions included in status of forces agreements concluded by the European Union deal with immunity from civil and criminal proceedings in foreign courts and procedures for settlement of claims against the European Union.

[24] The competence of the Court of Justice of the European Union, in accordance with articles 263 and 265 of the Treaty on the Functioning of the European Union encompasses exclusive jurisdiction to decide on the legality of acts of the European institutions that produce legal effects (or for failure to act). The jurisdiction of the Court is however excluded with respect to acts adopted under the Common Foreign and Security Policy provisions, with certain limited exceptions: see art. 275 of the Treaty on the Functioning of the European Union.

6. Draft article 7

Excess of authority or contravention of instructions

Joint submission of the Comprehensive Nuclear-Test-Ban Treaty Organization, the International Civil Aviation Organization, the International Fund for Agricultural Development, the International Labour Organization, the International Maritime Organization, the International Organization for Migration, the International Telecommunication Union, the United Nations Educational, Scientific and Cultural Organization, the United Nations World Tourism Organization, the World Health Organization, the World Intellectual Property Organization, the World Meteorological Organization and the World Trade Organization

The rules applicable to ultra vires acts of an organ of a State in draft article 7 of the articles on the responsibility of States for internationally wrongful acts cannot be transposed automatically to those of an agent or an organ of an international organization which can only be held responsible within the framework of the principle of speciality. At least, a better balance should be struck, on the one hand, between attribution of ultra vires acts and the protection of third parties who rely on the good faith of agents or organs acting beyond their mandate, and, on the other hand, on the principle of speciality and the fact that an agent or organ acting ultra vires operate beyond the mandate and functions entrusted to an international organization by its members. Due account should be taken in this respect of internal mechanisms and rules. The rules and established practices applicable to privileges and immunities of international organizations and their agents, for example, might constitute a check on the nature of the acts in question.

7. Draft article 8

Conduct acknowledged and adopted by an international organization as its own

European Commission

In paragraph (3) of the commentaries to draft article 8, reference is made to a statement of the European Community in a World Trade Organization case (*European Communities-Customs Classification of Certain Computer Equipment*). This statement is cited in support of the proposition that practice does not always clearly distinguish between acknowledgment of attribution of conduct or of responsibility to an international organization. However, the reference to this statement appears misplaced. In relation to the World Trade Organization case referred to, the European Union declared that it was ready to assume the entire international responsibility for all measures in the area of tariff concessions because it was exclusively competent for the subject matter concerned and thus the only entity in a position to repair the possible breach, namely the only entity to ensure possible restitution under the World Trade Organization rules for dispute settlement.

8. Draft article 9

Existence of a breach of an international obligation

European Commission

1. Paragraph 2 of draft article 9 raises again the questionable generic assumption that the “rules of the international organization” belong to the sphere of

international law. For the reasons set out above,[25] the European Union does not accept the proposition that its internal law forms part of this sphere. It would request that this be made clear in the commentaries.

2. In addition, the rule set out in draft article 9, paragraph 2, does not appear coherent with the later draft articles. The inconsistency is apparent when comparing draft article 9 with the first sentence of draft article 31. The latter provides that an international organization cannot rely on its internal law ("its rules") as justification for failing to comply with the draft articles on the content of the international responsibility. Consequently, the draft articles, as they currently stand, appear to state that the rules of the international organization should be considered irrelevant for the establishment of the content of the responsibility of the organization, and later on for the remedies, but not for the existence of the breach. This is inconsistent and there appears to be no support for this in the constituent instruments of many international organizations.

3. Moreover, paragraph (9) of the commentaries to draft article 9 erroneously cites the Court of Justice of the European Union case C-316/91, *Parliament v. Council*, for the proposition that an international organization may be bound by an obligation to achieve a certain result irrespective of whether the necessary conduct will be taken by the organization itself or by one or more of its member States. The European Commission would note in this regard that the Court of Justice of the European Union case in question was not concerned with the boundary between the "inner" and "outer" sphere, but with a "mixed agreement". These are agreements that cover subject matters that fall both under European Union and the national competence of the European Union member States and are hence concluded by both the European Union and all its member States together, *in casu* the Fourth Convention between the European Economic Community and the African, Caribbean and Pacific States. In such a specific case, involving "bilateral" cooperation between the European Union and its member States on the one hand and the non-European Union States on the other, all the treaty obligations bind both the European Union and its member States irrespective of the exact internal delimitation of competences. In sum, case C-316/91 does not bring clarification to the rule currently set out in draft article 9.

World Bank

1. Pursuant to paragraph 1 of draft article 9, an international organization breaches an international obligation when its act is not in conformity with what that obligation requires, "regardless of its origin and character". Paragraph 2 of the same draft article then adds that the scope of paragraph 1 "includes the breach of an international obligation that may arise under the rules of the organization". However, paragraph (5) of the commentary to draft article 9 acknowledges that the legal nature of the rules of the organization "is to some extent controversial" and, in any event, it remains open to question "whether all the obligations arising from the rules of the organization are to be considered as international obligations". This is why paragraph (6) of the commentary expressly clarifies that paragraph 2 "does not attempt to express a clear-cut view on the issue [and] simply intends to say that, to the extent that an obligation arising from the rules of the organization has to be

[25] See the comments of the European Commission under draft article 4.

regarded as an obligation under international law, the principles expressed in the present article apply".

2. Precisely because we agree with the Commission in its cautious approach to this important point, we think that the clarification provided in the commentary would be better reflected by the deletion of paragraph 2 from draft article 9. In fact, paragraph 1 already states that a breach is a breach regardless of the origin and character of an obligation binding an international organization, thus clearly implying that this origin may also be in the rules of the organization. On the contrary, retaining paragraph 2 may wrongly lead to the unsubstantiated conclusion (expressly denied in the Commission's commentary) that the breach of any rule of the organization is necessarily a breach of an international obligation.

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

9. Introductory commentary to chapter IV

European Commission

1. In paragraph (4), reference is made to cases before international tribunals or other bodies for the proposition that the question of the international organization's international responsibility has not been examined on *ratione personae* grounds. It is not clear to the European Commission that this comment is entirely well-placed here. In addition, it should be noted that all but one of the cases referred to relate to actions involving the European Union and its member States before the European Court of Human Rights. In this regard, it should be pointed out that the cases that have been dismissed at the level of the former European Commission of Human Rights do not have the same legal authority as judgments of the European Court of Human Rights. Furthermore, the picture given by these decisions of the former European Commission of Human Rights and the judgments of the European Court of Human Rights appears much more nuanced than would appear from the current introductory text to chapter IV of the draft. Applications directed against the European Union as an organization have been declared inadmissible *rationae personae* (CFDT[26]). However, the former European Commission of Human Rights did not dismiss applications involving an European Union act as inadmissible *rationae personae*, when those applications were directed against one or all the European Union member States and not against the European Union as such (*Senator Lines*;[27] *Emesa Sugar*[28]). In addition, the European Court of Human Rights has held that an European Union member State can be held responsible for acts of primary European Union law (*Matthews*[29]) and for national implementation act of European Union secondary law, irrespective of the nature of the European

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[26] European Commission of Human Rights, Application No. 8030177, *CFDT* v. *the European Communities and their Member States* (1978).

[27] European Court of Human Rights, Application No. 56672/00, *Senator Lines* v. *Austria. Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom*, Decision of 10 March 2004.

[28] European Court of Human Rights, Application No. 62023/00, *Emesa Sugar* v. *the Netherlands*, Decision of 15 January 2005.

[29] European Court of Human Rights, Application No. 24833/94, *Matthews* v. *United Kingdom*, Judgment of 18 February 1999.

Union act and of the fact whether the member State enjoys discretion or not (*Cantoni*[30];*Bosphorus*[31]).

2. It should also be noted that the European Union is currently negotiating its accession to the European Convention on Human Rights as mandated by article 6(2) of the Treaty of the European Union. Upon the European Union's accession applications to the European Court of Human Rights involving European Union as an organization will no longer be declared inadmissible on *ratione personae* grounds — provided that the impugned act or omission is itself imputable to the European Union.

10. Draft article 13

Aid or assistance in the commission of an internationally wrongful act

European Commission

Since aid or assistance is often used in a financial context, it would seem desirable that this draft article and its interpretation be kept as narrow as possible so as not to turn it into a disincentive for development aid by international organizations. Given that the threshold for the application of the rule seems low (knowledge), one should add in the commentary some limitative language (intent) in line with the commentaries of the articles on the responsibility of States for internationally wrongful acts.

International Labour Organization

The wording of subparagraph (a), which comes from the articles on the responsibility of States for internationally wrongful acts, may need to be further clarified to determine whether the expression "knowledge of circumstances" refers to the knowledge of the organization that it is committing an internationally wrongful act.

World Bank

1. We are not at all convinced that applying to international organizations the provision, found in the articles on the responsibility of States for internationally wrongful acts, on aid and assistance in the commission of an internationally wrongful act "is not problematic", as the Commission's commentary suggests.[32] Actually, if not strictly confined to its proper scope, this provision is worrisome and may create a dangerous chilling effect for any international financial institution providing economic assistance to eligible borrowers and recipients. If the source of draft article 13 on the responsibility of organizations is article 16 in the project on State responsibility, then we assume that the clarification given in paragraph (4) of the commentary to article 16 of the 2001 articles applies likewise to draft article 13.

2. Our assumption would seem to find support in footnote 58 of the Commission's commentary to the draft articles on the responsibility of international

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[30] European Court of Human Rights, Application No. *45/1995/551/637, Cantoni* v. *France*, Judgment of 15 November 1996.

[31] European Court of Human Rights, Application No. 450368/98 (*Bosphorus*), Judgment of 30 June 2005 (Grand Chamber).

[32] Commentary to draft article 13.

organizations, where it is written that "[t]o the extent that provisions of the present articles correspond to those of the articles on the responsibility of States, reference may also be made, where appropriate, to the commentaries on those earlier articles". Even if this footnote remains in the commentary after the second reading (and, *a fortiori*, if it disappears from the final commentary), we ask the Commission to please consider expressly indicating, in its commentary to draft article 13, that organizations providing financial assistance do not, as a rule, assume the risk that assistance will be used to carry out an international wrong, as the commentary to the articles on the responsibility of States for internationally wrongful acts clearly provides.

11. Draft article 14

Direction and control exercised over the commission of an internationally wrongful act

World Bank

1. As to the requirement of "knowledge", we would appreciate a clear indication, in the commentary to both this draft article and the previous one on "aid and assistance", that this is actual (not presumed) knowledge, as in fact the Commission had indicated in paragraph (9) of its commentary to article 16 in the articles on the responsibility of States for internationally wrongful acts.

2. As to "direction and control", what are they? As a result of an agreement between an international financial institution and a borrower or recipient, direction and control for the implementation of project or programme activities is never really ceded, because the responsibility for implementation remains with the borrower or recipient, while the international financial institution engages at most in the exercise of oversight. Oversight is neither "control" nor "direction", though. As the commentary to the corresponding provision in the articles on the responsibility of States for internationally wrongful acts appropriately points out, control "refers to cases of domination over the commission of wrongful conduct and not simply the exercise of oversight".[33] An express clarification to this effect in the commentary to draft article 14 would be critical to an accurate understanding of the text and to assuage any possible concern on the meaning and effect of such a provision.

12. Draft article 16

Decisions, authorizations and recommendations addressed to member States and international organizations

European Commission

In its previous contributions (see A/CN.4/568/Add.1), the European Union has commented that to hold that an international organization incurs responsibility on the basis of mere "recommendations" made to a State or an international organization appears to go too far. It remains the case that the commentary cites no authority for such a rule. Furthermore, the entire draft article and the commentaries thereto appear to be inspired by the European Court of Human Rights judgment in the *Bosphorus* case. It should be noted in this regard, as mentioned above, that the

[33] Para. (7) of the commentary to article 17.

European Union is currently negotiating its accession to the European Convention on Human Rights.

International Labour Organization

Draft article 16 makes reference, in addition to decisions and authorizations, also to recommendations. It would appear that recommendations are — by their nature — non-binding acts and that for an internationally wrongful act to be committed as a consequence of a recommendation there needs to be an intervening act — the decision of the State or another international organization to commit that act. The chain of causation would be thus broken.

Organization for Economic Cooperation and Development

A wrongful act committed by a member country while implementing a decision or recommendation of an organization cannot be attributed to such organization, absent the direction or control of the organization regarding the act itself. Thus, the member country alone should be responsible for the manner in which it implements, or not, the decision or recommendation. It is understood that an organization shall not, through a decision or a recommendation, request a member country to breach any of the latter's international obligations. In other words, as stated by IMF (see A/CN.4/556/sect.II.N), the identification of a certain objective by an international organization, which the member country decides to achieve by breaching its international obligations, can neither result in a breach of such obligations by the organization, nor in attribution to its responsibility.

Part Three
Content of the international responsibility of an international organization

Chapter I
General principles

13. Draft article 30

Reparation

International Labour Organization

1. In order to determine the existence of practice, the Commission, and its Special Rapporteur quoted, in particular, the examples of jurisprudence of the administrative tribunals, used to support the proposals regarding possible reparations by international organizations for internationally wrongful acts,[34] which are not relevant for the discussion on the responsibility of international organizations under general international law. Administrative tribunals have been created as a part of the "rules of the organization" and have been given different mandates by each "parent" organization. For example, the reinstatement of an official, as a measure that can be ordered by an administrative tribunal, does not exist in the statutes of all administrative tribunals. ILO therefore considers that such a practice is not relevant for the discussion on the responsibility of international organizations under general international law. It is also important to distinguish between acts committed by international organizations that are internationally

[34] Fifth report, A/CN.4/583 and Corr.1, para. 43.

wrongful, namely, being violations of international law, and those that are wrongful under national law.

2. Another potential problem with examples quoted by the Special Rapporteur is the unique situation of the European Union.[35] Examples of responsibility of organizations that are themselves members of other organizations, such as the European Union, and therefore subject to judicial or quasi judicial organs of the latter organizations would not necessarily amount to the practice applicable to all other "traditional" international organizations. The Commission may want to review the examples that led to some conclusions of the Commission in order to ensure that they apply only to such narrow situations.

3. The criterion of "full reparation", may lead to ideas requiring international organizations to maintain a contingency fund or have an insurance of large amount in order to ensure solvency in the event of such liabilities, or another type of mechanism for member States to contribute to pay such liabilities when and if they arise. International organizations are — in principle — not profit-generating and cannot rely on a tax system to finance their operations. They have to rely on funds allocated to them. If they were to provide funds for contingent obligations such as a possible compensation, they would have reduced funds for fulfilling their original mandates. By imposing such a parallel obligation on international organizations, the Commission risks limiting effectively their future operations. The requirement of "full reparation" may lead, in the case of compensation, to the disappearance of the international organization concerned. The Commission may want to consider some limits in the duty to compensate, as was done in the case of satisfaction.

Joint submission of the Comprehensive Nuclear-Test-Ban Treaty Organization, the International Civil Aviation Organization, the International Fund for Agricultural Development, the International Labour Organization, the International Maritime Organization, the International Organization for Migration, the International Telecommunication Union, the United Nations Educational, Scientific and Cultural Organization, the United Nations World Tourism Organization, the World Health Organization, the World Intellectual Property Organization, the World Meteorological Organization and the World Trade Organization

We are concerned that limited attention seems to have been paid by the Commission to the special situation of international organizations in relation to the obligation to compensate. If international organizations are "under an obligation to make full reparation for the injury caused by the internationally wrongful act", this could lead to excessive exposure taking into account that international organizations in general do not generate their own financial resources but rely on compulsory or voluntary contributions from their members. This could be unrealistic because, if the internationally wrongful act of an organization causes major damage, the organization might not have the funds to provide full compensation or, conversely, the payment of compensation could compromise its activities and mandates.

[35] Third report, A/CN.4/553, para. 1.

14. Draft article 31

Irrelevance of the rules of the organization

Council of Europe

Draft article 31 may give rise to certain hesitations as it would seem difficult to hold an international organization responsible for provisions contained in its constituent treaty which are wrongful under international law. The meaning of the word "rules" in paragraph 1 of the draft article would benefit from further clarification.

European Commission

As commented above in relation to draft article 9, it is not consistent for the draft articles to state, on the one hand, that a responsible international organization may not rely on its internal law ("its rules") to justify its failure to comply its obligations (draft art. 31(1)) and, on the other hand, state that a breach of the internal law of the organization may amount to a breach of international law (draft art. 9(1)).

International Labour Organization

The rules of organizations should not be compared to the internal rules of States, as was done in draft article 31 where the Commission makes a simple parallel to the principle that a State may not rely on its internal law as a justification for failure to comply with its obligations. It remains important to clarify whether the "rules of the organization" are part of international law or represent a sui generis system. In the situation described by draft article 31, one can detect rather conflict of norms on the same level than the hierarchy of norms that was justified in the context of State responsibility. One can even imagine the precedence of constituting instruments. For example, if an international organization under the decision of its organs refrains from providing technical assistance to a member State with which it has a valid treaty, would it be a conflict of two international obligations at the same level or should the obligation that prevails be the one derived from the constituent instrument of the organization? Should the rules of the organization preclude illegality of breach of another international obligation and provide a sufficient justification for not making reparations? Or, should the responsibility be of a purely objective nature, which means that an organization would be responsible for having breached an international obligation even if its governing bodies requested it to act in this way? Chapter V of the draft articles does not seem to adequately address this question.

15. Draft article 35

Compensation

International Labour Organization

[See the comment under draft article 30 above.]

16. Draft article 36

Satisfaction

International Labour Organization

As regards satisfaction, as one of the possible forms of reparations by international organizations, there is a difference between the responsibility of States and that of international organizations. While the customary international law rule as to who represents a State in international relations is well established, this is not obvious for international organizations, especially as different organs may be at the origin of the internationally wrongful act that needs to be repaired. Examples quoted by the Special Rapporteur (see A/CN.4/583 and Corr.1, paras. 50-52) and the International Law Commission demonstrate that there is a confusion in this field. While executive heads are a visible part of an organization, they are rarely empowered in the constituent instrument to represent the organization in such matters. It would thus seem important to add a qualifier at the end of the second paragraph of draft article 36, such as "made in accordance with the rules of the organization concerned" or a reference to a "competent organ".

17. Draft article 39

Ensuring the effective performance of the obligation of reparation

European Commission

The rule proposed in draft article 39 appears to be primarily based on one precedent, namely, the *Tin Council* case. As far as the European Union is concerned, there would appear to be no need for the draft articles to include such a generic rule. In any event, it should be noted that the European Union has a budget line providing a contingency reserve to deal with unforeseen circumstances.

International Labour Organization

Paragraph (3) of the commentary to draft article 30 regarding reparations clearly states that international organizations may not have all the necessary means for making the required reparations, especially due to the inadequacy of the financial resources. This commentary is, however, disregarded in the light of the explanation that inadequacy cannot exempt a responsible organization from the legal consequences resulting from its responsibility under international law. While the general principle may be acceptable, its practical application in terms of compensation seems problematic. In this context, draft article 39 is welcome as an innovative approach, but may need to be reinforced even further. The requirement for member States to act in accordance with the rules of the organization seems, however, redundant.

Joint submission of the Comprehensive Nuclear-Test-Ban Treaty Organization, the International Civil Aviation Organization, the International Fund for Agricultural Development, the International Labour Organization, the International Maritime Organization, the International Organization for Migration, the International Telecommunication Union, the United Nations Educational, Scientific and Cultural Organization, the United Nations World Tourism Organization, the World Health Organization, the World Intellectual Property Organization, the World Meteorological Organization and the World Trade Organization

Draft article 39 is a step in the right direction but it does not go far enough. Since the draft articles are largely an exercise in progressive development of international law, this could be a unique occasion to state the obligation of member States to provide sufficient financial means to organizations with regard to their responsibility.

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

Chapter I
Invocation of the responsibility of an international organization

18. Draft article 42

Invocation of responsibility by an injured State or international organization

European Commission

The European Union has standing before several international dispute settlement bodies, allowing non-European Union States to bring proceedings against it (e.g., the World Trade Organization dispute settlement bodies and the International Tribunal for the Law of the Sea). In addition, non-European Union States may have by virtue of express provisions in international agreements concluded with the European Union the possibility of seizing European Union courts with cases of alleged breaches of the agreement by the European Union. Furthermore, as mentioned above, when the European Union accedes to the European Convention on Human Rights, non-European Union States will be able to bring applications against the European Union on the basis of the "inter-State" provisions of the convention.

Organization for Security and Cooperation in Europe

The conjunction "and" in the phrase "the position of all the other States and international organizations" in subparagraph (b)(ii) should be replaced by "or".

19. Draft article 44

Admissibility of claims

Organization for Security and Cooperation in Europe

A reference to the functional character of claims of an international organization against another international organization or State based on the

criterion of "agent" (draft art. 2(c)) could be considered to be added in the draft article 44, preferably before paragraph 2.

20. Draft article 47

Plurality of responsible States or international organizations

European Commission

In relation to draft article 47, reference is made to the comments made above in relation to paragraph (9) of the commentaries to draft article 9. The Court of Justice of the European Union case C-316/91 *Parliament v. Council* is correctly discussed here as an example of a "mixed" agreement, where on the European Union side not only the European Union but also its member States are parties. It is worth noting also that while both the European Union and all its member States are members of the World Trade Organization, most disputes are entirely directed and enforced against the European Union only.

Chapter II
Countermeasures

21. Draft article 50

Object and limits of countermeasures

European Commission

In relation to the commentaries set out in paragraph (4), it should be pointed out that the World Trade Organization operates a specific regime of "countermeasures" under articles 21 and 22 of the Disputed Settlement Understanding. To the extent that these countermeasures are authorized by treaty it is arguable that these do not provide genuine examples of countermeasures under general international law.

Organization for Security and Cooperation in Europe

OSCE agrees with the possibility of countermeasures by or against international organizations, which ought to be distinguished from sanctions that an organization may impose on its members in accordance with its internal rules. The relevant provisions of the draft articles (draft arts. 21 and 50-56) apply only to the former category of actions. Some specific countermeasures concerning the non-performance of obligations owed to other international organizations or States may, however, ultimately affect third parties, for example, the beneficiaries of a programme jointly implemented by two or more international organizations and States, which is common in OSCE. In this context, the cessation of the (funding of the) implementation of such a project, as a countermeasure against a partner, may also affect the State where the project is being implemented or the final beneficiaries of the project. While the draft articles address the impact that countermeasures may have on the targeted entity (see draft art. 53), it may also be useful to address the issue of the impact of countermeasures on non-targeted entities. A specific explanation in the commentary may cover this issue.

22. Draft article 51

Countermeasures by members of an international organization

European Commission

Draft article 51, subparagraph (a), again raises the question, referred to above, of the status under international law of the internal law of an organization. It is very much doubtful that this draft article could be applied to the European Union so as to allow for the hypotheses of countermeasures under international law between the organization and its member States. This is demonstrated in part by the case law of the Court of Justice of the European Union discussed in paragraph (6) of the commentaries, where it is correctly stated that the existence of judicial remedies within the European Union appears to exclude European Union member States from resorting to countermeasures against the European Union.

Part Five
Responsibility of a State in connection with the act of an international organization

23. General comments

International Labour Organization

1. The International Labour Organization expressed its reservations as to what appear to be a joint responsibility of States and international organizations already in its 2006 comments (see A/CN.4/568/Add.1). In determining the right of the United Nations to make an international claim, the starting point for the International Court of Justice was the argument that the organization occupied a position in certain aspects in detachment from its members. It is difficult to reconcile this position with the position of the Commission that "a distinct legal personality does not exclude the possibility of a certain conduct being attributed both to the organization and to one or more of its members or to all its members".[36] Unless the organization itself authorizes its members to act on its behalf ("through the medium of the Member States") as, for example, when due to the impossibility for the organization to accept the international obligation (see an example of the Opinion 2/91 of 19 March 1993 of the European Court of Justice), or where shared liability is provided by treaty, there seems to be no clear reason why, for example, member States should be held liable for decisions taken by the organization bodies, particularly as they may be (and usually are) taken by a (majority) vote.

2. The notions of aid and assistance (draft art. 57), and even more direction and control (draft art. 58), not to mention "coercion" (draft art. 59), seem to deny the distinct legal personality of international organizations. The justification of piercing the "organization veil" cannot be found in the commentaries of the Commission and a parallelism between the corresponding articles on the responsibility of States for internationally wrongful acts does not appear to be helpful in distinguishing between a participation in the decision-making process of an organization according to its pertinent rules, and the situations envisaged by the draft articles. The impact that "the size of the membership" and "the nature of the involvement" may have in this context requires further clarification.

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[36] Para. (10) of the commentary to draft article 2.

3. It would appear that a distinction between members and non-members — or at least in what capacity States act in each situation — may be important in the situations foreseen in draft articles 57 to 59. Member States both act within international organizations and have an external legal relationship with them. Multiple layers of relationship between an international organization and its member States do not seem to be adequately taken into consideration. For example, member States contribute financially to the activities of the organizations not only (or even less and less) through their contributions to the regular budget, but also through their voluntary contributions, either budgetary or extrabudgetary. The responsibility in this type of relationship is based on both *lex specialis* of internally adopted rules and general treaty law.

24. Draft article 60

Responsibility of a member State seeking to avoid compliance

European Commission

Reference is made to the comments in connection with draft article 16 above. The improvements made in the drafting of the present draft article compared to earlier versions appear welcome. As for the question of "intent", the notion of "seeking to avoid" compliance does require establishment of intent, even if this intent can be inferred from the circumstances, as set out in paragraph (7) of the commentary.

25. Draft article 61

Responsibility of a State member of an international organization for the internationally wrongful act of that organization

European Commission

1. The European Commission considers that draft article 61(a) should read: "(a) It has in conformity with the rules of the organization accepted responsibility for that act."

2. It seems doubtful whether the concept of "reliance" referred to in draft article 61, paragraph 1(b), is a workable concept. The commentary at paragraph (9) as a whole does not seem to support such a rule. It appears to be based on a single arbitration award, *Westland Helicopters*, which could support the rule but appears to have been rendered in fairly exceptional circumstances.

3. On the whole, the main issue that draft article 61 raises is the question of "permeability" of international organizations vis-à-vis international law. The text of the draft articles and the commentaries as they stand appear to suggest to third States that there is legal uncertainty as regards where precisely the border lies.

Part Six
General provisions

26. Draft article 63

Lex specialis

European Commission

1. There are ample reasons for assuming that the European Union is an international organization that is unlike other more traditional international organizations. The special features of the European Union are many and can be summarized as follows:

- European Union member States have transferred competences (and therefore decision-making authority) on a range of subject matters to the European Union. The overall dividing line between competences of the member States and of the European Union is subject to continuous development, in accordance with rules set out in the founding treaties and the case law of the Court of Justice of the European Union.

- In many cases the European Union is able to act in the international sphere in its own name. It can become member of an international organization, where the constitutional rules of the latter so allow; it can conclude bilateral treaties on behalf of the European Union with non-European Union States and non-European Union entities; it can become a party to multilateral agreements in its own name and on its own behalf; and it can also can become a party to international legal proceedings on its own behalf. In cases where the European Union is unable to exercise its competence in the international sphere, because of lack of standing at the "receiving end" (particularly when international treaties and organizations do not allow for international legal subjects other than States to become party), the European Union may have to continue to use the vehicle of acting through its member States. However, in such cases European Union member States do not act on their own behalf but on behalf and in the interest of the European Union.

- The special character of the European Union as a result of the transfer of powers has implications for the freedom of European Union member States to act in the international sphere; the European Union acts to a large extent through its member States, rather than just through its own "organs" and "agents" as classical international organizations.

- The European Union member States and their authorities are obliged to carry out binding decisions and policies adopted by the European Union according to the European Union's internal rules.[37] This requires special rules of attribution and responsibility in cases where European Union member States are in fact only implementing a binding rule of the international organization. In other words, the European Union exercises normative control of the

[37] See Treaty on European Union, art. 4(3), paras. 2 and 3: "The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts or institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."

member States who then act as Union agents rather than on their own account when implementing Union law.

- In areas of European Union competence only the European Union may be able to undo breaches of international law that have their root cause in the European Union rules or practices: individual member States may be powerless to do so.
- The transfer of powers to the European Union from European Union member States in a range of subject matters means that the European Union may act in the international sphere (a) on its own behalf to the exclusion of its member States; (b) through the vehicle of its member States; and (c) sometimes along its member States, where the latter retain competences on subject matters alongside the European Union (either on a transitional or permanent basis).
- The rules regarding the transfer of powers are set out in the founding treaties of the European Union and the jurisprudence of the European Union's highest court, the Court of Justice of the European Union. It is the interpretation of the European Union judicature that this set of internal European Union rules governing the relationship between the European Union as an organization and its member States is more of a constitutional nature rather than qualified as international law. The Court of Justice of the European Union has in a series of cases taken the view that international law can permeate the European Union's internal constitutional order only under the conditions set by the latter; and that no international treaty can upset the constitutional division of powers between the European Union and its member States.

2. While the European Union may currently be the only such organization that exhibits all the special internal and external features that have been described above, other regional organizations may sooner or later be in a position to make similar claims. To the extent that the draft articles, even taking account of the commentaries, at present do not adequately reflect the situation of regional (economic) integration organizations such as the European Union, it would seem particularly important for the draft to explicitly allow for the hypothesis that not all of its provisions can be applied to regional (economic) integration organizations ("*lex specialis*").

International Labour Organization

1. This is a key provision of the draft articles and the Commission may wish to consider giving it a greater prominence in the overall structure. The attempts aimed at progressive development of international law should not have an adverse impact on the existing law. States' behaviour in a variety of international organizations very often differs. In fact, the rules of organizations are rarely identical and this may demonstrate that States do not necessarily wish to have a uniform set of rules applicable to all international organizations. Thus, the task of creating uniformly applicable rules for their responsibility becomes very complex, even with the caveat of draft article 63.

2. While there may be some value in arguments that the issue of the responsibility of a non-member State might have been better dealt with by the articles on the responsibility of States for internationally wrongful acts, the relationship between member States and the organization (including the situations

described in draft arts. 61 and 62) should be analysed in the light of the internal legal system of each organization, as created by the constituent instrument and developed further by the organization's internal rules and practice. These rules represent *lex specialis* and the relationship between the member State and the international organization should not be subject to general rules of international law for the issues regulated by the internal rules. The scope of draft article 63 has therefore to be understood broadly, not just as relevant to the determination of responsibility of an international organization, but also as pre-empting any general international law rules on responsibility where they coexist, following the principle *lex specialis derogat legi generali*. In that line of reasoning, the Commission may wish to revisit also paragraph 2, of draft article 9. ILO has already made extensive comments on this provision in its 2006 comments (see A/CN.4/568/Add.1).

International Monetary Fund

While we are encouraged by the inclusion of draft article 63 in the draft and its recognition of the primary importance of *lex specialis*, we believe that much greater clarity is needed with respect to the scope of this provision and the extent to which it qualifies other provisions. The provision itself and the related commentary should be redrafted to make it clear that, as noted above, the responsibility of an international organization for actions taken towards its members will be determined by reference to the organization's constituent instrument, and the rules and decisions adopted thereunder, along with peremptory norms of international law and other obligations that the organization has voluntarily assumed. Clarifying the scope and implications of draft article 63 will be critical as the Commission commences its second reading of the draft articles, and we strongly encourage the Commission to take the opportunity to do so.

Joint submission of the Comprehensive Nuclear-Test-Ban Treaty Organization, the International Civil Aviation Organization, the International Fund for Agricultural Development, the International Labour Organization, the International Maritime Organization, the International Organization for Migration, the International Telecommunication Union, the United Nations Educational, Scientific and Cultural Organization, the United Nations World Tourism Organization, the World Health Organization, the World Intellectual Property Organization, the World Meteorological Organization and the World Trade Organization

The interplay of the *lex specialis* principle in relation to the role devoted in the draft articles to the "rules of the organization" is ambiguous. We can accept that a single text covers all issues of responsibility involving international organizations. But, if this is so, special attention should be paid to the principle of speciality — which is one of the main factors differentiating the legal personality of international organizations from that of States. We therefore suggest the inclusion, in the introductory provisions of the draft articles, of an express provision specifying that the responsibility of international organizations is defined by the principle of speciality. We are concerned that, if the draft articles follow the same course as the articles on the responsibility of States for internationally wrongful acts and are left entirely to utilization by Governments, judicial bodies and other interpreters, their heavy reliance on the latter articles may make them unenforceable in practice or lead international organizations to be treated increasingly like States from the point

of view of their responsibility under international law, with unpredictable long-term consequences.

North Atlantic Treaty Organization

With reference to the phrase "special rules of international law, including rules of the organization applicable to the relations between the international organization and its members", it may be observed that the fundamental internal rule governing the functioning of the organization — that of consensus decision-making — is to be found neither in the treaties establishing NATO nor in any formal rules and is, rather, the result of the practice of the organization.

Organization for Economic Cooperation and Development

1. The constituent instruments and internal rules and procedures of international organizations are the primary source of obligations from which their responsibility is derived and should be assessed. Draft article 63 is a key provision. Indeed, the draft articles on responsibility of international organizations should not apply if the conditions, content or implementation of responsibility are governed by "special rules of international law, including rules of the organization applicable to the relations between the international organization and its members". We share the view that the legality of an international organization's act and the mechanism of responsibility should be primarily determined on the basis of its constituent instruments, internal rules and procedure.

2. The responsibility of an international organization can only be challenged when an act is clearly in breach of its constituent instruments, internal rules and procedures, or if in accordance with them, is in breach of peremptory norms.

3. The Commission, in its second reading, should revisit both the draft articles and the accompanying commentaries in such a way so that there may be no doubt on the prevailing centrality of *lex specialis* and the residual character of the general rules on the responsibility of international organizations. This contention is supported by the fact that the very purpose of special law is to supersede general rules, except if the matter at stake is governed by a peremptory norm.

4. In applying the principle of *lex specialis*, we support the role of international organizations in creating internal definitions for certain terms. We note in particular that a definition of the term "organ" is lacking within the draft articles. However, owing to the diversity of international organizations, we do not advocate for a generic definition, but instead consider that the internal rules of each international organization govern with respect to defining an "organ" of that organization.

Organization for Security and Cooperation in Europe

As international organizations do not possess general competence and therefore operate under the principle of speciality, it is important to acknowledge the fact that in several cases the specific rules of each organization would supersede the general ones provided for in the draft articles. Therefore, it is proposed that the Commission considers the possibility to include the relevant draft article 63 (*Lex specialis*) in Part One (Introduction) of the draft articles, as a new draft article 3. With the exception of the presence of a peremptory norm of general international law, the *lex specialis* rule is key to resolving potentially conflicting characterization

of any act of an international organization as "wrongful or not" under general international law vis-à-vis the internal law of the said international organization.

World Bank

1. If only one considers (a) the quasi-universal membership of the Bretton Woods institutions (the International Monetary Fund and the International Bank for Reconstruction and Development) and, in any event, the fact that international financial institutions operate, as a rule, within their member countries; (b) the comprehensive "rules of the organization" of international financial institutions; and (c) the detailed provisions, contained in their financial agreements, on the consequences deriving from the breach of primary obligations, it becomes evident that the occasions for resorting to rules on responsibility other than special law are quite rare (if at all) within the context of the operations of international financial institutions.

2. The draft articles contain, in draft article 63 on *lex specialis*, what is probably its key provision. While the current formulation of draft article 63 may certainly be improved, as the comments of other international organizations have suggested, its crucial role within the scheme of the draft articles is undisputable. On this basis, we take the liberty of strongly encouraging the Commission, when proceeding to its second reading, to revisit both the draft articles and the accompanying commentaries in such a way that there may not be any doubt on the centrality of *lex specialis* and the residual character of the general rules on the responsibility of international organizations.

3. In paragraph (6) of the commentary to draft article 63, the Commission indicates that the draft article in question is "designed to make it unnecessary to add to *many* of the preceding articles a proviso such as 'subject to special rules'" (emphasis added). Why this reference to "many" preceding rules instead of a reference to them all, save for the preservation of the effects of peremptory norms of jus cogens? In other words, which other draft articles on general rules, other than those on jus cogens, are not qualified by special law? We have difficulties thinking of any.

4. In paragraph (5) of the commentary to draft article 4, one reads that "it would be questionable to say that the internal law of the organization always prevails over the obligation that the organization has under international law towards a member State". Again, as the internal law of the organization is, as a rule, the most significant component (when not the whole) of *lex specialis*, will not a special rule prevail over *all* international obligations other than those deriving from jus cogens? We cannot think of any dispositive (as opposed to peremptory) norm that would constitute an exception, precisely because, on any matter that is not governed by a peremptory norm, a general obligation is qualified and superseded by special law, this being the very purpose of special law. We therefore encourage the Commission to reconsider the above-mentioned sentence, by either deleting or qualifying it by preserving the prevailing role of special law.

5. We encourage the Commission, in its second reading, to ensure that the expression "international law" (which is not defined in the draft articles) be used with a uniform meaning throughout the text, and that it also take due account of any applicable special law. For example, does the expression "under international law" have one and the same meaning in the current text of draft article 4, subparagraph (a),

on the elements of an internationally wrongful act and draft article 5, paragraph (1), on the conduct of an organ or agent as an act of the organization? And, if so, is "international law" meant to encompass, in both draft articles, both general international law and any applicable special law?

III. List of attachments to the comments and observations received from international organizations[38]

Council of Europe

Summary of the relevant case-law of the European Court of Human Rights entitled "The Court's Competence in respect of Acts of International Organizations"

North Atlantic Treaty Organization

Article VIII of the Agreement between the Parties to the North Atlantic Treaty regarding the status of their forces, done in London, 19 June 1951

[38] The attachments to the comments and observations received from international organizations are on file with the Codification Division of the Office of Legal Affairs.