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ЛЕКЦИИ ЛЕТНЕЙ ШКОЛЫ ПО МЕЖДУНАРОДНОМУ ПУБЛИЧНОМУ ПРАВУ

Ответственность международных организаций
Мигель де Серпа Суареш

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Responsibility of International Organizations
Miguel de Serpa Soares

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ПО МЕЖДУНАРОДНОМУ ПУБЛИЧНОМУ ПРАВУ**

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The present publication contains the text of lectures by Miguel de Serpa Soares on the topic “Responsibility of International Organizations”, delivered by him within the frames of the Summer School on Public International Law 2019.

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Летняя Школа по международному публичному праву 2019 года
Summer School on Public International Law of 2019

Дорогие друзья!

Центр международных и сравнительно-правовых исследований продолжает публикацию лекций, прочитанных в рамках Летней Школы по международному публичному праву.

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В 2019 году состоялась вторая Летняя Школа. Специальные курсы были посвящены теме «Ответственность в международном праве». Их прочитали Джеймс Катекя («Ответственность государств»), Мигель де Серпа Суареш («Ответственность международных организаций»), Ивана Хрдличкова («Международная уголовная ответственность индивида»), Джон Дугард («Дипломатическая защита»), Алина Мирон («Контрмеры и санкции»). Общий курс международного публичного права прочёл Туллио Тревес.

Центр международных и сравнительно-правовых исследований выражает благодарность членам Консультативного совета Летней Школы: Р. А. Колодкину, С. М. Пунжину, Л. А. Скотникову, Б. Р. Тузмухамедову — и всем, кто внёс вклад в реализацию этой идеи, в том числе АО «Газпромбанк» за финансовую поддержку проекта.

Dear friends,

The International and Comparative Law Research Center continues publication of lectures delivered within the Summer School on Public International Law.

The Summer School is a project of the Center aimed at providing those learning, working, or aspiring to work in the sphere of international law, with an opportunity to obtain advanced knowledge of the subject and encouraging participants to engage in independent research. The Summer School's curriculum is comprised of lectures and seminars of the general and special courses under one umbrella theme delivered by leading international law experts, as well as of independent and collective studying.

The second Summer School was held in 2019. The Special Courses were devoted to the topic "Responsibility in International Law". The courses were delivered by James Kateka ("Responsibility of States"), Miguel de Serpa Soares ("Responsibility of International Organizations"), Ivana Hrdličková ("Individual Criminal Responsibility in International Law"), John Dugard ("Diplomatic Protection"), and Alina Miron ("Countermeasures and Sanctions"). The General Course on Public International Law was delivered by Tullio Treves.

The International and Comparative Law Research Center wishes to express its appreciation to the members of the Advisory Board — Roman Kolodkin, Sergey Punzhin, Leonid Skotnikov, and Bakhtiyar Tuzmukhamedov — as well as others who helped implement the project, including Gazprombank (JSC) for their financial support.



Мигель де Серпа Суареш

Мигель де Серпа Суареш был назначен Заместителем Генерального секретаря ООН по правовым вопросам и юрисконсультom ООН в сентябре 2013 года. Он курирует Управление по правовым вопросам, в задачи которого входит обеспечение юридического сопровождения деятельности ООН. Мигель де Серпа Суареш обладает обширным опытом в области права и международных отношений и ранее представлял Португалию на различных двусторонних и многосторонних международных площадках, в том числе в Шестом комитете Генеральной Ассамблеи ООН, Комитете юридических советников Совета Европы по вопросам международного публичного права, Ассамблее государств-участников Статута Международного уголовного суда и Рабочей группе Европейского совета по вопросам международного права. До прихода на нынешнюю должность с 2008 года он был Генеральным директором Департамента по правовым вопросам МИД Португалии. В период с 1999 по 2008 годы был юрисконсультom Постоянного представительства Португалии при ЕС (Брюссель). Мигель де Серпа Суареш получил степень в области права в Лиссабонском университете и степень в области европейского права в Европейском колледже (Брюгге, Бельгия). Он является членом ряда организаций в области международного права и выступает с лекциями в различных университетах мира.*

* Выражаю признательность моим коллегам из Управления по правовым вопросам за помощь в подготовке этих лекций, в особенности г-ну Арнольду Пронто и г-же Даре Лайсахт.

Miguel de Serpa Soares

Miguel de Serpa Soares was appointed the Under-Secretary-General for Legal Affairs and United Nations Legal Counsel in September 2013. He oversees the Office of Legal Affairs, the overall objectives of which are to provide a unified central legal service for the United Nations. Mr. Serpa Soares has extensive experience of legal and international affairs, having represented his country in various bilateral and multilateral international forums, including the Sixth Committee of the United Nations General Assembly, the Committee of Public International Law Advisers of the Council of Europe, the International Criminal Court's Assembly of State Parties, and the International Law Working Group of the EU Council. Before taking up his current position, Mr. Serpa Soares was Director-General of the Department of Legal Affairs of the Ministry of Foreign Affairs of Portugal from 2008. Between 1999 and 2008, he was the Legal Adviser of the Permanent Representation of Portugal to the EU in Brussels. Mr. Serpa Soares has a degree in Law from the University of Lisbon and a degree in European Law from the College of Europe, Bruges, Belgium. He is a member of a number of entities in the field of International Law and has given lectures on topics of International Law in different Universities worldwide.*

* I wish to acknowledge the assistance received from colleagues within the Office of Legal Affairs in the preparation of these lectures, in particular, Mr. Arnold Pronto and Ms. Dara Lysaght.

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LECTURE 1:

Introduction to the Responsibility of International Organizations

In 1949, in the wake of the assassination of Count Bernadotte, a Swedish diplomat on a mission to Palestine for the United Nations, the International Court of Justice held that the United Nations enjoyed legal personality separate from its member States. While the focus was on the United Nations, the Court's advisory opinion heralded the emergence of international organizations onto the international level as subjects of international law in their own right. The implications for all international organizations have proved far-reaching. In particular, since 1949 it has become settled law that international organizations are able to acquire international rights and obligations separate from their members. Not only can they enforce such rights, but they can also be held accountable for not fulfilling their international obligations.

I am Miguel de Serpa Soares, Legal Counsel of the United Nations, and I am honoured to have been invited to this Academy in order to present a series of lectures on one of the consequences flowing from the existence of separate legal personality, namely the responsibility that an international organization incurs for its internationally wrongful acts.

Before proceeding, permit me to thank the organizers and, in particular, Prof. Roman Kolodkin for his invitation and warm welcome. I have seen the programme for the Academy's session this year, and it is truly impressive. I congratulate the organizers for what I am sure will be an interesting and productive session.

Permit me to begin by saying that, as the Legal Counsel of an organization with as many wide-ranging activities and functions as

the United Nations, the potential legal responsibility that may be incurred by the Organization is foremost on my mind and that of my colleagues in the Office of Legal Affairs of the United Nations Secretariat.

Such responsibility may arise in a variety of contexts. I have been invited to come to Moscow to present on one such context, namely that of the responsibility of international organizations for their wrongful acts under international law. However, it is worth noting that claims against international organizations are often, if not more commonly, pursued under national laws. I intend to say a few things about those types of claims as well.

A contemporary discussion of the rules of international law concerning the responsibility of international organizations for internationally wrongful acts necessarily involves a consideration of the articles on the responsibility of international organizations, adopted by the International Law Commission (ILC) in 2011. The ILC is a subsidiary body of the General Assembly of the United Nations entrusted with the task of assisting the Assembly in carrying out its mandate under Article 13(1)(a) of the Charter of the United Nations, to “initiate studies in the progressive development of international law and its codification”. It is constituted of 34 independent experts of international law, drawn from all regions of the world. Prof. Kolodkin was himself a member of the ILC. The Commission carries out its functions by preparing texts of draft conventions and other international instruments containing proposed rules of international law, for the consideration of the General Assembly.

The work of the ILC is generally regarded to be authoritative in the elaboration and restatement of rules of general international law and has provided the foundation for some of the most important codification exercises undertaken by the United Nations since its creation. Here, I have in mind the early work on the law of the sea, the codification of the modern rules on the conduct of diplomatic and consular intercourse, as well as the law of treaties, among others.

Since the 1950s, the ILC embarked on a project to develop the rules applicable to the international responsibility that arises as a consequence of the violation of international law obligations. This was undertaken primarily in the context of State responsibility, resulting in the adoption in 2001 of the seminal articles on the responsibility of States for internationally wrongful acts. The following year, the Commission commenced work on a sister text, looking at the equivalent rules regulating the responsibility of international organizations. This work resulted in the adoption, in 2011, of a set of articles dedicated to the position of international organizations.

I understand from the programme for this year's session of the Academy that you will be hearing from Judge Kateka on the question of State responsibility. As will become evident over the coming days, there is a significant amount of overlap between the 2001 and 2011 articles, and to a significant extent, my lectures should also be understood as supplementing what Judge Kateka will say in the context of the work on State responsibility. While some overlap is inevitable, I will seek to emphasise those aspects unique to international organizations.

I propose to organize my lectures as follows. In this lecture, I will cover some introductory material, focusing on several core concepts that are foundational to understanding the responsibility of international organizations under international law, and concluding with a brief recapitulation of the history of the preparation of the ILC's articles. I will then devote the second and third lectures to providing an overview of the ILC's articles on the responsibility of international organizations. During my fourth lecture I propose to look a little closer at some of the aspects of the ILC's articles that are unique to the legal position of international organizations. Then during my fifth lecture, we will shift gears and consider some aspects of private law claims brought against international organizations under the national law of States in which they are present. Finally,

we will meet in the form of a seminar to have a more interactive conversation about some of the issues raised during my lectures.

I would request that you have with you the copies of the ILC's articles that were provided to you, especially for the second and third lectures, as we will proceed through that text article by article. You were also provided with a reading list in advance of this session. Some of the material I will cover is drawn from the commentaries to the articles, prepared by the Commission and I would recommend that any study of the work of the ILC on the topic have as its starting point those commentaries.

Let us now commence with our consideration of the substantive aspects of the topic.

Core Concepts Fundamental to Understanding the Responsibility of International Organizations

There are a series of core concepts that are central to understanding the responsibility of international organizations under international law. Some relate to the notion of "international responsibility" under international law generally, regardless of whose responsibility we are referring to. Others are more specific to the legal position of international organizations.

Core Concept no. 1: Responsibility for Internationally Wrongful Acts Under International Law

The first concept to keep in mind is that we are speaking here about the consequences that arise following the commission of an internationally wrongful act. This involves, by definition, the non-performance of an obligation under international law. In other words, breach of an obligation under national law would not constitute an internationally wrongful act, unless that obligation also exists under international law.

This may seem somewhat trite, but it is an important threshold criterion. In order to trigger the applicability of the rules of general international law on international responsibility, one has to be in the presence of an internationally wrongful act. Without it, the rules of international law I will be discussing in my first four lectures would not, in principle, apply.

As a corollary to this, for there to be an internationally wrongful act, there must have been an existing obligation under international law which was breached. In other words, if the obligation did not yet arise, or was not an obligation under international law, then one cannot be in the presence of an internationally wrongful act.

This also means that obligations arising under international law are to be distinguished from obligations arising under other rules of law, such as national law or, in the case of international organizations, the rules of an international organization, to the extent that such rules are not simultaneously also rules of international law. We will explore this last point further when we look at the question of the nature of the rules of an international organization as rules of international law, in my fourth lecture. As already indicated, I will dedicate my fifth lecture to the question of the consequences of breaches of obligations arising under national law.

A further important aspect to keep in mind is that international law reserves to itself the question of the characterization of a particular rule as being a rule of international law or not. Likewise, the consequences at the international level arising from the existence of an internationally wrongful act are determined solely by international law. In other words, the position under national law is not directly relevant to determining that existing under international law. As I will discuss briefly in my second lecture, this is a key orientation common to both the 2001 and 2011 articles.

It is useful at this point to recall that the ILC, when coming to the question of international responsibility, drew a distinction between primary and secondary rules of international law. The primary rules are those reflected in the international obligations existing in the relations between subjects of international law, either States or international organization. So, for example, an obligation arising under a treaty, or by way of customary international law, to do or to refrain from doing something is a primary rule.

The secondary rules are the rules of international law concerning the existence and implementation of the primary rules. So, for example, the Vienna Convention on the Law of Treaties of 1969 contains a number of secondary rules dealing with a variety of legal questions related to treaties, such as the validity of treaties, their entry into force, what constitutes a breach and what are the consequences of breach for the continuation of the treaty. It is within this framework of rules that contemporary treaties are concluded. Such “secondary” rules apply residually to all treaties by operation of law, without the need for specific provisions in the treaties themselves. They lie dormant, as it were, until triggered.

So, too, the rules on international responsibility developed by the ILC are secondary rules of international law, in this case dealing with the consequences of a breach, in other words of the commission of an internationally wrongful act. The focus here is less on the impact on the underlying primary obligation, and more on the question of providing redress for the harm caused by the wrongful conduct in question.

Earlier, I described such rules as being “residual” in nature. I meant this in two senses. First, that they are primary rule agnostic. In other words, in the vision of the ILC, the secondary rules on international responsibility apply to all primary rules of international law, without distinction. Second, they are residual in the sense of being applicable to all subjects of international law. However, it is important to note that international law permits

variation at the level of detail. As will be discussed in my fourth lecture, a specific allowance is granted for exceptions and variations on the basis of the application of the principle of *lex specialis*.

I will not press this point any further now and propose to leave you with the reflection that what is important to recall is that we are delving into the realm of the “architecture” of international law, so to speak, when considering the question of international responsibility.

Core Concept no. 2: Separate Legal Personality of International Organizations

The second core concept fundamental to our discussion is the recognition that international organizations may enjoy separate legal personality as subjects of international law in their own right. As with the existence of an internationally wrongful act, the existence of a distinct legal personality is a key threshold requirement. Without it, one cannot speak of the international responsibility of the international organization itself, as distinct from that of its members.

At the beginning of my lecture this morning, I referred to the *Reparations for Injuries*¹ advisory opinion of the International Court of Justice, delivered in 1949. It was in that opinion (later supplemented by other pronouncements) that the International Court of Justice made the key intellectual advance by recognizing that the United Nations, as an international organization, enjoys international legal personality separate from its member States.

A full exploration of the concept would be more appropriate for a general set of lectures on the law of international organizations. Nonetheless, I propose to discuss briefly what is meant by the existence of separate legal personality, and some

¹ I.C.J. Reports 1949, p. 174.

of its implications for the rules of international law applicable to international organizations. I do so precisely because it will provide a useful context for our consideration of the ILC's articles on the responsibility of international organizations.

The first point to be made is that by "separate" we are speaking of legal personality that is distinct from the members (usually States) that established the organization. Furthermore, international organizations such as the United Nations are constituted of organs through which each organization undertakes its work. A consequence of the distinction drawn from the existence of separate legal personality is that decisions of such organs are attributed to the international organization itself and not to the member States participating in the decision.

Next, separate legal personality arises for an international organization either by virtue of being expressly conferred on it by its establishing members or by implication from its functions. The United Nations falls within the latter category. The Charter of the United Nations makes no reference to the legal personality of the Organization at the international level. Nonetheless, the International Court found that the United Nations necessarily enjoyed such personality as a consequence of its functions and rights. Permit me to quote from the opinion, as follows:

...the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane...it could not carry out the intentions of its founders if it was devoid of international personality...Accordingly, the Court has come to the conclusion that the Organization is an international person.²

² At p. 179.

The legal personality of an international organization is not identical to that enjoyed generally by States. Instead, it is limited to that necessary for the proper fulfillment of its functions. In other words, the extent to which an international organization enjoys separate legal personality may differ from other international organizations, owing to the differences in their functions. I do not mean to imply that there exist different degrees of personality, but rather that each international organization has its limits to which it can assert its separate legal personality at the international level, and these may differ by organization. We will pursue some of these ideas further in the fourth lecture when coming to the question of the “principle of speciality”.

The benefit of being endowed with legal personality is that it provides the international organization with the capacity to effectively discharge its functions at the international level. It can do this by entering into international relations with other subjects of international law, thereby acquiring rights and incurring obligations under international law. This means that it necessarily also enjoys the capacity to make claims so as to enforce its rights, as well as incur international responsibility for a breach of its international obligations. This last point will form the subject-matter of my first four lectures.

Finally, I would like to recall that the legal personality enjoyed by international organizations such as the United Nations is “objective” in nature, in the sense that it does not require recognition in order to exist. In other words, it is opposable not only to the organization’s members but also to *vis-à-vis* third parties. This is a key consideration since it means that an international organization endowed with international legal personality has the capacity to enter into legal relations with other subjects of international law, not limited to its members. This also means that it may be held responsible for breach of its international obligations owed towards such other parties. As will be discussed in the fourth lecture, it is

precisely in the area of international legal relations between an international organization and non-member third parties (States or other international organizations) that the ILC's articles aspire to make a contribution.

Core Concept no. 3: International Responsibility as “Legal” Responsibility and the Distinction With Accountability

The next core concept to get under our belts is that the responsibility we are referring to here is **legal** responsibility. We are not considering the moral or political consequences of the conduct of an international organization. The consequences flowing from the existence of international responsibility are legal in nature, even if they may have other additional political ramifications.

The ILC has employed the word “responsibility” as a term of art, distinct from the concept of international “liability” (which it has reserved for injurious acts that are strictly speaking not unlawful under international law). In practice, such strict distinction is not always maintained, and the terms have been to a certain extent used interchangeably. For purposes of clarity, I will stick with the ILC's use of the word “responsibility” in the sense of its special meaning as “legal” responsibility.

I am stressing the legal nature of the exercise for several reasons. First, it comes with several practical and additional legal consequences. Engaging the international responsibility of another subject of international law, such as an international organization, involves the making of international claims usually pursued at the diplomatic level, and may even trigger the operation of dispute settlement procedures. If successfully pursued, it may, in turn, give rise to new international legal obligations imposed on the wrongdoing State or international organization, for example, to provide reparation or to provide legal assurances and guarantees of non-repetition. The non-performance of these secondary obligations may itself be the source of international responsibility.

It goes without saying that responsibility in the political or moral spheres does not usually carry with it such additional implications.

The other reason for stressing the legal nature of the international responsibility of international organizations is precisely to delimit it from other concepts. In particular, the International Law Association has in recent times undertaken work in the area of the so-called “accountability” of international organizations. This is a broader concept that includes within it the legal dimension of international responsibility, but is not limited thereto. Accountability also extends to fields beyond the law to areas such as political accountability. What is more, the accountability of international organizations more generally also includes assertions of the applicability of certain primary rules imposing obligations on international organizations to do or to refrain from doing certain actions. As I mentioned earlier, the rules of international law on the international responsibility of international organizations are secondary rules. Any discussion of the primary rules opposable to international organizations is beyond the scope of my lectures.

Introduction of the Articles on the Responsibility of International Organizations

I would like to conclude this first lecture with a brief introduction of the articles on the responsibility of international organizations.

As I alluded to earlier, the work on developing the international legal framework governing international responsibility for the commission of wrongful acts has been a major project of the ILC since the 1950s. This work has been of great interest to my Office both because of its implications for the United Nations, as I mentioned earlier, and also because one of the divisions of the Office of Legal Affairs, the Codification Division, serves as the Secretariat of the ILC. The Codification Division has been deeply involved in the work of the ILC on the topic of international responsibility since the very

beginning. As such, in these first four lectures, I am presenting the work of the ILC also as seen from our vantage point as its Secretariat.

Very briefly, when the ILC commenced its work on the question of State responsibility in the 1950s, the initial conception was limited to the case of injury to aliens. This was later superseded by a more general concept of responsibility arising from all international wrongs. This resulted out of the seminal work of Prof. Roberto Ago, later a judge on the International Court of Justice, and subsequent Special Rapporteurs. The Commission concluded its work in 2001, on the basis of the reports of the then Special Rapporteur, Prof. James Crawford, who is himself now a judge on the International Court. That year, the Commission adopted the articles on the responsibility of States for internationally wrongful acts. You will be hearing more about those articles from Judge Kateka.

The following year, the Commission decided to proceed to considering the question of the responsibility of international organizations for internationally wrongful acts, a topic specifically excluded from the 2001 articles. It appointed Prof. Giorgio Gaja as Special Rapporteur. As you know, he is himself now also a judge on the International Court. As an aside, this is an example of the close linkage between the ILC and the International Court of Justice. It is really on the basis of the seminal work of Prof. Gaja, as he was then known, that the Commission undertook its consideration of the topic of responsibility of international organizations. As indicated earlier, my lectures draw upon the commentaries of the Commission that were prepared by Judge Gaja.

The Commission concluded its work in 2011 and adopted the articles on the responsibility of international organizations. The Commission made the same recommendation to the General Assembly of the United Nations as was done with the 2001 articles, namely that the Assembly first take note of the articles by annexing them to a resolution, and then at a later stage decide whether or not to convene a diplomatic conference to conclude a convention on the

basis of the articles. The first step was completed in 2011, and the question of whether or not to transform the articles into a treaty is still before the General Assembly, which is scheduled to take the matter up again in 2020.

I wish to make one last general remark about the articles on the responsibility of international organizations before concluding this first lecture. This has to do with the relationship between the 2011 articles and the 2001 articles on State responsibility, as well as the question of the extent to which the 2011 articles reflect the practice of international organizations.

As we proceed through the next few lectures, it will quickly become apparent that one of the characteristics of the 2011 articles is the extent to which they track their 2001 counterpart. A significant portion of the provisions was reproduced either verbatim or with minimal change. This has led to a robust chorus of criticism, including from international organizations (and here I would include my own office), to the effect that the solutions found for States are not necessarily suitable for international organizations. Simply put, such organizations are not cloaked with the same general competence as States, and accordingly, the assumptions made when coming to States do not necessarily apply to international organizations.

A further dimension of this criticism has been that the articles do not sufficiently reflect the practice of international organizations, or, put differently, that the provisions therein are not sufficiently rooted in the practice of international organizations in order to merit inclusion in an instrument purporting to state, in an expository manner, a set of general rules applicable to all international organizations.

The view of the ILC was that its solicitation of practice, which was extended every year to a large group of international organizations, had not consistently resulted in a sufficiently comprehensive body

of practice to help inform its work in a meaningful way. There were exceptions of course, but overall, the evidence of practice received from international organizations was sparse and sometimes contradictory or not pertinent to the position existing under international law.

Faced with the task of developing a complete set of rules on the responsibility of international organizations under international law on the basis of relatively little practice, the ILC shifted the strategy and pursued a more deductive approach, whereby rules were deduced from assertions of general principle. Since many of the provisions in the 2011 articles have in common the same general principles underlying the 2001 State responsibility articles, it was, perhaps, inevitable that there would be relatively minor variation between the two sets of articles.

What is more, the inference to be drawn from the relative lack of practice cuts in both directions. On the one hand, some of the critics of the articles point to this fact as diluting the usefulness of the articles as a restatement of accepted rules applicable to all international organizations. On the other hand, the relative lack of practice could also be understood as limiting the extent to which solutions different from those presented in the 2001 articles concerning states existed for international organizations. This was the approach of the ILC. In other words, on a number of occasions, the ILC found itself unable to depart from a rule initially formulated with States in mind precisely because of a lack of practice confirming a different solution or outcome when coming to the conduct of international organizations.

Having said so, the ILC nonetheless itself acknowledged the shortcomings of the 2011 articles when it indicated in the general commentary to the entire set of articles that they were closer to progressive development than their counterpart adopted for States in 2001.

This is an important consideration to be kept in mind as we proceed through the Commission's work. To a certain extent, we are dealing with the cutting edge of contemporary international law, and the solutions offered by the ILC in its 2011 articles might be more the beginning than the end of the discussion on the matter.

For our part, my office still maintains the various concerns it has expressed on several occasions in the past, especially at the level of detail. Nonetheless, my brief was not so much to present the views of the Secretariat of the United Nations, but rather to provide a more general exposition on the law applicable to the international responsibility of international organizations today. Regardless of what one's views might be on the articles, it is fair to say that any such discussion would be incomplete without a consideration of the work of the ILC on the topic.

We will, accordingly, turn next to undertake precisely such review of the ILC's 2011 articles on the responsibility of international organizations, starting at our next lecture.

LECTURE 2:

Overview of the Articles on the Responsibility of International Organizations (Part One)

In this lecture, I will turn to providing an overview of the articles on the responsibility of international organizations, adopted by the International Law Commission (ILC). In accordance with the overall outline for these series of lectures, I will dedicate this and the next lecture to the overview. In my fourth lecture, I will go into more depth into several provisions and aspects of the articles of specific relevance to the position of international organizations.

As mentioned in my first lecture, a contemporary reflection on the topic of responsibility of international organizations requires an understanding of the articles developed by the ILC. They remain as the main authoritative statement on the question of “responsibility” (as opposed to broader notions of “accountability”) under international law that may arise from the wrongful acts committed by international organizations. Accordingly, I propose now to proceed through the text of the articles, following their structure and sequence. It would be quite useful to have your copies of the articles with you, in order to accompany me as I proceed through the text.

I plan to cover Parts One and Two dealing with the questions of the overall scope and general principles of responsibility under international law, respectively. As alluded to in my first lecture, there is a significant amount of overlap with the rules applicable to the international responsibility of States. This will be particularly evident when we reach the question of general principles. To the extent possible, I will endeavour to focus on the perspective of international organizations, so as to limit overlap with Judge Kateka’s lectures on State responsibility. At the same time, a solid

grounding in the basic principles of international responsibility is fundamental to the topic at hand.

Part One – Scope

Part One deals with the scope of application of the articles, which it does in two provisions: the first dealing directly with the matter of scope, and the second more indirectly by providing for a series of definitions of certain terms used.

As a preliminary point, it should be noted that Part One should be read in conjunction with Article 65 which confirms that the articles do not claim to provide a comprehensive rendering of all rules that may be relevant in establishing the international responsibility of international organizations. Nonetheless, the ILC set itself the goal of covering at least what it considered to be the core rules and principles necessary to form a single coherent body of rules, capable of being operational in practice.

On the basis of such understanding, we turn now to Article 1 which confirms that the articles apply to the “international responsibility of an international organization for an internationally wrongful act”. This reflects the basic proposition – discussed in my first lecture – that, as subjects of international law, international organizations are capable of incurring international obligations, including those arising as a consequence of the acts they commit that may be wrongful under international law.

Indeed, let me repeat that and say that the scope *ratione materiae* of the articles is restricted, first, to wrongful acts; and, second, to international law. In other words, we are not dealing with acts that are in principle lawful, but may nonetheless cause harm. Likewise, we are looking at lawfulness from the perspective of international law, in other words relating to obligations incurred by international organizations under international law, not under

national law. I will revert in my fifth lecture to the discussion of the interface with the national laws of the States in which international organizations have a presence.

There is a further dimension that arises here, and which is unique to the case of international organizations. While with States there are two possible applicable bodies of law (international and domestic), with international organizations there is actually a third: namely the rules of the organization itself. Those are defined in Article 2 as: “the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization”.

I intend to cover some of the special issues pertaining to the rules of international organizations in my fourth lecture. It is sufficient for now to point out that they have a hybrid nature. While they are not, strictly speaking, part of the body of public international law, in some situations they may either give rise to obligations under international law, or even constitute rules of international law. We will revert to these matters in due course.

The scope *ratione personae* of the articles deals primarily with international organizations. Here, again, two points are worth raising. First, the concept of “international organization” today encompasses a broad range of entities in terms of not only functions but also the composition and manner of establishment. Gone are the days that international organizations were mostly if not all strictly intergovernmental in nature. In seeking to develop a body of rules of general application to all international organizations, the Commission opted for a broad, more all-encompassing, definition of an international organization. We will return to this point in the fourth lecture.

The next point to make is that, while the focus of the articles is on the responsibility of international organizations, there is an

exception: the articles also deal with an aspect of State responsibility. Part Five of the articles covers the question of the responsibility of States in connection with the conduct of an international organization, in certain situations. Such type of responsibility was not dealt with in the 2001 State responsibility articles.

In short, therefore, the articles deal with the situation of international organizations committing international wrongs against States or international organizations. They also cover the international responsibility that might arise for States in connection with the wrongful conduct of an international organization. They do not, however, deal with State responsibility for wrongful acts committed against international organizations. Such responsibility is covered, in part, by the 2001 State responsibility articles.

Part Two – Internationally Wrongful Act

We turn now to Part Two of the articles, dealing with the legal criteria for the existence of an internationally wrongful act of an international organization, and which will take the remainder of this lecture.

Part Two of the articles is arguably the part that most closely tracks the 2001 articles on State responsibility, and which you will be familiar with from Judge Kateka's lectures. The Part spans from Articles 3 to 27, and is divided into five chapters.

Chapter I – General Principles

The first chapter proclaims several general principles, the most significant being that contained in Article 3, namely that:

Every internationally wrongful act of an international organization entails the international responsibility of that organization.

This provision is central to the concept of international responsibility contained in the articles. The commission of a wrongful act by an international organization will give rise to its responsibility under international law.

This is a well-established principle of law, and its applicability to the acts of international organizations was recognised by the International Court of Justice in its advisory opinion on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, of 1999. There the Court stated that:

the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity. The United Nations may be required to bear responsibility for the damage arising from such acts.³

Article 3 has two elements. First, the concept of an “internationally wrongful act of an international organization”, and second, the concept of “international responsibility”. We will discuss the first element next, and return to the second element when we discuss the question of the “content of international responsibility” in the third lecture tomorrow morning.

Article 4 establishes a two-prong test for the existence of an internationally wrongful act, namely whether conduct by an international organization (which might consist of either an act or an omission):

is attributable to that organization under international law; and constitutes a breach of an international obligation of that organization.

³ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, I.C.J. Reports 1999, p. 62, at pp. 88–89, para. 66.

Such test reflects a general principle not unique to international organizations. In yet another advisory opinion, namely that on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, the International Court of Justice expressed the view that international organizations are:

bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.⁴

The two elements are cumulative in the sense that both need to be satisfied in order to engage the international responsibility of an international organization. Both elements are considered further in Chapters II and III of Part One, which we will come to shortly.

Before doing so, it is worthwhile to point out that, as in the case of State responsibility, the existence of damage is not, under international law, a requirement for the international responsibility of an international organization to be engaged. While wrongful acts might typically be accompanied by some level of damage, it is also possible that a breach of an international obligation by an international organization not resulting in damage could nonetheless give rise to the international responsibility of that organization if the conduct in question is attributable to it.

A further preliminary point is that the characterization of an act as being “international wrongful” is governed by international law, and only international law. In other words, such characterization under other bodies of rules is, in principle, irrelevant. This rule is to be found in Article 5, which was replicated from the articles on State responsibility. It should be observed, however, that the position is less clear when coming to international organizations. The clear distinction between international law and internal law, applied in the context of States, is not easily transposed to that of

⁴ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, I.C.J. Reports 1980, p. 73, at pp. 89–90, para. 37.

international organizations. As mentioned earlier, the “internal law” of international organizations is their rules. While not all such “rules of the organization” are necessarily rules of international law, some might, in fact, also be rules of international law. This would be the case, for example, of a constitutive treaty establishing an international organization. In other words, it is quite possible that some “internal” rules of the organization, to the extent that they are also part of international law, might affect the characterization of an act by the organization as being internationally wrongful under international law.

Chapter II – Attribution of Conduct to an International Organization

Chapter II of the articles deals with the key issue of attribution of conduct to an international organization, as the first constitutive element of the existence of an internationally wrongful act. Attribution refers to the process by which the conduct of an individual or an entity becomes, as a matter of law, that of the international organization as a whole. Needless to say, attribution is central to the process of engaging international responsibility. This is particularly so with international organizations. As legal persons, their conduct is manifested through the acts of particular entities such as the organs of the organization in question, or individuals empowered to act on behalf of the organization. Articles 6 to 9 cover the most common of such types of conduct attributable to international organizations.

Before considering each, I wish to point out that what is being attributed here is conduct. This is without prejudice, at this initial stage, to whether such conduct is wrongful or not. I make this point because there exist examples of treaties that purport to provide for the attribution of international “responsibility” to an international organization. An example of this is to be found in Annex IX of the

United Nations Convention on the Law of the Sea (UNCLOS), which envisages the possibility of an international organization having the “responsibility for failure to comply with obligations”. There the reference is being made to the end result (namely, responsibility), whereas in the ILC’s articles the question of attribution arises at the beginning of the process and relates to the conduct of the international organization for purposes of the legal assessment of the existence of responsibility.

It should also be noted that the provisions on attribution are formulated in positive terms, dealing with scenarios where conduct is attributed to the organization. They do not cover situations where conduct would not, *per se*, be attributed. Nonetheless, the types of conduct that would, in principle, not be attributed to an international organization may be ascertained by implication from the operation of Articles 6 to 9.

Finally, I wish to add that the provisions on attribution provide an example of where the ILC deviated from the 2001 State responsibility articles, in that the ILC included only four of the six grounds enumerated in those articles. The ILC took the view that conduct involving the exercise of governmental authority and the conduct of insurrectional or other movements, both attributable to States, was simply too remote a possibility to arise in the context of international organizations.

Article 6 – Conduct of Organs or Agents of an International Organization

Article 6 deals with arguably the most common form of conduct attributable to an international organization, namely that of its organs or its agents. The first paragraph establishes the basic rule in the following terms:

The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent

shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.

The provision was modeled on the structure and practice of the United Nations. The Charter of the United Nations establishes six principal organs through which the Organization functions. The decisions of those organs are *prima facie* attributable to the Organization as a whole. By definition, such conduct would include that of subsidiary bodies.

At the same time, the concept of “organ” should be understood in the generic sense. While not all international organizations have the same internal structure as the United Nations, it is fair to say that many are constituted typically of one or more internal organs or bodies, which take decisions on behalf of the organization.

The second way in which the provision is modeled on the United Nations is the inclusion of the concept of “agent” of the Organization. The International Court of Justice, as far back as 1949, dealt with the status of persons acting for the United Nations and understood the term “agent” to mean:

any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the organization with carrying out, or helping to carry out, one of its functions — in short any person through whom it acts.⁵

In other words, according to the International Court, the conduct of the United Nations includes not only that of its principal organs but also acts or omissions of its “agents”. This refers not only to officials but also to other persons acting for the United Nations on the basis of functions conferred by an organ of the Organization. Here again, while the practice of the United Nations is singled

⁵ *Reparations for Injuries suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1948, p. 174, at p. 177.

out, such arrangements are also common to many international organizations and serve to expand the orbit of conduct which might be attributable to the international organization concerned.

There exists no meaningful distinction, as a matter of law, between attribution of the conduct of an organ and that of an agent. Nonetheless, the range and nature of the acts of an organization's agents may vary quite considerably. While such acts are attributable to the international organization as a matter of international law, paragraph 2 confirms that it usually falls to the rules of each international organization to determine the functions of its organs and agents.

I should add here that the question of *ultra vires* conduct is dealt with in Article 8, which we will return to shortly.

Article 7 – Conduct of Organs of a State or Organs or Agents of an International Organization Placed at the Disposal of Another International Organization

Conduct undertaken directly by an organ or agent is not the only scenario. It is also possible, and in fact happens in practice, that the organ or agent in question has been seconded to the international organization in question by a State or another international organization. Where the organ or agent is fully seconded to the international organization in question, then the general rule in Article 6 applies, and the conduct of that organ or agent is attributable to the international organization on whose behalf it acts.

Article 7 deals with the more complicated arrangement where an organ or agent is seconded, but nonetheless still continues to a certain extent to act as an organ or agent of the seconding State or international organization. Such “mixed” scenarios occur, for example, in the case of military contingents of a State placed at the disposal of the United Nations for purposes of peacekeeping

operations. Under the existing arrangements, the seconding State typically retains disciplinary authority and criminal jurisdiction over the members of its national contingent.

While such arrangements are typically put into place on the basis of an agreement between the sending State or international organization and the receiving international organization (such as a status of forces or status of mission agreement), the ILC took the view that such agreements are limited to regulating the rights and responsibilities of the sending and receiving entities. In principle, they do not affect the rights of third parties, under the *pacta tertiis* rule (unless such third parties have consented to the rules of the organization). In such cases, it would be the general rules of international law, as contained in the articles, that would govern the question of attribution. In other words, what I am about to describe relates to the general position under international law, which might be modified or be different in the context of an arrangement between the seconding and receiving entities.

The issue confronted in Article 7 is, quite simply, on what basis can one attribute the conduct of the seconded organ or agent to the receiving international organization in such “mixed” circumstances where the authority over the organ or agent in question is effectively shared?

The legal test proposed by the Commission in Article 7 is that of the “exercise of effective control over the conduct”. Such criterion refers to the “factual control that is exercised over the specific conduct taken by the organ or agent placed at the receiving organization’s disposal.”

In the practice of the United Nations, there is an assumption that in principle, it retains exclusive control over the deployment of national contingents in a peacekeeping force. As a subsidiary organ of the Organization, the acts of such a force would, in principle, be attributable to the Organization. This approach reflects the position

taken by the Organization in relation to peacekeeping missions since their inception.

Nonetheless, this is not an absolute position. The extent to which the conduct of national contingents can be attributed to the United Nations is necessarily limited by the extent to which sending States retain not only authority but control over such conduct committed by their contingents.

The matter is even more acute when coming to the scenario of joint operations, involving the combined actions of contingents under the control of the United Nations together with those under the direct control of States or other international organizations. In such scenarios, the position of the Secretary-General has been that the criterion of the “degree of effective control” is decisive in determining the attribution of conduct.

This was confirmed in 1996, when the Secretary-General indicated that:

In joint operations, international responsibility for the conduct of the troops lies where operational command and control is vested according to the arrangements establishing the modalities of cooperation between the State or States providing the troops and the United Nations. In the absence of formal arrangements between the United Nations and the State or States providing troops, responsibility would be determined in each and every case according to the degree of effective control exercised by either party in the conduct of the operation.⁶

It should be noted, however, that the position of the United Nations Secretary-General has been contested, most prominently by the European Court of Human Rights in Strasbourg in a set of cases decided in 2007 (*Behrami and Behrami v. France*, and *Saramati*

⁶ UN document A/51/389, paras. 17–18, quoted in *Yearbook of the International Law Commission*, 2011, vol. II (Part Two), para. 9 of the commentary to Article 7.

v. France, Germany and Norway),⁷ dealing with the conduct of forces placed in Kosovo at the disposal of the United Nations (UNMIK), and those authorized by the United Nations (KFOR). In deciding whether it enjoyed jurisdiction *ratione personae*, the European Court considered that the decisive factor was whether the United Nations Security Council “retained ultimate authority and control so that operational command was only delegated”. On the facts, since the presence of KFOR in Kosovo was based on a resolution adopted by the Security Council, the Court went on to hold that the impugned action was, in principle, attributable to the United Nations. The Court subsequently maintained the same position in several cases before it.

The matter has also come before Courts in the United Kingdom (House of Lords decision in the *Al-Jedda* case)⁸ and the Netherlands (District Court of the Hague dealing with the conduct of the Dutch contingent in the United Nations Protection Force (UNPROFOR) in relation to the massacre in Srebrenica – the “*Dutchbat*” case).⁹ While initially those Courts acknowledged the position taken by the European Court, they either adopted a result closer to the position of the United Nations or were reversed on appeal. Even the European Court itself, in 2011, seemed to take a more attenuated position once the *Al-Jeddah* case (previously considered by the House of Lords) came before it. There the Court agreed with the House of Lords that the conduct was attributable to the United Kingdom since in the situation prevailing in Iraq the Security Council “had neither effective control or ultimate authority and control”.¹⁰

⁷ *Behrami and Behrami v. France* application No. 71412/01 and *Saramati v. France, Germany And Norway*, European Court of Human Rights (Grand Chamber), application No. 78166/01, decision (admissibility), 2 May 2007, para. 141.

⁸ *R (on the application of Al-Jedda) (FC) v. Secretary of State for Defence*, case No. [2007] UKHL 58, judgment, 12 December 2007, para. 5.

⁹ *Mustafić-Mujić v. State of the Netherlands*, District Court of The Hague, case No. 265618/HA ZA 06-1672, judgment, 10 September 2008, para. 4.10, and *Nuhanović v. State of the Netherlands*, District Court of The Hague, case No. 265615/HA ZA 06-1671, judgment, 10 September 2008, para. 4.8.

¹⁰ *Al-Jedda v. United Kingdom*, European Court of Human Rights (Grand Chamber), application No. 27021/08, judgment, 7 July 2011, para. 84.

Nonetheless, there still continue to be judgments citing the broader “ultimate control” test, both by the European Court of Human Rights and by some national Courts (relying on the dicta of the European Court). It seems, however, that such view is primarily limited to the jurisprudence of the European Court, and has not acquired a general acceptance. In fact, as already alluded to, in some national cases sympathy for the position of the European Court by lower courts has been reversed on appeal. Here I wish to cite the example of the *Dutchbat* case I mentioned earlier. The initial decisions, in 2008, by the District Court of The Hague applied the “under direction and control” test in holding that the conduct of the contingent “should be attributed strictly, as a matter of principle, to the United Nations”. However, the Court of Appeal of The Hague, in 2011, reversed the lower court’s decision and applied the “effective control” test.¹¹ Such position was subsequently upheld by the Supreme Court of the Netherlands in 2013.¹²

Needless to say, the position of the United Nations on the matter has not changed.

Article 8 – Excess of Authority or Contravention of Instructions

Article 8 deals with the important question of *ultra vires* conduct. Such conduct may be considered *ultra vires* if it exceeds the competence of the organization. It might even also include conduct which lies within the competence of the international organization but, nonetheless, exceeds the authority of the acting organ or agent.

The provision should be read together with paragraph 2 of Article 6. In other words, the rules of the organization will usually

¹¹ *Mustafić-Mujić v. State of the Netherlands*, Court of Appeal of The Hague, case No. 200.020.173/01, judgment, 5 July 2011, para. 5.9, and *Nuhanović v. State of the Netherlands*, Court of Appeal of The Hague, case No. 200.020.174/01, judgment, 5 July 2011, para. 5.9.

¹² *State of the Netherlands v. Mustafić-Mujić*, Supreme Court of the Netherlands, Judgment of 6 September 2013 para. 3.10.2, and *State of the Netherlands v. Nuhanović*, Supreme Court of the Netherlands, Judgment of 6 September 2013, para. 3.10.2.

govern the question of whether an organ or agent has the authority to undertake certain conduct. This arises necessarily from the fact that each international organization is unique in terms of functions, internal structure, and rules.

The basic policy decision taken in Article 8 is that *ultra vires* conduct is nonetheless attributable to the international organization if the organ or agent acts in an official capacity and within the overall function of the organization. The latter criteria are key. Private acts committed by agents of an international organization are not attributable to it. Instead, for attribution to occur, the conduct in question must have been undertaken “in an official capacity and within the overall functions of the organization”.

In *Serdar Mohammed v. Ministry of Defence and others*,¹³ the England and Wales High Court, citing Article 8, maintained that the fact that the detention of Mr. Mohammed fell outside the scope of authority conferred by the United Nations Security Council, which established the ISAF mandate in Afghanistan, did not make any difference to the legal position.

Furthermore, the fact that the conduct in question may not be valid under the rules of the organization does not affect the question of the attribution of the impugned conduct to the international organization in question under international law. The ILC took the policy decision that:

The need to protect third parties requires attribution not to be limited to acts that are regarded as valid...Denying attribution of conduct may deprive third parties of all redress, unless conduct could be attributed to a State or to another organization.¹⁴

¹³ *Serdar Mohammed and Others v. Ministry of Defence*, Royal Courts of Justice (England and Wales High Court, Queen’s Bench Division), case No. HQ12X03367, judgment, 2 May 2014, para. 165.

¹⁴ *Ibid.*, paras. 5 and 6 of the commentary to Art. 8.

Such position accords with the view taken by the International Court of Justice, which in the *Certain Expenses* advisory opinion, stated, *inter alia*, that:

Both national and international law contemplate cases in which the body corporate or politic may be bound, as to third parties, by an *ultra vires* act of an agent.¹⁵

Such position is not unique to the United Nations and can be viewed as a principle of more general application (as evidenced by the acceptance of the same or similar approach by other international organizations).

It is in the nature of the subject-matter at hand that the legal outcome will usually turn on the factual circumstances, and the interpretation and application of the applicable rules of the international organization (if any). For example, the United Nations has developed a jurisprudence around the characterization of conduct committed by members of national contingents while “on-duty” and “off-duty”. There may be other similar distinctions drawn in the rules of other international organizations.

Article 9 – Conduct Acknowledged and Adopted by an International Organization as Its Own

Article 9 covers the circumstance of conduct which is not attributable to an international organization under Articles 6 to 8, but which the organization nonetheless “acknowledges and adopts...as its own”. In such cases, the conduct in question would be attributed to the international organization for purposes of the process of ascertaining international responsibility.

There are two elements that have to exist: acknowledgment of the conduct, and adoption or acceptance as its own. While the

¹⁵ *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, I.C.J. Reports 1962, p. 151, at p. 168.

existence of only the first element (acknowledgement) would be insufficient for purposes of attribution, the existence of the second element (adoption) would necessarily imply the existence of prior knowledge of the conduct in question.

It bears observing that the exact terminology used, or the precise formulation in which such adoption of action takes place, is less significant. In practice, terminology such as “recognition”, “approval”, “acceptance”, “ratification” would have the same effect. What matters is the intention of the international organization to adopt the conduct as its own.

As already mentioned, we are dealing in the chapter with the question of attribution as one of the two legs for determining the existence of an internationally wrongful act. Accordingly, the adoption of conduct being referred to here is that for purposes of attribution to the international organization. I am recalling this because it is not uncommon to hear about the adoption of “responsibility”. In such cases, the adoption would not necessarily be limited to conduct, but to the question of international responsibility as a whole. As will be discussed next, the existence of a breach of international law is also required in order to determine that one is in the presence of an internationally wrongful act. Whether such internationally wrongful act engages the international responsibility of the international organization will, in turn, depend on the extent to which the wrongfulness of the act might be precluded by one of the recognized defenses under international law. We will return to that aspect in due course.

Chapter III – Breach of an International Obligation

Let us now turn to Chapter III dealing with breach of an international obligation. The chapter is constituted of four articles. I will not go into each in much detail for the simple reason that they, for the large part, track the articles on State responsibility, which I

leave to Judge Kateka. I will focus on aspects unique to international organizations.

Article 10 establishes the general rule that a breach of an international obligation by an international organization arises when:

an act of that international organization is not in conformity with what is required of it by that obligation, regardless of the origin or character of the obligation concerned.

Importantly, what is being referred to are obligations arising under international law, which could arise by operation of a treaty, customary international law, a general principle of law, or even an obligation arising from a peremptory norm of general international law (*jus cogens*). This is no different from the position applicable to States. However, international obligations may also arise for an international organization from its own rules, such as obligations arising from constituent instruments concluded in the form of treaties, or binding acts that are based on those instruments. Paragraph 2 of Article 10 makes this clear. We will return to the question of the rules of international organizations in the fourth lecture.

Article 11 confirms that for an act to constitute a breach of an international obligation, such obligation has to be in force for the international organization at the time the act occurs.

Articles 12 and 13 deal with special types of breaches, namely breaches constituted of continuing or composite acts, respectively. While developed in the context of State responsibility, there is no reason in principle why such types of breaches could not likewise apply to the conduct of international organizations. Much will depend on the interpretation and application of the primary rule in question, for example, to the extent to which it establishes obligations of conduct or result.

It remains to add that when coming to obligations arising out of treaties, the secondary rules of the law of treaties governing breach might also be of relevance in determining breach for purposes of international responsibility.

Chapter IV – Responsibility of an International Organization in Connection With the Act of a State or Another International Organization

Chapter IV of Part Two deals with an alternative basis for international responsibility of an international organization, namely that analogous to accomplice liability. As a matter of principle, the international responsibility of an international organization can be triggered for conduct undertaken in connection with the wrongful act of a State or of another international organization. This chapter covers such possibility, which may arise in the context of the provision of aid or assistance, or direction and control over the commission of the act, or even in the form of coercion.

While all such grounds were transposed from the rules on State responsibility (on the assumption that there is, in principle, no reason why they could not equally apply to international organizations), the case of international organizations includes one additional such ground. The responsibility of an international organization might also be engaged in circumstances where it exerts influence over the conduct of its member States (for example, through the taking of binding decisions) leading to the commission of an internationally wrongful act.

All of these grounds will be examined next in turn.

Article 14 – Aid or Assistance in the Commission of an Internationally Wrongful Act

Article 14 confirms that, and here I quote:

An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so.

For such type of responsibility to arise, two conditions have to be satisfied. First, the international organization must have provided the aid or assistance “with knowledge of the circumstances of the internationally wrongful act”.

As an aside, it should be noted that such requirement constitutes an exception to the general approach of the articles, which establish a system of strict liability. In other words, knowledge or intention (*mens rea*) is not a general requirement for the existence of an internationally wrongful act under the articles. However, in the special case of responsibility arising on the basis of the grounds listed in Chapter IV, prior knowledge is required. Put the other way around, if the assisting or aiding international organization is unaware of the circumstances in which its aid or assistance is intended to be used, then it bears no responsibility.

The second condition is that for responsibility to arise for the aiding or assisting international organization, the act in question must have been equally wrongful under international law for the organization if it had committed the act itself. Thus, responsibility is linked to the breach of an obligation to which the aiding or assisting international organization is itself bound.

While seemingly theoretical, applied cumulatively, the two conditions have far-reaching practical consequences since they constitute important safeguards for international organizations, like the United Nations, which regularly work in concert with other international organizations, or States. The extent to which the United Nations may be implicated in the wrongful conduct of other entities is a matter of constant scrutiny and concern for the Office of Legal Affairs. Knowledge of wrongfulness is key.

I might point out that the commentary to the equivalent provision in the articles on State responsibility (Article 16) indicates that the knowledge element implies a requirement that the relevant organ of the aiding or assisting State (in that case) actually “intended by the aid or assistance given, to facilitate the occurrence of the wrongful conduct and the internationally wrongful conduct is actually committed by the aided or assisted State”.¹⁶ There is no reason to maintain that such specification would not also apply to international organizations. In other words, it is not a general knowledge that is required, but rather a more specific knowledge arising from an actual intent to aid or assist with the commission of an internationally wrongful act.

Article 15 – Direction and Control Exercised Over the Commission of an Internationally Wrongful Act

Let us move now to Article 15, and further up the ladder of the level of involvement of an international organization in the actions of another such organization or of a State. Article 15 covers the scenario of actual direction and control exercised over the commission of the internationally wrongful act in question.

As with Article 14, such direction or control over the actions of another international organization or a State would, in principle, engage the international responsibility of the directing or controlling international organization.

Such outcome is subject to the same two conditions found in Article 14, namely the prior existence of knowledge of the circumstances, and the requirement that the act would also be wrongful if it had been committed by the directing or controlling international organization itself.

¹⁶ *Yearbook of the International Law Commission*, 2001, vol. II (Part Two), p. 66, para. 5 of the commentary to Art. 16.

Here again, the commentary on the equivalent article in the State responsibility articles (Article 17) sheds some more light. There it is clarified that:

the term “controls” refers to cases of domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or concern, [and that] the word “directs” does not encompass mere incitement or suggestion but rather connotes actual direction of an operative kind.¹⁷

This ground of responsibility raises interesting questions as to whether those decisions taken by an international organization which, under the rules of the organization in question, are binding on member States could potentially constitute the type of direction or control envisaged in the present provision. While not excluding such possibility, the ILC, in its commentary, took the view that whether such responsibility was engaged by the adoption of binding decisions depended on the circumstances of each case.

Nonetheless, to the extent that such responsibility does arise then there would be an overlap between this article and Article 17 dealing with the question of an international organization circumventing its international obligations by adopting decisions addressed to, or authorizing, its members. We will get to Article 17 shortly.

Article 16 – Coercion of a State or Another International Organization

The next ground of possible responsibility for conduct in connection with another international organization or State is, perhaps, the most extreme, namely coercion. Article 16 confirms the basic rule that:

¹⁷ *Ibid.*, p. 69, para. 7 of the commentary to Art. 17.

An international organization which coerces a State or another international organization to commit an act is internationally responsible for that act.

While aiding or assisting and direction and control are not *per se* unlawful, there are few scenarios in which coercion could ever be lawful. In other words, coercion by an international organization or another such organization or a State may, in and of itself, constitute a wrongful act. However, here we are dealing with coercion with the purpose of inducing the other international organization or State to commit an internationally wrongful act.

The articles follow the same approach taken by their counterpart for State responsibility, namely that the type of coercion being envisaged is that which would be tantamount to *force majeure*. This is the reason why under the first of the two conditions, to which Article 16 is subject, the wrongful act in question must have been of such a nature that it would have been an internationally wrongful act of the coerced international organization or State “but for the coercion”. The assumption is that the coerced international organization or State would be able to raise the defense of *force majeure* to preclude its wrongfulness. The effect of this then is that only the coercing international organization would be held responsible.

The second requirement — again, common to the bases for responsibility under Chapter IV — is that of knowledge. The coercing international organization must have done so with the knowledge of the circumstances of the act, namely that its commission by the coerced international organization or State was *prima facie* wrongful.

It should be noted that, different from the provisions on aid or assistance and direction and control, there is no requirement that the internationally wrongful act committed by a coerced international organization or State must have been equally wrongful if it had been committed by the coercing organization itself. As mentioned earlier,

coercion is itself a sufficient basis for responsibility, regardless of whether the international obligation in question was opposable to the coercing international organization at the time.

Finally, permit me to add that the ILC was of the view that:

a binding decision by an international organization could give rise to coercion only under exceptional circumstances.¹⁸

Indeed, it is quite difficult to conceive of one such scenario where a decision of an international organization binding on its members could amount to coercion. This because binding decisions are typically taken on the basis of existing legal authority to do so, to which members of the organization have agreed in advance. In the case of the United Nations, such authority rests in Article 25 of the Charter. This is not to ignore the possibility that binding decisions taken by an international organization could give rise to conflicting obligations for its members, but rather that such conflict and the ensuing commission of wrongful acts that may arise are not usually treated as a question of coercion, but rather on other grounds. For example, for the United Nations, the question of precedence of international obligations is dealt with in Article 103 of the Charter.

Article 17 — Circumvention of International Obligations Through Decisions and Authorizations Addressed to Members

As mentioned in the introduction to this chapter, Article 17 deals with a scenario that is unique to international organizations. The provision deals with the possibility of an international organization seeking to “circumvent” its international obligations by inducing its members, through binding decisions or authorizations, to commit an act which would have been internationally wrongful if it had been committed by the organization itself. In other words, it is conceivable that an international organization could “seek to

¹⁸ *Ibid.*, para. 4 of the commentary to Art. 16.

influence its members to achieve through them a result that the organization could not lawfully achieve directly”.¹⁹

In this scenario, the level of *mens rea* required would be actual intention (*dolus*) and not mere knowledge. This is evident from the explanation of the concept of “circumvention” provided by the ILC, namely that it:

...implies an intention on the part of the international organization to take advantage of the separate legal personality of its members in order to avoid compliance with an international obligation. The evidence of such an intention will depend on the circumstances.²⁰

Two scenarios are anticipated. Paragraph 1 deals with binding decisions, and paragraph 2 covers authorizations. Both share in common the requirement that there must exist an international obligation opposable to the international organization which it seeks to “circumvent” by means of the adoption of the binding decisions or authorizations. Different from the grounds for responsibility provided for in Articles 14 to 16, in this scenario, there is no requirement that the acts required or authorized by the international organization also be internationally wrongful for the members to which the decision or authorization is addressed. This is provided for in paragraph 3. In other words, the basis of responsibility is the attempt by the international organization at “circumvention” of its obligations.

It was on the point as to whether it is a requirement that such circumvention actually occurs that the ILC introduced a distinction between the two scenarios.

In the case of the adoption of binding decisions intended to circumvent an existing international obligation, the ILC took the

¹⁹ *Ibid.*, para. 1 of the commentary to Art. 17.

²⁰ *Ibid.*, para. 4.

view that it was not necessary that the members in questions actually acted on the decision. The mere fact of the adoption of the binding decision would be sufficient to engage the responsibility of the organization. It bears recalling that the potential broad scope of such approach is tempered by the requirement that it be accompanied by the intention to circumvent, something which, I would venture to add, is extremely rare in the practice of international organizations. In other words, accidental or unforeseen conflicts between binding resolutions and existing obligations on the international organization would not amount to “circumvention” for lack of the necessary *mens rea*.

The ILC decided to peg the point of the emergence of responsibility at the time of the adoption of the conflict binding resolution, and not later, for essentially practical reasons. Here I will quote the corresponding commentary:²¹

Since compliance by members with a binding decision is to be expected, the likelihood of a third party being injured would then be high. It appears therefore preferable to hold the organization already responsible and thus allow the third party that would be injured to seek a remedy even before the act is committed. Moreover, if international responsibility arises at the time the decision is taken, the international organization would have to refrain from placing its members in the uncomfortable position of either infringing their obligations under the decision or causing the international responsibility of the international organization, as well as possibly incurring their own responsibility.

However, whether or not circumvention actually occurs through the conduct of a member becomes relevant in the situation where the binding decision allows the member a margin of discretion to take an alternative course. Responsibility would only arise if the

²¹ *Ibid.*, para. 5.

course taken by the member would result in circumvention by the organization.

The position is different when coming to authorizations of action. There a member that is authorized by an international organization is, in principle, free to decide not to avail itself of the authorization. Accordingly, responsibility would only arise if the member decides to commit the act, in accordance with the authorization, thereby resulting in the circumvention of the authorizing organization's international obligations.

The ILC was further of the view that reliance on the authorization in question "should not be unreasonable". In other words, in its view, the responsibility of the authorizing international organization would not arise if the authorization is outdated, or not intended to apply to the circumstances at hand, or had been amended by subsequent changes.

Article 18 – Responsibility of an International Organization Member of Another International Organization

Let us now proceed to the penultimate provision in Chapter IV of Part Two, namely Article 18. In my third lecture, I will cover the question of the residual responsibility that members of an international organization, typically States, might have for the acts committed by the organization itself. Since international organizations may themselves be members of an international organization, it is theoretically possible that they too may be responsible for the acts of the organization they are members of.

Article 18 points to a further such possible ground in which an international organization might incur international responsibility. It does so in the context of two possible scenarios, by making Articles 61 and 62 also applicable to the case of member international organizations. We will return to those grounds tomorrow.

Article 19 – Effect of This Chapter

Finally for this chapter, Article 19 contains a without prejudice clause confirming that Articles 14 to 18 do not prejudice the international responsibility of the international organization or State actually committing the acts in question, and which may arise separately on other grounds, including, in the case of acts by member States, the grounds provided for in the articles on State responsibility.

It bears pointing out that the without prejudice clause has to be read in the context of the provisions themselves. Hence, it applies less clearly to Article 16 where, by the terms of the provision read together with Article 23, the fact of the existence of coercion might serve to preclude the wrongfulness of the acts of the coerced member thereby preventing it from being held responsible for such acts.

Chapter V – Circumstances Precluding Wrongfulness

Let us turn now to the final chapter of Part Two, namely Chapter V on circumstances precluding wrongfulness, on which I will spend the remainder of this lecture.

Central to the concept of international responsibility is the requirement of “wrongfulness” of the conduct (act or omission) of, in the present case, an international organization. Conduct that is not in violation of an international obligation (i.e., is not unlawful) is by definition not wrongful, even if it caused harm or damage or both. This is without prejudice to the application of other rules of international law to such conduct. But, the point here is that without the existence of wrongfulness there is no international responsibility.

Conversely, an act of an international organization committed in violation of an international obligation opposable

to it would be *prima facie* wrongful. This would not yet amount to international responsibility. The difference between the two relates to the possibility that the wrongdoing international organization might be able to raise a defense which would preclude its wrongfulness thereby preventing it from incurring responsibility. It should go without saying that if a defense is not available or not sustained, then international responsibility for the wrongful act would arise.

Chapter V lays out the most commonly accepted such defenses, which are designated “circumstances precluding wrongfulness”. While covering very different scenarios, they all share in common the fact that they do not annul or terminate the obligation in question, but provide a justification or excuse for non-performance.

Six such defenses are recognized, all of which are also found in the articles on State responsibility. As I have done earlier in this lecture, here too I will seek to focus on those aspects pertinent to the responsibility of international organizations.

Article 20 – Consent

Article 20 confirms the basic principle that the wrongfulness of an act committed by an international organization may be precluded if it was consented to by the international organization or State to which the obligation was owed.

Of all the defenses consent is arguably the most relevant for international organizations. All international organizations operate on the territories of States, including of their host States, on the basis of some form of consent.

A full discussion of the concept of consent falls outside the scope of the present lectures. It is sufficient to indicate that consent may be manifested in various forms. It can be express or implied. It might be granted *ex post*. It might also be constructed, for example, by the operation of a waiver of a claim.

Consent serves not only as an affirmative legal basis for action, but — importantly for present purposes — also as a defense against a claim of unlawful action. The presence of international organizations on the territories of States is *prima facie* unlawful. Nonetheless, the consent of those States serves to preclude the wrongfulness of such conduct.

In order for it to do so, consent must be “valid”. In almost all cases, the question of validity is determined primarily by the internal rules of States or international organizations, as the case may be. International law, to the extent it would apply at all, might only provide residual guidance, for example, in the form of the secondary rules of the law of treaties on full powers (Article 7 of the Vienna Convention on the Law of Treaties of 1969). In some rare cases, valid consent might arise from a different source of authority, such as the Security Council.

While I have provided the common example of consent to the presence of international organizations on the territories of States, of course, consent as a defense would apply to all obligations entered into by an international organization. An agreement to vary the obligations under an existing treaty between an international organization and another organization or State would provide the basis for consent to be raised as a defense against a claim that the obligations under the original treaty were not performed.

Article 21 – Self-Defense

Article 21 recognizes the taking of a “lawful measure of self-defense under international law” as a circumstance which would preclude the wrongfulness of an act of an international organization. Such defense was included in the articles on State responsibility. While it certainly is more relevant in the context of State conduct, the ILC nonetheless maintained that, as a matter of coherence, the defense should also be available to international organizations. It goes without saying that the provision would only apply to the small

subset of international organizations, including the United Nations, which enjoy a mandate to undertake enforcement action including the resort to force in specific circumstances. For the vast majority of international organizations which do not have such mandates, the defense would simply not be available.

Without entering into a detailed exposition of the rules applicable to the resort to force by international organizations, I wish to point out that the ILC was of the view that, for the United Nations, self-defense could be invoked by the Organization in situations other than those contemplated in Article 51 of the Charter, for example, in the context of peacekeeping operations.

The provision refers to the taking of a “lawful measure”. The lawful character of the measure is to be determined primarily by the application of international law. The rules of the organization might also be relevant to the extent that they might themselves enjoy an international character. So, for example, the provisions of the Charter of the United Nations (which are part of the rules of the Organization) would likely play a role in the overall determination of the prevailing position under international law.

Article 22 – Countermeasures

Under Article 22, the wrongfulness of an act can be precluded if it was taken as a lawful countermeasure, as envisaged in Article 51. We will consider the question of the taking of countermeasures at our next lecture.

The first paragraph of Article 22 is drawn from its equivalent in the State responsibility articles and establishes the basic rule.

Paragraphs 2 and 3 are unique to the situation of the responsibility of international organizations. They provide an example of the general proposition that the question of international responsibility is more complex when coming to international organizations than that of States. While the rules on international

responsibility typically apply to States without distinction, when coming to international organizations, the same rule might apply differently in different contexts. We are in the presence of one such scenario.

Both paragraphs deal with the situation of countermeasures taken against members of the organization. In principle, there is a difference between countermeasures taken against third States or international organizations, and countermeasures exercised against members. The presumption in paragraph 1 is that countermeasures taken against third parties are lawful (as long as the relevant requirements have been met).

Under paragraph 2, the position is reversed when coming to countermeasures taken against members. There the general rule is that such countermeasures are not permissible, except if the three conditions in subparagraph (a) to (c) are all satisfied. In other words, for an international organization to take a lawful countermeasure against one of its members in response to the breach of an international obligation owed to the international organization, the conditions for the lawfulness of the countermeasure referred to in paragraph 1 have to be satisfied; the countermeasure cannot be inconsistent with the rules of the organization; and no other appropriate means is available to ensure compliance.

Paragraph 3 deals with yet another distinction applicable to the responsibility of international organizations, namely that between international obligations under international law and those arising from the rules of the organization. Paragraph 2 deals with the former, paragraph 3 applies to the latter. In this case, an even stricter position is taken whereby countermeasures taken in response to an international obligation arising under the rules of the organization are prohibited, unless the rules themselves provide for the taking of such countermeasures.

I will return to the question of the multi-layered nature of the rules of the international organization in my fourth lecture. In the interests of time, I will proceed to the next defense.

Article 23 – Force Majeure

As in the case of State responsibility, the existence of *force majeure* is available to the international organization seeking to preclude the wrongfulness of its conduct. This is confirmed by Article 23.

The defense of *force majeure* is a general principle of law applicable equally to all subjects of international law. While the inclusion of a *force majeure* clause is a common practice in agreements entered into by international organizations, such as the United Nations, the defense would be available regardless of such inclusion, by the operation of the secondary rules of international law reflected in the articles.

The defense is only available in the context of the occurrence of an irresistible force or of an unforeseen event, beyond the control of the organization, making it materially impossible in the circumstances to perform the obligation. The defense is not available when the situation arises from the conduct of the international organization invoking it, or where the organization has assumed the risk of the situation occurring.

Article 24 – Distress

Article 24 provides for the defense of distress as serving to preclude the wrongfulness of an act if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care. The classical example is that of the taking of safe harbour in the context of the onset of a natural disaster.

As with some of the other circumstances, the defense of distress is a well-established general principle of law. While practice involving the assertion of the defense by international organizations is sparse, the ILC took the view that the defense should in principle be available to the wrongdoing international organization as well.

It is in the nature of the scenario being envisaged that it typically involves the conduct of natural persons (referred to in the provision as the “author” of the act). Here, I refer you back to the discussion on Article 6 dealing the attribution of conduct by *inter alia* agents of the international organization to the organization itself. Some of the considerations discussed there would apply.

Article 25 – Necessity

Article 25 deals with the last substantive defense envisaged in Chapter V, namely the invocation of necessity as a circumstance precluding the wrongfulness of an act. As in the case of some of the other circumstances, the defense of necessity is a well-established general principle of law; and, as such, was considered by the ILC to be equally applicable to international organizations.

The provision is modeled on that found in the State responsibility articles. It is formulated in the negative: necessity may not, in principle, be invoked as an excuse for wrongful conduct except in certain specific circumstances. It bears recalling that such structure was adopted to minimize the potentially de-stabilizing effect of broad assertions of the existence of necessity as a ground for justifying non-compliance with international obligations.

The grounds for the permissible assertion of necessity are listed in subparagraphs (a) and (b), of which the first has been modified to reflect the position of international organizations, while the second retains the approach taken vis-à-vis State responsibility.

Under subparagraph (a), invocation of necessity is possible if it is the only means for the international organization to “safeguard

against a grave and imminent peril an essential interest of its Member States or of the international community as a whole, when the organization has, in accordance with international law, the function to protect the interest in question". The commentary to the provision²² explains that, as a matter of policy, necessity should not be invocable by international organizations as widely as by States. This was achieved by limiting the constellation of interests to be safeguarded to those of the member States of the organization or those of the international community as a whole, to the extent that the organization has, in accordance with international law, the function to protect such interests.

In other words, when an international organization has been given the powers over certain matters, then it may, in the use of such powers, invoke the need to safeguard an essential interest of its member states or of the international community as a whole. The organization can only invoke one of its own interests if it coincides with an essential interest of the international community or of its member States.

In addition, under subparagraph (b), the invocation of necessity cannot take place if it seriously impairs an essential interest of the State or States to which the international obligation exists, or of the international community as a whole.

Two further safeguards are provided in paragraph 2, namely that necessity cannot be invoked if the international obligation in question excludes such possibility, or if the invoking international organization has itself contributed to the situation of necessity.

Articles 26 and 27 – Compliance With Peremptory Norms and Consequence of Invocation

Finally, Articles 26 and 27 are residual clauses. Article 26 is a saving clause preserving the continued existence and application of

²² *Ibid.*, para. 4.

obligations arising under peremptory norms of general international law (*jus cogens*). None of the defenses in Chapter V can be resorted to in order to violate a peremptory obligation.

Article 27 makes it clear that while the successful invocation of one of the defenses may lead to the preclusion of wrongfulness, this would be without prejudice to the continued application of (and hence the requirement of compliance with) the obligation in question, if and to the extent that the circumstance precluding wrongfulness ceases to exist.

The provision also makes it clear that the successful invocation of a circumstance precluding wrongfulness would not likewise prejudice the question of compensation for material loss caused by the act of the international organization.

Conclusion

We have reached the end of the second lecture. At the next lecture, we will turn to the second half of the articles on the responsibility of international organizations and will look at the question of the so-called “content” of international responsibility, its invocation and some special issues, including the resort to countermeasures, and the matter of the responsibility that might arise for States in connection with the conduct of international organizations.

LECTURE 3:

Overview of the Articles on the Responsibility of International Organizations (Part Two)

At our last lecture, we commenced the overview of the articles on the responsibility of international organizations, focusing on Parts One and Two, dealing with a number of fundamental rules and principles of international responsibility applicable also in the context of international organizations.

In this lecture, I will turn to providing an overview of the remainder of the articles, starting with Part Three. As was done yesterday, while we need to cover the rules in question, I will, to the extent possible, seek to focus on aspects of particular relevance or application to international organizations.

Part Three – Content of International Responsibility

Part Three deals with the legal consequences of internationally wrongful acts of international organizations.

It is important to understand that from Part Three onwards, we have shifted from the question of the existence of international responsibility to the legal position that arises once international responsibility has been determined. In other words, it answers the question: what are the consequences for an international organization that has been found internationally responsible for its conduct?

Part Three follows the same structure as its equivalent in the State responsibility articles. It is arranged in three chapters dealing with general principles, reparation for injury, and serious breaches of peremptory norms of general international law, respectively.

We will now consider each chapter in turn.

Chapter I – General Principles

Chapter I contains six draft articles laying down a series of general principles concerning the legal consequences of an internationally wrongful act. This is confirmed by Article 28.

As with some of the provisions we looked at yesterday, the ILC considered the general principles in Chapter I to apply generally to the question of international responsibility, regardless of the subject of international law involved. In other words, while the principles were initially enunciated in the State responsibility articles, the ILC saw no reason why they would not apply equally in the case of international organizations.

Since this material is likely also being covered in the lectures on State responsibility, I will proceed through Chapter I quickly.

Articles 29 and 30 – Continuation of Performance and Cessation

Article 29 recognizes the duty of a responsible international organization to continue to perform the obligation that was breached. In other words, a breach does not constitute a ground for the discontinuation of performance of the obligation.

As a corollary to Article 29, an internationally wrongful act committed by an international organization gives rise, under Article 30, to a new additional obligation on the organization to do two things: cease the act (if it is still continuing), and offer appropriate assurances and guarantees of non-repetition, as required in the circumstances.

Article 31 – Obligation to Make Reparation

Article 31, in turn, affirms the general principle of international law establishing the obligation to make full reparation for the injury caused by the internationally wrongful act of the international organization. Paragraph 2 clarifies that by “injury” what is

meant is “any damage, whether material or moral, caused by the internationally wrongful act of the international organization.”

The ILC took the basic policy decision that limitations in the financial resources available to international organizations would not, in principle, affect the basic obligation.

Nonetheless, it also confirmed that the obligation ought to be applied flexibly, particularly in light of the practice and rules of the international organization in question. So, for example, the provision should be read in light of the practice of the United Nations of making *ex gratia* payments, where appropriate, without accepting international responsibility. Similarly, it is not uncommon for international organizations, including the United Nations, to enter into agreements with host countries to regulate the international responsibility that may arise out of the actions of the organization on the territory of the State in question. This is a practice that occurs, for example, in the peacekeeping operations of the United Nations.

From the perspective of the articles on responsibility of international organizations, such arrangements constitute *lex specialis*, whereby the applicable residual rules of international law are set aside by specific rules regulating the international responsibility of the international organization in question. We will return to the matter of *lex specialis* later in this and the next lecture.

The forms that reparation can take are covered in Chapter II, which we will turn to shortly.

Article 32 – Relevance of the Rules of the Organization

Article 32 is unique to the responsibility of international organizations. It deals with the question of the extent to which the rules of the responsible international organization have a bearing on the overall legal picture.

It confirms the basic rule that a responsible international organization cannot rely on its rules to justify a failure to comply with the obligations set out in Part Three, namely the obligations that arise for it by operation of the rules of international law on international responsibility, as in the case, for example, of the obligation, which we have just covered in Article 31, to provide full reparation.

The provision reflects the policy stance taken by the ILC, which wished to preserve the precedence of international law over the rules of the organization. It was inspired by Article 27, paragraph 2, of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations,²³ which provides:

An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty.

However, given the multi-faceted complexity of the position of international organizations, the Commission recognized that the legal position may be different in the relations between non-members from that with members. In the view of the ILC, the general rule would apply in relation to third parties (non-members).

However, the same could not, necessarily, be said for the position arising out of the relations between the organization in question and its members. It is possible that the rules of the organization could, for example, modify the rules on the forms of reparation that a responsible organization may have to make towards its members. The possibility of the modification of the overall position is preserved in paragraph 2.

For the sake of completeness, permit me to add that not only would such deference to the rules of the organization not

²³ United Nations doc. A/CONF.129/15.

apply to non-members, but the corresponding commentaries make it clear that it cannot likewise “affect the consequences relating to breaches of obligations under peremptory norms as these breaches would affect the international community as a whole”.²⁴

In my next lecture, we will explore the questions of hierarchy and the relationship between international law and the rules of the organization, particularly in the context of the applicability of the principle of speciality.

Article 33 – Scope of International Obligations

Article 33 deals with the scope of the additional obligations that may arise for a responsible international organization by operation of the rules in Chapter I.

The articles take a similar approach to those on State responsibility, in the sense that they envisage not only the obligations in question being owed bilaterally but also the possibility of such obligations arising at the multilateral level and even being owed *erga omnes*, that is, to the international community as a whole.

Paragraph 2 preserves the rights which may accrue to individuals and entities other than States or international organizations as a consequence of the responsibility of the international organization. It bears recalling here that we are speaking about responsibility under international law. The position under national law is simply not covered by the articles.

Examples of such types of rights accruing to individuals would include those arising from breaches by international organizations of obligations under international law concerning employment.

²⁴ *Ibid.*, para. 5 of the commentary to Art. 32.

Chapter II – Reparation for Injury

Chapter II expands on the obligation to provide full reparation, contained in Article 31, by providing for the various forms that reparation may take.

Article 34 – Forms of Reparation

Article 34 extends the same forms of reparation recognized in the context of State responsibility to that of international organizations. To quote the provision, full reparation takes the form of:

...restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

Each form is dealt with in the following articles.

Article 35 – Restitution

Restitution is the first form. It involves the re-establishment, as far as possible, of the situation which existed before the internationally wrongful act was committed by the responsible international organization.

The obligation is qualified by the two subparagraphs, which serve to exclude the possibility if it is materially impossible, or it involves a burden out of all proportion to the benefit deriving from restitution instead of compensation.

The chapter establishes a sequence in the forms of reparation: if restitution is not available by operation of Article 35, then the obligation to provide compensation arises. We turn to that obligation next.

Article 36 – Compensation

Reparation in the form of compensation is perhaps the most common form and is frequently paid by international organizations.

This should be understood in light of what I said earlier about the practice of making *ex gratia* payments.

That an international organization like the United Nations may be responsible for compensation for any damages incurred as a result of acts performed by it or by its agents acting in their official capacity was anticipated by the International Court of Justice in its 1999 advisory opinion on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*.²⁵

It is also worth keeping in mind that the articles deal with reparation for breaches of obligations owed by international organizations either to States or to other international organizations. In other words, in principle, compensation would be owed to the injured State or international organization. Nonetheless, the practice of international organizations tends to concern compensation paid directly to individuals for the harm suffered at the hands of the international organization in question.

Article 37 – Satisfaction

A further form of reparation is that of the giving of satisfaction, usually by means of an apology or expression of regret. Satisfaction might also be provided in the form of a declaratory judgment confirming the responsibility of the international organization for its wrongful act.

While in practice, the offering of apologies and expressions of regret on the part of international organizations do occur, the legal context in which they are made is not always clear as they are not typically accompanied by any acknowledgment of wrongdoing. Accordingly, an analysis of the underlying facts and of the stance taken by the international organization in relation to those facts is called for, in order to determine whether a particular apology was

²⁵ *Ibid.*, para. 66.

offered within the framework of the responsibility of international organizations, or not.

Articles 38 and 39 – Interest and Contribution to the Injury

Articles 38 and 39 provide two further residual rules. First, Article 38 regulates the payment of interest for compensation due under Article 37.

Article 39, in turn, covers the extent to which contributory negligence should be taken into account in the determination of reparation. The successful invocation of the contribution by the injured State or international organization to the injury would result in the diminution of reparation owed as a consequence of the responsibility of the wrongdoing international organization.

Both provisions are also drawn from the articles on State responsibility.

Article 40 – Ensuring the Fulfilment of the Obligation to Make Reparation

Article 40 is new and unique to the case of international organizations. It operates from the starting point that international organizations have separate legal personality, distinct from their members. As such, the international responsibility for the wrongful conduct of an international organization is that of the organization itself, and not of its members.

This is the position taken by the articles, which principally in Article 62 (which we will get to in due course) only envisage the residual responsibility of members of an international organization on two narrow grounds. This means that in many if not most cases, it is only the international organization that may be called upon to provide reparation. If no financial provision has been made for the payment of compensation, the injured party would not be able to make good its claim.

The ILC was also of the view, reflected in Article 40, that international organizations are obliged to take the necessary measures to be in the financial position to comply with their obligations should they incur international responsibility. Such obligation, which is likely more in the nature of the progressive development of international law, is reflected in paragraph 1.

In the words of the commentary,²⁶ paragraph 2 is “essentially of an expository character”. It serves as a reminder to members of an international organization that they are required, in accordance with the rules of the organization, to take all appropriate measures to provide the organization with the means for effectively fulfilling its obligation to make reparation.

Chapter III — Serious Breaches of Obligations Under Peremptory Norms of General International Law

Chapter III deals with the special case of breaches of obligations arising under peremptory norms of general international law (*jus cogens*). While the ILC admitted that the likelihood of an international organization breaching a peremptory norm was minimal, it nonetheless considered the possibility to be theoretically possible, and accordingly worth providing for; also, to avoid an incorrect *a contrario* interpretation had Articles 41 and 42 been excluded. The provisions are drawn from the articles on State responsibility.

Article 41, paragraph 1, limits the scope of Chapter III to “serious” breaches of peremptory norms of general international law. Such limitation has been carried over from the work on State responsibility and relates to the policy decision taken by the ILC, in 2001, that the special consequences for breaches of peremptory norms, as listed in Article 42, could only realistically apply to “serious” breaches, and not to regular breaches.

²⁶ *Ibid.*, para. 4.

Of course, such position then begs the question as to what distinguishes a “serious” breach from a “regular” breach of a peremptory norm. Paragraph 2 attempts to answer that question by providing the following definition:

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

Article 42 identifies two “particular” consequences of a serious breach of an obligation under a peremptory norm of general international law (*jus cogens*), found in paragraphs 1 and 2, respectively. First, that States and international organizations are required to cooperate to bring to an end through lawful means the serious breach. Second, the obligation not to recognize the lawfulness of the situation created by the serious breach, nor to render aid or assistance in maintaining the situation.

Paragraph 3 preserves the possibility that the consequences referred to in Part III, such as the obligation to provide reparation, would apply. It also preserves the possibility that there may be other consequences under international law, not provided for in the articles, for serious breaches of peremptory norms.

It might be observed here that, in practice, it is not common for international organizations to be accused of serious breaches of peremptory norms. Accordingly, the particular consequences envisaged under Article 41 rarely arise directly for international organizations.

Nonetheless, the obligations in that article have, on occasion, arisen indirectly in the context of serious breaches committed by States. For example, with regard to the annexation of Kuwait by Iraq, the Security Council, in paragraph 2 of its resolution 662 (1990) of 9 August 1990, called upon “all States, international organizations and specialized agencies not to recognize that annexation, and to

refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation”.

Part Four – Implementation of the International Responsibility of an International Organization

Part Four deals with the question of the so-called “implementation” of international responsibility. This relates first to the practicalities of the invocation of the responsibility of an international organization (dealt with in Chapter I), and second to the possibility that an international organization might be able to take countermeasures in reaction to a breach of an obligation owed to it (covered in Chapter II). Let us proceed to deal with each chapter in turn.

Chapter I – Invocation of the Responsibility of an International Organization

As just indicated, Chapter I concerns the important matter of how the responsibility of international organizations is invoked in practice. It consists of Articles 43 to 50. Let us consider those now in turn.

Article 43 – Invocation of Responsibility by an Injured State or International Organization

Article 43 establishes the general rule that an injured State or international organization is entitled to invoke the responsibility of the wrongdoing international organization.

If you recall, at the beginning of my last lecture, I covered the matter of the scope of the articles. The scenario we are dealing with here is that of an international organization committing an internationally wrongful act vis-à-vis a State or another international organization. We are not dealing with the wrongful acts of States

against international organizations. Such responsibility is, in principle, dealt with by the 2001 articles on State responsibility.

Accordingly, Article 43 is limited to the invocation of the responsibility of international organizations, not of States.

This arrangement, however, is more complex than it may seem, because, as I will discuss later in this lecture, Part Five of the articles provides for the possibility of State responsibility in connection with the conduct of an international organization, in certain circumstances. In such a case, the limitation in Article 43 to invocation against an international organization means that the invocation of responsibility of a State in the context of conduct envisaged in Part Five would actually take place on the basis of the 2001 State responsibility articles.

Returning to the text of Article 43, two scenarios are envisaged corresponding to the types of obligations involved. The first, in subparagraph (a), involves the invocation of a breach of a regular obligation owed to the injured State or international organization. As the vast majority of obligations owed by international organizations are owed to a State or another international organization, there is a greater likelihood that any breach would be of such an obligation.

Subparagraph (b) deals with a special category of obligations, namely obligations owed to a group of States or international organizations (*erga omnes partes*), including the injured State or international organization, or to the international community as a whole (*erga omnes*). When in the presence of such types of obligations, the injured State or international organization may invoke the responsibility of the wrongdoing international organization in one of two scenarios: first, if the breach of the obligation in question specially affects the injured State or international organization; or second, if the breach of the obligation:

is of such a character as radically to change the position of all the other States and international organizations to which the

obligation is owed with respect to the further performance of the obligation.

An example of the latter type of obligation would be that arising under the Antarctic Treaty. Breach by one of the parties would risk radically changing the position of all the other parties.

The obligations envisaged in subparagraph (b) were included again on the model of the State responsibility articles, because it is theoretically possible that such obligations may be owed by an international organization. At the same time, the ILC admits in the commentary that such possibility is unlikely.

Articles 44, 45 and 46 – Notice of Claim, Admissibility of Claims and Loss of Claim

Article 44 confirms the rule that an injured State or international organization which invoked the responsibility of the wrongdoing international organization is required to give notice of its claim.

Article 45, in turn, deals with the admissibility of claims. Although the nationality of claims rule, reflected in paragraph 1, typically deals with the exercise of diplomatic protection by a State against another State for the mistreatment of a national of the former, the ILC maintained that it was possible for a State to exercise diplomatic protection on behalf of its nationals against a wrongdoing international organization.

Paragraph 2 reaffirms the exhaustion of local remedies rule “when it applies to a claim”. Examples would be claims for diplomatic protection and those for the violation of human rights. It is not, however, applicable when the international organization exercises functional protection in order to protect one of its officials or agents.

In the view of the ILC, whether the exhaustion of local remedies rules applies in cases of international claims against international organizations depends on the nature of the claim. In some cases,

for example, claims in respect of the treatment of individuals by an international organization while administering a territory would seem to be subject to the requirement that local remedies be exhausted first.

While the terminology is drawn from the State responsibility context, what is being referred to are remedies offered by the international organization itself. The rule is subject to the requirement that such remedies be “available and effective”. In other words, if no such remedies are available within an international organization, the requirement to exhaust local remedies would not, in principle, apply.

Article 46 concerns the circumstances in which an injured State or international organization might lose its right to invoke the responsibility of the wrongdoing international organization. This may occur in two situations: first, where the injured State or international organization waives its claim, or second, where the injured State or international organization, through its conduct, validly acquiesces in the claim lapsing.

While both reflect established principles of law, not necessarily unique to claims against States, as a practical matter either scenario may be more complex when coming to the situation of international organizations. For example, the determination of which organ of an international organization would be competent to waive a claim on behalf of the organization would presumably depend on the rules of the Organization. A similar complexity arises when seeking to ascertain the existence of “valid acquiescence” on the part of an international organization.

Article 47 – Plurality of Injured States or International Organizations

Article 47 confirms that in the case of more than one injured State or international organization, each injured party may

separately invoke the responsibility of the wrongdoing international organization.

This basic rule may be modified by agreement, for example, where one of the injured parties might refrain from invoking responsibility, thereby leaving other injured States or international organizations to do so. Such undertaking could amount to waiver under Article 46.

The prevailing legal position may be more complex when both the international organization and one or more of its members are both injured as a result of the wrongful act. In such case, it is possible that the rules of the organization might have a bearing on the question of priority when coming to the invocation of responsibility.

Article 48 – Responsibility of an International Organization and One or More States or International Organizations

Article 48 concerns the possibility of international responsibility being shared by an international organization and one or more States or international organizations.

Such joint responsibility is envisaged in Articles 14 to 18, which we discussed yesterday and which concern the responsibility an international organization might incur in connection with the act of a State (or another international organization). If you recall, this had to do with the circumstance of aid and assistance, direction or control, or even coercion. Joint responsibility is also envisaged in Part Five (Articles 58 to 62), which deals with the opposite scenario, namely the responsibility of States in connection with the internationally wrongful act of an international organization. We will cover those articles later in this lecture.

There are examples of such arrangements which may give rise to joint or shared responsibility. A well-known possible example, referred to in the ILC's commentary, is that of the "mixed agreements" concluded by the European Union together with its

member States. Any international responsibility that might arise from such agreements would be shared.

Turning now to the text of the provision, paragraph 1 establishes the general rule that the responsibility of each responsible entity may be invoked by the injured State or international organization.

However, the ILC recognised that in some scenarios one of the responsible entities might only bear “subsidiary responsibility”. This means that that entity (a State or international organization) would only have an obligation to provide reparation if, and to the extent that, the primarily responsible State or international organization fails to do so. This is anticipated in paragraph 2.

We will cover an example of “subsidiary” responsibility when we get to Article 62 dealing with the question of the responsibility of Member States for the wrongful acts of the international organization.

Paragraph 3 introduces some limits and safeguards concerning the invocation of joint responsibility.

Article 49 – Invocation by a State or International Organization Other Than an Injured State or International Organization

Let us turn now to Article 49. We have already seen that the articles on the responsibility of international organizations follow the communitarian approach adopted in the 2001 articles on State responsibility. For example, in Article 43, we considered the fact that obligations may also be owed to a group of States and international organizations, and even to the international community as a whole.

Article 49 is yet another example of such “communitarian” tendency in the work of the ILC on international responsibility. The provision, which is drawn from its counterpart on the State responsibility articles (Article 48), concerns the invocation of responsibility of an international organization by a State or another

international organization which, although it is owed the obligation breached, cannot be regarded as an injured State or international organization within the meaning of Article 43.

In other words, we are dealing here with States or international organizations which may have a legal interest in the performance of an obligation that is owed to them either as members of a group of States and organizations or as a consequence of the obligation in question being owed to the international community as a whole.

Paragraphs 1 to 3 deal with the various permutations of the types of obligations that might be involved, and essentially provide for the level of “legal interest” required for the responsibility of the wrongdoing organization to be invoked by a non-injured State or international organization.

Hence, according to paragraph 1, a State or international organization can invoke the responsibility of a wrongdoing international organization if the obligation it breached was owed to a group of States or international organizations (or a combination thereof), including the particular State or organization invoking the responsibility.

The type of obligation being envisaged here could be one established by a multilateral convention for the protection of a common environment. The other parties could invoke the responsibility of the wrongdoing international organization even if they are not “specially affected”, in the sense of Article 43. International obligations owed by an international organization to its members would not necessarily fall within this category. At the same time, and as I have had the opportunity to note on several occasions, the rules of the organization might serve to modify the position taken in the articles, for example, by restricting the entitlement of a member to invoke the responsibility of the international organization in question.

Paragraph 1 also adds an important qualification. The obligation being the subject of the invocation has to have been established to protect a collective interest of the group. In other words, it is not just any obligation owed to the group, but one essential to the protection of such collective interest.

Paragraph 2, in turn, provides for the possibility of States other than an injured State to invoke the responsibility of the wrongdoing international organization for the breach of an obligation owed to the international community as a whole (*erga omnes*).

The ILC decided to draw a distinction between the invocation of responsibility by a State with a legal interest in the performance of an *erga omnes* obligation (as defined in this article), and invocation by an international organization of responsibility owing to breach of the same type of obligation. In its view, there was insufficient practice or agreement supporting the assertion that international organizations enjoyed a general right to invoke the responsibility of other international organizations for the breach of an obligation owed to the international community as whole (*erga omnes*). Hence, paragraph 3 only envisages such invocation if

safeguarding the interest of the international community as whole underlying the obligation breached is within the function of the international organization invoking responsibility.

In other words, there has to be a link between the functions of the international organization invoking responsibility and the interest of the international community as a whole that has been affected by the breach.

Paragraph 4 provides the types of remedies available to the States or international organizations which invoke the responsibility of a wrongdoing international organization in the scenarios envisaged in paragraphs 1 to 3. In such cases, the invoking State or international organization may claim cessation

of the internationally wrongful act, assurances and guarantees of non-repetition and the performance of the obligation of reparation “in the interest of the injured State or international organization or of the beneficiaries of the obligation breached”.

Paragraph 5 serves the function of making the various procedural requirements in Articles 44 to 46 (notice of claim etc) equally applicable to invocation by States or international organizations with a legal interest in the performance of the obligation, as provided for in the present article.

Finally, I should note that paragraph 1 of Article 45, on the nationality of claims rule, is not included. Almost by definition, the claims envisaged herein are by third States (or international organizations) and not by the injured State itself.

Article 50 – Scope of Chapter I

Turning now to Article 50: the purpose of the provision is to preserve the possibility that entities other than States and international organizations might also be entitled to invoke the responsibility of an international organization. This would also include invocation by individuals. In other words, the fact that Chapter I only deals with invocation by States and international organizations does not exclude the possibility that others might also have a similar right to do so, under present or future international rules. The articles simply do not deal with such possibility.

The provision accords with the limited scope of the articles, and mirrors a similar restriction in the scope of application contained in Article 33, in that case to Part Three.

If you recall, I touched on such matters of the scope *ratione persone* at the beginning of my second lecture yesterday when dealing with Article 1. The effect of Article 50 (together with Article 33) is that while Parts I and II, dealing with general principles of international responsibility, are not limited *per se* to a specific set

of entities (or persons), Parts II and III, dealing with the content and implementation of responsibility, respectively, focus on injured States and international organizations.

I will return to the question of claims by individuals in my fifth lecture.

Chapter II – Countermeasures

The contemporary international legal order is characterised, *inter alia*, by a relatively under-developed system of binding settlement of disputes. As a quintessentially “horizontal” system of law, international law tolerates other modes of compulsion in response to a breach of an international obligation.

The State responsibility articles included one such alternative mode, namely the taking of countermeasures in order to induce a wrongdoing State to comply with its obligations. The ILC decided to extend such possibility to the situation of wrongdoing international organizations.

Such possibility is arguably particularly pertinent in the context of international organizations given that of the relatively small number of judicial instances that do exist very few enjoy jurisdiction over international organizations.

The articles in Chapter II, namely Articles 51 to 57, aspire to do two things: first, to provide a legal basis for the taking of countermeasures, and second, to impose limits and safeguards on such taking of countermeasures. If you recall, at our last lecture, according to Article 22 the taking of a valid countermeasure would serve as a defense thereby precluding the wrongfulness of the act in question. This chapter sets out the permissible grounds for the taking of countermeasures, thereby making available the defense in Article 22.

Article 51 – Object and Limits of Countermeasures

Article 51 sets out the object and limits of the taking of countermeasures. Hence, under paragraph 1, the countermeasure may only be taken against the international organization responsible for an internationally wrongful act. Under paragraph 2, countermeasures are limited to the temporary non-performance of international obligations owed to the responsible international organization. Paragraph 3 requires that countermeasures be taken, as far as possible, in such a way as to permit the resumption of performance of the obligations in question.

Paragraph 4 is new and pertains to the position of international organizations. Since the taking of a countermeasure against an international organization may impede the functioning of the responsible international organization, the paragraph seeks to mitigate such risk by requiring an injured State or international organization to select countermeasures that would affect in as limited a manner as possible the exercise by the targeted international organization of any of its functions. This would essentially be a qualitative assessment.

Article 52 – Conditions for Taking Countermeasures by Members of an International Organization

Article 52 deals with the tricky question of countermeasures taken by members of an international organization against the organization.

The assumption underlying the provision is that there exists a substantive difference in the prevailing legal position between measures taken by non-members as opposed to those taken by members.

Given the close proximity of members to the international organization itself, paragraph 1 states the general rule that an injured State or international organization which is a member

of a responsible international organization may not take countermeasures against that organization.

As with most general rules, there usually are exceptions. Subparagraphs (a) to (c) anticipate that it would, in fact, be possible for a member to take a countermeasure against the international organization itself if the three conditions in those subparagraphs are met. These are that: the basic conditions already discussed under Article 51 are satisfied; the countermeasures would not be inconsistent with the rules of the organization; and that there would be no appropriate means for otherwise inducing compliance.

Paragraph 1 is dealing with the taking of countermeasures for non-compliance with obligations arising under international law generally, and as I have just described, only permits the taking of such countermeasures in a narrow set of circumstances.

Paragraph 2, in turn, deals with obligations arising under the rules of the international organization. Under the terms of the provision, the taking of countermeasures by a member of an international organization, in response to a breach of an obligation arising under the rules of that organization, committed by the organization itself, is only possible if the rules of the organization themselves provide for the taking of such countermeasures.

Articles 53 to 57 – Obligations Not Affected by Countermeasures

Articles 53 to 57 seek to further regulate the resort to countermeasures. Since they are almost entirely based on their equivalents in the State responsibility articles, I propose to deal with them somewhat briefly, before moving on to Part Five.

Article 53 provides a list of fundamental obligations which may not be affected by the taking of countermeasures. These are largely a well-known list of obligations which, in general, protect the essential interests and values of the international community.

The list is, in large part, drawn from the 2001 State responsibility articles, with the exception of paragraph 2(b) which is specific to the case of international organizations. The provision serves to safeguard obligations that protect international organizations and their agents.

Article 54 confirms that the taking of countermeasures is subject to the rule of proportionality.

Article 55 imposes several conditions on the resort to countermeasures. Accordingly, paragraph 1 establishes two procedural requirements, namely that the responsible international organization first be called upon to fulfil its obligations under Part Three (in subparagraph (a)); and, secondly, that the State or organization intending to take countermeasures should provide notice of its decision while offering to negotiate a solution (in subparagraph (b)).

The requirement of notification is subject to paragraph 2 which safeguards the possibility of taking urgent countermeasures as necessary to preserve rights.

Paragraph 3 prohibits the taking or continuation of countermeasures if the internationally wrongful act has ceased and the dispute is pending before a court or tribunal. Lastly, paragraph 4 subjects the limitation in paragraph 3 to the good faith rule. Again, these are provisions largely transposed from the 2001 State responsibility articles.

Article 56 envisages the termination of countermeasures as soon as the responsible international organization has complied with its obligations under Part Three in relation to the internationally wrongful act.

Article 57 is a without prejudice clause, preserving the possibility that a non-injured State or international organization entitled to invoke the responsibility of the wrongdoing international

organization, under Article 49, may have the right to resort to countermeasures. The ILC acknowledged, in its commentary, that there is no practice on this point, but nonetheless included the provision since it could not rule out such possibility. The presumption is that, were such countermeasures to be taken, they would be subject to the requirements and restrictions laid out in the chapter just discussed (such as the requirement of proportionality, etc.).

Part Five – Responsibility of a State in Connection With the Conduct of an International Organization

As I have previously alluded to, Part Five is somewhat out of the ordinary. It does not deal with the responsibility of international organizations *per se*, but rather State responsibility. As such, it may be viewed as an extension of the 2001 articles on State responsibility.

The Part consists of six articles, which seek to answer the basic question of what responsibility a State would have in connection with the wrongful acts of an international organization.

We will see shortly that the scenarios envisaged in this Part are analogous to those in Chapter IV of Part Two, which we covered in the last lecture. If you recall, that chapter dealt with the situations of aid or assistance, direction or control, and coercion, where an international organization could incur responsibility in connection with the wrongful acts of a State or another international organization.

Here, in Part Five, we are looking at the opposite scenario, namely the possibility that States may incur responsibility in connection with the wrongful conduct of an international organization.

The interconnection with the articles on State responsibility is important here, so much so that Part Five should be considered in

light of the State responsibility articles. For example, the applicable rules on attribution to the State are to be found in the 2001 articles, not their 2011 counterpart on the responsibility of international organizations.

In principle, a State need not be a member of an international organization in order to incur responsibility in the circumstances envisaged in Part Five. At the same time, it would include the actions of States members of the international organization in question.

If you recall, when we dealt with the definition of “international organization” in Article 2(a), during the last lecture, I explained that the ILC had adopted a broad definition, including organizations with mixed composition counting among their members entities other than States or other international organizations.

Part Five deals with the vicarious responsibility of States members of an international organization. The possible responsibility of international organizations, *qua* members of an international organization, for the wrongful conduct of that organization, is covered by the general rules in Chapter IV of Part Two.

This leaves the question of the responsibility of entities, other than States or international organizations, that are also members of international organizations. In the ILC’s view, such responsibility, to the extent that it may exist, falls outside the scope of the articles.²⁷

Article 58 – Aid or Assistance by a State

Article 58 is the parallel provision to Article 14 and covers the international responsibility that would arise for a state for aid or assistance provided to an international organization in the commission of a wrongful act.

²⁷ *Ibid.*, para. 5 of the general commentary to Part Five.

The same requirements of knowledge and wrongfulness for the aiding or assisting State itself, as found in Article 14, are required here as well.

When coming to the acts of States that are members of the wrongdoing international organization, paragraph 2 provides that the fact that the act by the member State was in accordance with the rules of the organization does not, as such, engage the international responsibility of that State. Instead, the ILC took the view that the factual context such as the size of membership and the nature of the involvement would probably be decisive.²⁸

What is more, even if a State does not *per se* incur international responsibility for aiding or assisting an international organization of which it is a member, the obligation in question could encompass the conduct of a State when it acts within an international organization. Should a breach of an international obligation be committed by a State in this capacity, the State would not incur international responsibility under the present article, but rather under the articles on State responsibility articles.

Article 59 – Direction and Control Exercised by a State

This provision is the analogue to Article 15. Here we are dealing with the scenario of a State directing or controlling an organization.

As just discussed in the context of Article 58, a distinction should be made between participation by a member State in the decision-making process of the organization according to its rules, and direction and control as envisaged in the present article. Since the latter conduct could take place within the framework of the organization, in borderline cases one would face the same problems that were just referred to in the context of aid or assistance.

²⁸ *Ibid.*, para. 4 of the commentary to Art. 58.

Article 60 – Coercion by a State

Article 60, in turn, is the counterpart to Article 16. Here, we are dealing with a State coercing an international organization.

The State coercing an international organization may be a member of that organization. You will notice that the article does not contain a paragraph similar to paragraph 2 of Articles 58 and 59. This is because it seemed to the ILC that it would be highly unlikely that an act of coercion could be taken by a State member of an international organization in accordance with the rules of the organization.

Article 61 – Circumvention by a State of Its Obligation

I turn now to Article 61. If you recall, Article 17 dealt with the scenario of an international organization inducing its Member States to perform an act which would have been wrongful if the organization had undertaken it itself. This was called “circumvention”. Here, in Article 61, we have a similar situation, but this time involving circumvention by a State of one of its international obligations when it avails itself of the separate legal personality of an international organization of which it is a member.

As in the case of circumvention under Article 17, we are talking about intentional action here. International responsibility will not arise as a consequence of the unintended result of the Member State’s conduct.

The circumstance being considered in this provision is not as theoretical as it may seem at first glance. There are examples within the jurisprudence of the European Court of Human Rights involving cases of the transfer of sovereign powers of States to international organizations. The Court has consistently insisted on the continued application of the obligation of the States in question under the European Convention on Human Rights.

Likewise, in 2014, the African Commission on Human and Peoples Rights in assessing whether the Member States of the Southern African Development Community could be held responsible for the suspension and permanent ouster of the Southern Africa Development Community Tribunal had occasion to observe, *inter alia*, that:

the current trend in International Law is that where states transfer sovereign powers to an International Organization and in the course of carrying out the functions assigned to it the International Organization occasions wrongs that would have invoked the international responsibility of the Member States individually had they acted on their own, the States can individually bear responsibility for those wrongful acts and omissions of the International Organization.²⁹

Three conditions are required for international responsibility to arise for a member State circumventing one of its international obligations. The first is that the international organization has competence in relation to the subject matter of an international obligation of a State. In other words, what is relevant for international responsibility to arise under the present article is that the international obligation covers the area in which the international organization is provided with competence. The obligation may specifically relate to that area or be more general, as in the case of obligations under treaties for the protection of human rights.³⁰

The second requirement is that there be a significant link between the conduct of the circumventing member State and that of the international organization. The act of the international organization has to be caused by the Member State.

²⁹ *Luke Munyandu Tembani and Benjamin John Freeth*, communication 409/12, decision on merits, 30 April 2014, para. 134.

³⁰ *Ibid.*, para. 6 of the commentary to Art. 61.

The third is that the international organization commits an act that, if committed by the State, would have constituted a breach of the obligation.

Paragraph 2 explains that it is not required that the act be internationally wrongful for the international organization concerned. Circumvention is more likely to occur when the international organization is not bound by the international obligation. However, the mere existence of an international obligation for the organization does not necessarily exempt the circumventing State from international responsibility.

Article 62 – Responsibility of State Members for Wrongful Acts of an International Organization

Article 62 deals with the interesting question of the residual responsibility that a Member State may have for the wrongful acts of the organization. This is a scenario different from that of State responsibility arising out of aid or assistance, direction, and control or coercion.

The basic stance, implied in the provision, is that membership does not as such entail for member States international responsibility when the organization commits an internationally wrongful act. This view has been supported in State practice, including in the Courts of the United Kingdom, in the *International Tin Council* case.⁵¹ It also reflects the position of the Institut de droit international in a resolution adopted in 1995.⁵²

Two exceptions are recognized. The first is if the member State accepts responsibility for the wrongful act of the international

⁵¹ *Maclaine Watson and Co. Ltd. v. Department of Trade and Industry; J. H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry and others*, and related appeals, Judgment of 27 April 1988, England, Court of Appeal, ILR, vol. 80, p. 109.

⁵² Institut de droit international, “The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties”, 1995, Art. 6.

organization. What is being referred to is responsibility towards the injured party. Hence, internal arrangements within an international organization to provide, for example, financing for compensation would not qualify as acceptance within the meaning of Article 62.

The second exception is the case where the conduct of member States has led the third party to rely on the responsibility of Member States. This occurs, for instance, when the members lead a third party reasonably to assume that they would stand in if the responsible organization did not have the necessary funds for making reparation. An example of such scenario arose in the *Westland Helicopters* case,³⁵ where it was found that the special circumstances in question invited

the trust of third parties contracting with the organization as to its ability to cope with its commitments because of the constant support of the member States.

Here reliance is not necessarily based on an implied acceptance. It may also reasonably arise from circumstances which cannot be taken as an expression of an intention of the Member States to bind themselves. There is no presumption that a third party should be able to rely on the responsibility of Member States.³⁴

Since the responsibility of the wrongdoing international organization would be unaffected, the possible responsibility that a Member State might incur, under paragraph 1, for the conduct of the international organization is presumed to be subsidiary in nature, by which it is meant that it is supplementary to the responsibility of the international organization.

³⁵ *Westland Helicopters Ltd. v. Arab Organization for Industrialization*, Award of 21 July 1991, para. 56.

³⁴ *Ibid.*, para. 10 of the commentary to Art. 62.

Article 63 – Effect of Part Five

Article 63 is a saving clause which preserves the international responsibility of the international organization which commits the act in question, which I have already referred to, as well of any State or other international organization.

This provision is also a logical consequence of what was just said about the responsibility envisaged in Article 62 being subsidiary in character.

Part Six – General Provisions

Part Six is the final part of the articles. It contains four provisions regulating general matters applicable to the entire articles.

Article 64 – Lex Specialis

The first is Article 64 that reflects the *lex specialis* rule, which is a general principle of law.

The articles on the responsibility of international organizations are posited as rules of general application to all international organizations. By operation of the *lex specialis* principle, general rules may be set aside by special rules governing the same matter. Article 64 confirms the precedence given to special rules over the general rules reflected in the articles. So, for example, international organizations might have special rules on attribution of conduct, or on the taking of countermeasures.

Such special rules are applicable “where and to the extent” they govern the same issues covered in the articles. This means that they might only apply in part, in which case the general rules continue to apply to the extent that they have not been displaced by the special rules.

We will explore the implications of the *lex specialis* rule in more depth in my next lecture.

Article 65 – Questions Not Regulated by the Articles

Let us now consider Article 65. Earlier, I said that the articles posit a set of rules of general application to all international organizations. In doing so, the Commission had the ambition of producing as complete a system of rules as possible, with a view to regulating all the main aspects of the definition, content, and implementation of international responsibility of international organizations (as well as of States for conduct related to the wrongful acts of international organizations).

Nonetheless, the articles do not purport to cover all rules applicable to the responsibility of international organizations. Article 65 serves the function of confirming this, and of specifically preserving the continued application of such rules.

Like the *lex specialis* rule in Article 64, the provision anticipates the existence of other applicable rules governing aspects of international responsibility not covered by the articles. However, different from the *lex specialis* scenario, such external rules would supplement, not displace, those laid down in the articles.

Article 66 – Individual Responsibility

Article 66 seeks to preserve the continued application of rules governing the responsibility of individuals under international law. Here we are referring to persons acting on behalf of an international organization, and whose conduct is attributed to the organization under Article 6. The fact of attribution does not *per se* absolve the individual from any responsibility under international law.

No attempt is made to resolve the question of individual responsibility. Instead, the legal position of individuals is left to other applicable rules.

The provision follows necessarily from Article 2, which restricts the scope of the articles to the responsibility of international

organizations, and that of States in the special circumstances we covered in Part Five.

Article 67 – Charter of the United Nations

We conclude our tour of the articles with Article 67, which seeks to preserve the continued applicability of the Charter of the United Nations. The provision reflects Article 103 of the Charter, which establishes the priority of the Charter in the event of a conflict between the obligations of Member States under the Charter and their obligations under other international agreements.

The position is less straightforward when coming to international organizations since they are not members of the United Nations, and accordingly not parties to the Charter. Nonetheless, the view of the ILC was that:

even if the prevailing effect of obligations under the Charter of the United Nations may have a legal basis for international organizations that differs from the legal basis applicable to States, one may reach the conclusion that the Charter of the United Nations has a prevailing effect also with regard to international organizations.³⁵

This position was taken on the basis of an understanding that Security Council resolutions, adopted under Chapter VII of the Charter, are addressed to the international community as a whole.

I do not propose to go any further on the question of the applicability of the Charter of the United Nations to international organizations generally, as the matter lies beyond the scope of the subject-matter of these lectures. Suffice it to add that since the membership of the United Nations is almost universal, many States members of other international organizations are also members of the United Nations and accordingly would typically also be subject

³⁵ *Ibid.*, para. 2 of the commentary to Art. 67.

to the binding decisions of the Security Council. Any conflict in obligations would, under Article 103, be resolved in favour of those arising under the Charter.

This could result in States being obliged to take actions, including in the context of other international organizations, in conformity with their obligations flowing from the Charter. It is in this sense too that, in the words of the ILC, the Charter may have a “prevailing effect”.

Conclusion

With this, we have now completed our overview of the articles on the responsibility of international organizations.

In my next lecture, I will explore further some of the aspects of the articles dealing with the unique position of international organizations.

LECTURE 4:

Overview of the Articles on the Responsibility of International Organizations (Specific Aspects)

At our last lecture, we completed the overview of the articles on the responsibility of international organizations, focusing on Parts Three to Six, dealing with the question of the so-called “content” of international responsibility; in other words, what are the legal consequences flowing from the determination that an international organization is “internationally responsible” for its conduct? We also considered how such responsibility is invoked, as well as the question of the taking of countermeasures in response to an internationally wrongful act. We then turned to the special problem of State responsibility for the wrongful acts of international organizations, and concluded with a brief discussion of several general provisions.

In this lecture, we will undertake a more in-depth analysis of several aspects of the articles that are unique or of particular relevance to the international responsibility of international organizations, as opposed to that of States.

I will focus on several issues. First, we will consider the concept of “international organization” as understood in the articles. Next, we will look at the nature and significance of the “rules of the international organization”, including as a source of obligations under international law. Then, we will turn to the so-called “principle of speciality” which is key to understanding the position of international organizations under international law. Finally, I will revert to the question of the scope of the articles, in particular, the types of claims that are excluded. This will set the stage for my fifth lecture.

Let us now continue on this journey through the work of the International Law Commission.

Definition of International Organizations

One of the major difficulties which the ILC confronted in its work on the responsibility of international organizations was the multiplicity of forms of such entities. All States, from the most to the least powerful, are juridically identical in the eyes of the law. This makes it relatively straightforward to assert the existence of a common set of international rules applicable to the wrongful acts of States.

The situation is more complex when coming to international organizations. Let us leave aside for now the matter of different mandates, an issue we will return to when we consider the principle of speciality. The fact is that while the presence of international organizations, existing on the international plane as subjects of international law alongside states, is a relatively new phenomenon, there are today hundreds if not more such entities. In addition, they come in a range of varieties, sizes, and compositions. What is more, there seem to exist multiple avenues for their emergence onto the international plane. From this reality, one immediately gets a sense of the scope of the challenge the ILC confronted when it turned to the consideration of the responsibility of international organizations.

The key initial question confronted by the ILC was whether the multiplicity of forms of international organizations had a bearing on the applicable rules of international law concerning the international responsibility of such organizations. In other words, does the fact of the special nature of any particular international organization *per se* determine the rules of international law applicable to it?

The answer underlying the articles prepared by the ILC is an emphatic “no”. The unarticulated premise of the articles is that it is possible to have a common set of rules of international law applicable to all international organizations regardless of their form, nature, or mode of establishment. To a certain extent, the ILC had no choice, otherwise, it would have been confronted with the possibility of the existence of multiple sets of rules governing international responsibility, each tailored for the international organization in question. This would have made the codification of a set of rules that are generally applicable to all international organizations virtually impossible.

Let me say that such approach has not been without controversy. Some of the criticisms lodged against the articles prepared by the ILC, including by various international organizations, have been precisely that the special nature of international organizations makes it not feasible, if not impossible, to develop a common set of international rules applicable to all international organizations.

As I have said, this was not the view of the ILC. Let me clarify, though, that it is not that the ILC took the position that all international organizations are the same. Rather, it accepted the premise that variation at the level of each international organization is possible, and in fact likely. We will discuss this when coming to the rules of the organization and the principle of speciality.

The ILC undertook its work on the articles on two assumptions: first, that it was possible to develop a set of general rules applicable to all international organizations; and second, that developing such set of rules was desirable precisely because of the limitations inherent in the rules of international organizations.

The first such limitation was that, in its view, the question of international responsibility of international organizations is

not typically sufficiently dealt with by the rules of international organizations. As a practical matter, many if not most international organizations do not have in place detailed rules governing their international responsibility under international law. In such scenario, the expectation is that the articles would apply residually, either in their entirety or in part (in order to provide solutions to issues not fully covered by the existing internal rules of an international organization).

The second, perhaps more significant, limitation concerns the relations between an international organization and third parties. The rules of an international organization only apply by definition to the organization in question and its members. They do not, in principle, apply in the relations with other international organizations or non-members.

So, let us take the practical example of the United Nations and the European Union (by which here I am referring to its external manifestation as an international organization). Both have, to varying degrees, applicable internal rules governing aspects of any legal responsibility that may arise out of their respective acts. Let us assume that tomorrow the United Nations and the European Union enter into an international agreement. Whose rules would apply? Short of consent by one party to apply the rules of the other, or agreement on a common set of such rules, neither would apply, since neither organization's set of internal rules extend *per se* to third parties. It would be at this point that the residual rules of international law, as reflected in the articles, would, according to it, apply.

In other words, the vision of the ILC was essentially one of international organizations existing as “islands” of law embedded in the broader ocean of international law, with each organization enjoying distinct characteristics, but all sharing a common thread. Let us explore these characteristics further.

International Personality

For the ILC, the primary common characteristic is international personality. This brings us back to the beginning, to the *Reparations* advisory opinion, and the recognition by the International Court of Justice that international organizations such as the United Nations have international legal personality, and as such are subjects of international law just as States (even if their competence may be more limited than that of States).

The existence of international legal personality is the threshold requirement for the activation of the articles. It is laid down in the definition of “international organization” found in Article 2(a), which confirms that for the articles to apply the international organization must “possess its own international legal personality”.

If an entity does not enjoy international legal personality, it is not a subject of international law, and the articles simply do not apply to it. Conversely, one of the consequences of acquiring international personality is that such an international organization can enter into international relations and acquire rights and obligations under international law. This, in turn, means that such international organization would also, by operation of law, be subject to the secondary consequences of its wrongful acts (including breach of its obligations) under international law.

As I mentioned in my first lecture, such legal personality is objective in nature, in the sense that it does not require recognition by States, nor is it affected by non-recognition.

It should be noted however that, in some circumstances, recognition may serve as evidence of the status of an entity as an international organization, under international law. For example, the United Nations has developed a procedure for the grant of observer status to international organizations, which involves, *inter alia*, the consideration by the Sixth Committee of the General Assembly

of the legal status of the organization requesting observer status. Under a set of criteria developed by the General Assembly in the 1990s, the grant of observer status is limited to intergovernmental organizations (which typically are international organizations with international legal personality). With some exceptions, such requirement has been applied to all such applications for observer status at least over the last two decades. As such, the grant by the General Assembly of the United Nations of observer status to an international organization may serve to substantiate a claim of its existence as an international organization under international law. While not constitutive, it may at least be declaratory of such existence, or provide authoritative evidence thereof.

A similar point can be made with regard to the specialized agencies of the United Nations, which are typically international organizations in their own right. In other words, the fact that an organization is a specialized agency of the United Nations provides strong evidence of its status as an international organization under international law.

An additional aspect is that, in order to qualify as an international organization, its legal personality should be separate and distinct from that of its members. The entire framework of the responsibility of international organizations rests on the assumption that an international organization can incur international responsibility separately from its members. This is a feature common to most if not all conceptions of legal persons under the various legal systems throughout the world.

We have already confronted some of the legal implications of this, during our last lecture, when we considered Part Five of the articles, dealing with the question of the residual responsibility of States members of an international organization for the wrongful acts of that organization. Such possibility is premised on the existence of a distinction between the responsibility incurred by the international organization and that falling to its member States.

Establishment Requirements

One of the interesting features of the articles on the responsibility of international organizations is that the ILC felt it necessary to include guidance on how to assess the existence or not of an international organization.

This was a departure from the work on State responsibility where no definition of statehood was provided for purposes of the 2001 articles. The assumption there was that the legal question of the criteria for statehood was not a matter of international responsibility. The 2001 State responsibility articles take as their starting point the existence of statehood. With a few narrow exceptions, if the entity in question is not a “state”, as understood under international law, the 2001 articles simply do not apply.

However, when coming to international organizations, the Commission went one step further and provided several indicators or factors suggestive of the existence of an international organization. These provide a basic framework, even if somewhat rudimentary, of rules concerning the creation of international organizations.

Two sets of factors are recognised: the first dealing with the mode of establishment, and the second the composition of the membership of the Organization.

Starting with the former, the articles give prominence to establishment by treaty as a common method. Many examples exist of international organizations being established by treaties, which serve as their constitutive instruments. Perhaps the most prominent example is the Charter of the United Nations, through which the Organization was established.

The important point to recall, however, is that establishment by treaty is not the only method. International organizations have been created through other modes, such as the adoption of resolutions by an international organization or by a conference of States.

In general, entities established under municipal law are not considered to be international organizations, at least not for purposes of the ILC's articles. This is the case regardless of the fact that some such entities, like the International Union for Conservation of Nature (IUCN) — an example cited in the ILC's commentaries — include States among its members. The prevailing legal position may be changed by the subsequent adoption of a treaty or other instrument governed by international law purporting to establish the organization as an international organization for purposes of international law.

The question of the legal status of entities is a matter regularly confronted by my office. There seems to be a limitless number of creative ways in which international entities are being established.

While the ILC's articles provide some guidance, they do not claim to be definitive on the point. Instead, some measure of appreciation is called for, and the analysis is best undertaken on a case-by-case basis.

The second factor to take into account in assessing the legal status of an organization is the composition of its membership. Certainly, intergovernmental organizations carry a strong inference that they are international organizations as conceived of under international law.

This is not conclusive, however, as there are intergovernmental entities like the OECD which have not acquired separate legal status to that of its States members, and as such would not satisfy the criteria set out in the ILC's articles.

Nonetheless, when coming to intergovernmental entities, the inference is strong. So much so that, in its earlier work, in the 1970s and 1980s, the ILC limited the definition of international organizations to intergovernmental organizations.

I have already referred to the practice in the Sixth Committee of the General Assembly of only recommending the grant of observer status to intergovernmental organizations. The underlying

assumption is that those organizations are typically international organizations, for purposes of international law, in their own right.

Having said so, the ILC modified its earlier position and took a more liberal approach in its 2011 articles. The fact is that while purely intergovernmental organizations are an important category of international organizations, they are nonetheless still a subset of a broader community. There are other organizations that have a mixed membership, including entities other than states or international organizations as members. Nonetheless, the fact of such mixed membership has not prevented them from acquiring separate legal personality under international law.

Here I wish to cite the well-known example of the International Labour Organization, which is celebrating its centenary this year. The ILO has a mixed membership structure, which includes in addition to representatives of member States also representatives of employers and workers. The fact of such composition has not served as a bar to it acquiring the status of an international organization. Indeed, the ILO is a specialized agency of the United Nations.

The definition of international organization adopted by the ILC in its 2011 articles includes a second sentence whereby it expressly recognises that “[i]nternational organizations may include as members, in addition to States, other entities.” The effect of this is to significantly broaden the scope of application of the articles to a whole host of international organizations with a variety of members. It is also a reflection of a reality that, in the twenty-first century, States are no longer the sole actors at the international level.

I propose to go no further on the matter of the establishment of international organizations. This is more properly dealt with in a lecture, or a series of lectures, focusing on the law of international organizations more generally. My goal here was merely to draw your attention to the fact that the ILC did include some indications in

the 2011 articles, even if such guidance was intended as a means of obtaining an understanding of the scope *ratione personae* of the articles.

Rules of the Organization

Let us turn now to the matter of the rules of the organization. I have already, on a number of occasions, referred to the existence of such rules and their potential significance in the assessment of the legal position in which an international organization might find itself. I wish to explore this further.

We can start with the basic reflection that, as with States, the actions of international organizations may be governed both by international law and the national law of States. As regards the latter, when coming to the United Nations, Article 104 of the Charter expressly provides that the “Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes”. This requirement is typically operationalized through the national laws of its member States.

Here the example of the recognition of the privileges and immunities of an international organization can be cited. While such recognition is often based on an existing treaty, that is not always the case. For some organizations, such privileges and immunities are extended by the domestic laws of a host state or states in which the organization has a presence. Even in cases of privileges and immunities established by treaty between the State and the international organization in question, it is relatively common that such recognition is subsequently reflected in the laws of the granting state.

What is different about international organizations, at least in relation to States, is that there is the third body of rules applicable

to international organizations, namely their own internal rules, collectively referred to as the “rules of the organization”. All international organizations have them.

These include the constituent instruments, such as a founding treaty, as well as decisions, resolutions, and other acts of the organization adopted in accordance with the procedures established in the constituent instruments. Such other acts might include administrative issuances and decisions of administrative tribunals. In fact, there is a broad variety of such types of internal rules. In addition, it is quite common for such rules to exist within an established hierarchy, so that some might take precedence over others. No general rule can be provided on this point, as each international organization is free to establish its own system of internal rules.

One very important further manifestation of the rules of an international organization are those developed through practice. In the *Reparations* advisory opinion, the International Court of Justice expressly recognized that the rights and duties of an international organization depended on “its purposes and functions as specified or implied in its constituent documents and developed in practice”.

In over 70 years of existence, the United Nations has developed an extensive body of practice on a broad range of matters relating to the functions of the Organization. Evidence of such practice is to be found in a variety of sources. Some such practice has subsequently been codified in internal administrative issuances, or rules and regulations adopted by the General Assembly. A description of the practice is also to be found in documents such as the reports of the Secretary-General, or in the dedicated publications produced by the Organization. Here I would like to mention in particular the *Repertory of Practice of United Nations Organs*, the *Repertoire of Practice of the Security Council* and the *United Nations Juridical Yearbook*. The last of these three publications is of specific interest because it includes extensive coverage not only of the practice

of the principal organs of the United Nations but also that of the Secretariat. So, for example, you will find there selected legal opinions issued by the various Legal Counsels of the United Nations over the years, as well as those issued by the Secretariats of the specialized agencies. All of these materials form part and parcel of a burgeoning corpus of law that constitutes, in the nomenclature of the ILC's articles, the "rules of the organization".

Practice serves different functions. Sometimes, it involves the adoption of new procedures and guidance dealing with issues not previously regulated. At other times, it supplements existing rules through interpretation and contextualization.

At this juncture, it should be apparent to you from what I have said that the rules of an organization enjoy a *sui generis* character. I mean this in two senses. First, every set of rules of an organization is unique to the international organization in question. No two international organizations share an entirely common set of rules. Not even international organizations which are in a special relationship with one another, such as the specialized agencies of the United Nations.

Secondly, and more importantly for present purposes, the rules of the organization are *sui generis* in the sense that they are neither national law nor entirely international law. They exist, in a sense, suspended between those two bodies of rules.

It is the relationship with international law that is of particular interest here. The basic point to be made is that the rules of an international organization are not *ipso facto* rules of international law. An assessment is called for in each case. Sometimes, a rule of an international organization is clearly a rule of international law. For example, a rule laid down in the founding treaty establishing the criteria and procedure for the admission of members would enjoy the character of a rule of international law (as it establishes treaty-based rights and obligations). However, an internal

administrative issuance regulating the activities of the staff of an international organization would not typically be considered a rule of international law (as it does not create rights and obligations at the international level).

While this may seem to be merely of academic interest, it has real implications for our consideration of the international legal framework applicable to the responsibility that international organizations may incur for their wrongful conduct. Whether a rule of an international organization is simultaneously a rule of international law is important in determining whether it operates at the international level as *lex specialis* in relation to an existing general rule of international law, thereby displacing the latter rule. A rule of an organization that is not a rule of international law cannot, as a matter of operation of law, have that effect. We will return to the principle of *lex specialis* shortly.

However, the matter does not end there. In fact, we are only touching the tip of the iceberg of the complexity that exists. First of all, there is a significant grey area between rules of the organization that are and those that are not rules of international law. Let us take the example of non-binding resolutions of international organizations purporting to declare *ex urbi et orbis* the law on a particular point. Do such resolutions establish rules of international law? Arguments may be made in both directions. The point is, as I have already said, that a case-by-case assessment is called for.

The second level of complexity arises from the fact that, in some cases, those rules of an organization which are not considered rules of international law may nonetheless still affect the prevailing legal picture at the international level. For example, many international organizations have internal rules establishing categories of staff and other officials. The United Nations recognizes several such distinctions. Those established by treaty, such as the distinction between staff and experts on mission established in the Convention on the Privileges and Immunities of the United Nations of 1946,

would seem to reflect rules of international law binding on the parties to the treaty in question. In other cases, such characterizations arise from practice, such as in the case of the practice of the Secretariat of including military observers seconded to the Organization within the category of experts on mission for purposes of the 1946 convention. Other international organizations establish similar categorizations primarily through internal issuances.

Such rules would be pertinent in determining whether an individual was acting as “agent” of the international organization in question, for purposes of attribution under Article 6. Likewise, as we discussed in the second lecture, such attribution of the acts of an agent to the international organization in question is contingent on the acts having been committed in the performance of official functions. What constitutes an official function would be determined by the relevant rules of the organization. In such scenarios, the fact that the rules of the organization might themselves not be rules of international law does not limit their relevance in making the necessary assessment called for under the ILC’s articles.

Yet another dimension to consider is that even if some rules of the organization are not rules of international law *per se*, this does not release members of the organization in question from performing the obligations arising under those rules. This means that members of the international organization in question could potentially face a conflict between obligations existing on different planes, so to speak, namely obligations under international law and obligations arising under the rules of the organization. The ILC was keenly aware of this problem, and, as we have seen over the last two lectures, it specifically included a series of “carve-outs” in various provisions whereby preference is given to the position prevailing under the applicable rules of the organization.

Such “carve-outs” are not contingent on the nature of the rules of the organization in question. Therefore, what emerges is a partial hybrid arrangement where rules that might not technically be rules

of international law can nonetheless either inform or even be determinative of the prevailing legal position under international law. This, by the way, is an example of the implementation of the principle of speciality, which I will turn to shortly.

There is an important caveat that needs to be kept in mind, and that is that such “carve-outs” only arise in the relationship between the international organization in question and its members. By definition, as previously mentioned, the rules of an international organization are not opposable to third parties, unless they have consented to them.

Principle of Speciality

Let us turn now to the next sub-topic of this lecture, namely the principle of speciality. In its advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, the International Court of Justice drew a distinction between States and international organizations along the following lines:

international organizations ... do not, unlike States, possess a general competence. International organizations are governed by the “principle of speciality”, that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.³⁶

The meaning and implications of the dictum of the Court have been the subject of much discussion and contemplation. I will not attempt a comprehensive recapitulation of such debates, which would be more appropriate in a general course on the law of international organizations. Suffice it to state that the notion of the “principle of speciality” is one of the more mysterious concepts in international law.

³⁶ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, I.C.J. Reports 1996, p. 66, at p. 78, para. 25.

It suggests several things. First, that no international organization (regardless of how universal it is) enjoys general competence. Second, as a corollary to the first point, that the competence of any international organization has to be positively established, failing which it does not enjoy such competence. Third, the competence of an international organization under international law is a function of the powers granted to the organization. Fourth, those powers are granted by the members (typically states) which established the organization. Finally, such powers are necessarily limited by the extent of the grant by the members.

So far so good. What is of particular interest for us in considering the topic of these lectures is the implication of the principle of speciality for the applicability of general international law. Broadly speaking, there are two schools of thought. The first, exclusionary approach, is that the principle serves in large measure to exclude the applicability of the rules of general international law, either in their entirety or by admitting their applicability only to the extent of their relevance to the functions of the international organization.

The second position is inclusionary or more permissive in approach. Under this view, the principle of speciality does not serve to exclude the applicability of general international law, but rather confirms that the functions and powers granted to an international organization are relevant in any assessment of the position of the organization under international law.

The ILC's articles are premised on the second view. As stated at the beginning of the lecture, this was done as much as out of necessity as conviction. A vision of international organizations existing in separate legal universes, so to speak, would render futile any attempt at developing a common set of rules applicable to all international organizations.

It also accords with the general philosophy of the ILC which has consistently favoured a conception of international law as a

single unitary system. I return to the metaphor of islands I used at the beginning of this lecture. For the ILC, while international organizations may be their own islands of law, they nonetheless exist in a sea of international law. This is confirmed by the fact that many, if not all, international organizations are established by treaties — the quintessential instrument of modern international law — or by other instruments governed by international law. Likewise, the existence of the attribute of separate legal personality arises as a function of the operation of the rules of international law within which all international organizations benefitting from such status are embedded. International organizations are, in a sense, creations of international law, and, as such, they are subject to its rules.

This is not to say that the principle of speciality is not of importance, or that the articles are to be understood in opposition to the principle. Rather, as already previously stated, the ILC took the applicability of the principle as a given, and sought to operationalise it in the articles.

It did this in two ways, first through the express recognition of the applicability of the *lex specialis* principle, and secondly through the inclusion of several elements throughout the articles designed to allow a certain measure of appreciation of the specific characteristics and functions of international organizations. I will deal with each in turn.

Lex specialis

As mentioned briefly in my last lecture, Article 64 expressly recognizes the applicability of the *lex specialis* principle. In other words, the provisions of the articles are subject to the applicability of special rules, to the extent that those exist.

I will open the discussion in this section with the reflection that an initial distinction should be drawn between the *non-existence* of specific rules as opposed to the *existence* of conflicting special rules.

The ILC's articles are meant to apply as residual rules of international law in the absence of specific rules regulating the conduct of the international organization in question. I have previously made the point that many, if not most, international organizations do not have detailed rules regulating the various aspects of international responsibility arising from their wrongful conduct. In the absence of such rules, the general rules laid down in the articles apply by operation of law. This, however, is less a matter of the applicability of "special" rules, and more a consequence of their absence, thereby triggering the application of the residual "general" rules.

The principle of *lex specialis* concerns the opposite scenario, namely of the existence of more than one set of applicable rules. It seeks to regulate the interaction between those rules, which is more often than not one of conflict. It does so by establishing a system of priority, whereby the special rules displace the general rules, to the extent of the conflict.

Let us explore this further. First, it bears saying that conflict is not the only possible outcome of the interaction between rules. It is also conceivable that two sets of applicable rules might be mutually supportive. In such circumstances, the priority of the special rules would not arise, with the consequence that the general rules would continue to apply. In other words, another possible outcome may be the co-existence of rules. As mentioned in my last lecture, such co-existence is specifically envisaged in the provision, in the reference to the fact that the general rules are applicable "where and to the extent" that they are not displaced by the special rules.

Likewise, the extent to which a rule is "special" is to be assessed in relation to the other equally applicable rule. In that assessment, which rule is "special" and which might be the "general" is a matter of appreciation. It is quite possible that the two conflicting rules might swap positions. The principle of *lex specialis* is a general principle

of law, not limited to the special circumstances of the responsibility of international organizations. As such, it is also possible that the principle would operate in the opposite direction, namely where a rule of general international law would be in the position of being the “special” rule in relation to a more general rule of the organization. This could conceivably arise, for example, in the situation where a rule of an international organization that recognizes, in principle, the general responsibility of the organization for its wrongful acts is modified in part by the rules of general international law recognizing various defenses that the organization might invoke to preclude the wrongfulness of its actions.

I admit that such possibility — of the general rules of international law displacing the rules of the organization — is usually the less common scenario. It is more likely that the rules of the organization would take the position of special rules in relation to conflicting rules of general international law. In any event, the possibility of rules of general international law trumping the rules of the organization could only arise to the extent that the ILC’s articles do not expressly give priority to the rules of the organization. As we have seen, this was expressly done in several “carve-out” clauses.

Nonetheless, I raised the bi-directional nature of the *lex specialis* principle both because it is a theoretical possibility and to illustrate some of the complexities that attach to the application of the principle.

Having said so, the stance taken in the ILC’s articles is generally in favour of the applicability of the rules of the organization. In fact, Article 64 expressly confirms not only the significance of the rules of the organization as *lex specialis*, but also that it is more likely than not that one would find such “special” rules among the rules of the organization (and not elsewhere). Such bias in favour of the applicability of the rules of the organization should be understood as a manifestation of the underlying principle of speciality.

Permit me, however, to reiterate the caveats I gave earlier. When we speak of the operation of the principle of *lex specialis*, we are referring to its applicability at the level of international law, as a technique to resolve the conflict between two rules of international law. Accordingly, for a rule of an organization to serve as a “special” rule in relation to a more “general” rule of international law, both rules have to exist on the same plane. The rule of the organization has to also be a rule of international law. If it is not, there is no conflict since the only applicable rule at the international level would be the general rule laid down in the ILC’s articles. I discussed this problem earlier in the context of the discussion on the nature of the rules of the organization. The fact that the international nature of the rules of an organization is not always a straightforward exercise merely serves to add more complexity to the prevailing legal position.

What is more, as also discussed earlier, rules of the organization only apply in the relations between the organization and its members. In the context of the application of the principle of *lex specialis*, this means that a conflict between a general rule of international law and a “special” rule contained in a rule of the organization would only arise to the extent of the applicability of the rule of the organization. Put more simply, this means that the rule of the organization can only serve as *lex specialis*, thereby displacing any general rules, in the context of the legal position existing between the organization and its members. It would not, in principle, displace the operation of the general rule in the legal relationship with third parties.

I have gone into these matters at a deeper level of detail in order to illustrate some of the complexities that flow from the application of the *lex specialis* principle. It rarely leads to an all or nothing outcome. Instead, what typically emerges is an attenuated legal position involving some combination of the application of the rules of the organization and the rules of general international law.

The Principle of Speciality Reflected in the Articles

Let us turn now to the second way in which the principle of speciality is reflected in the articles, namely through the inclusion of several elements within the articles giving effect to the notion that the special character of each international organization may be of some relevance in an analysis of the responsibility of the organization for its internationally wrongful acts.

The main such elements are the specific provisions aimed at taking into account the special position prevailing between the organization and its members, which may give rise to policy considerations different to those applicable in the relations with third parties. We saw this when we discussed what I have called the various “carve-out” provisions contained in the articles. One example is Article 52 dealing with countermeasures taken by members against the international organization. If you recall, there the ILC sought to take into account the special position existing between members and the organization, which leads to a result different from that applicable in relation to third parties. This may be understood as a consequence of the application of the principle of speciality.

There are other, even more direct, examples that do not involve the application of the rules of the organization. Perhaps the best is precisely the topic with which we started today’s lecture, namely the fact that the ILC chose to adopt a definition of “international organization” which specifically took into account the possibility that international organizations come in a variety of types, sizes and compositions and with varying mandates, powers, and functions. Such receptivity to variation lies at the heart of the principle of speciality.

At the same time, it should be appreciated that the ILC set itself the task of developing a single self-standing framework of rules applicable to all international organizations generally. This

led, by necessity, to a certain degree of over-inclusion of rules in order to cover the potential variety in the mandates of international organizations. It is no secret that it modelled its rules on the position of the United Nations and other prominent international organizations. Nonetheless, this did not diminish its ambition to adopt a set of rules of general application to all international organizations.

A necessary consequence of this is that not all provisions are equally applicable to all international organizations. For example, as we discussed in the second lecture, the circumstance precluding wrongfulness of self-defense is only relevant to organizations with the mandate to employ force. In such circumstances, the principle of speciality provides a strong interpretative pull in the application of the articles, in the sense that self-defense would only be available to international organizations which enjoy the mandate and consequential powers to employ force, and not to those organizations which were not granted such powers.

Accordingly, the principle of speciality would prevent arguments that such latter international organizations would acquire new competence as a consequence of the inclusion of self-defense in the ILC's articles. As confirmed by the International Court's description of the principle of speciality, each international organization can only enjoy those powers granted to it by its members.

What is more, the very fact of the existence of variation in the powers granted to international organizations, made explicit in the principle of speciality, means that variation in the applicable rules is also possible; in fact, likely. In other words, the fact that self-defense is not relevant to the activities of many international organizations does not affect its applicability to those that do enjoy the requisite mandate and powers. This is different from the position applicable to the responsibility of States. There, the fact that a rule might not be equally applicable to all States is likely an indication that it has not acquired the character of a rule of general

international law. With international organizations, variation in the applicability of rules of international law is permissible, and in fact specifically envisaged. This is a further consequence of the application of the principle of speciality, which does not find its equivalent in the context of State responsibility.

Conclusion of the Overview of the Articles on the Responsibility of International Organization – Recapitulation of Scope

We have reached the end of our overview of the articles on the responsibility of international organizations, adopted by the ILC in 2011. As we have seen over the last four lectures, the ambition of the Commission was nothing less than the elaboration of a complete system regulating the international responsibility incurred by international organizations as a consequence of their internationally wrongful acts.

Having said so, in moving on from our consideration of the articles it is worth recalling their scope of application, in particular, what issues they do not purport to regulate.

Wrongful Acts Under International Law

As we have seen, the scope *ratione materiae* of the ILC's articles pertains first to wrongful acts under international law. In other words, the initial enquiry is whether the conduct in question is wrongful under international law. This typically involves the breach of an obligation of the international organization arising under international law. If the outcome of such assessment is that the conduct is not wrongful under international law, then the articles are simply not triggered. This, of course, does not exclude the possibility that the conduct may be wrongful under other rules, such as the rules of the organization itself or of the national law in which the organization is operating. The responsibility engaged by the

international organization under those rules would, by definition, not be international responsibility.

Wrongful Conduct of International Organizations

Next, the ILC's articles deal primarily with the wrongful conduct of international organizations, or that arising for States in relation to the conduct of international organizations. In other words, it is based primarily on the hypothesis of wrongful conduct committed by an international organization against other subjects of international law, primarily States or international organizations.

The key point to understand is that wrongful acts committed by States against international organizations do not fall within the scope of the articles. So, for example, the provisions on invocation of international responsibility do not provide for invocation by an injured international organization against a wrongdoing State.

The assumption is that the rules on State responsibility, as reflected in the 2001 articles, would apply by analogy (since they themselves do not provide for the invocation by international organizations of the responsibility of States). This may only provide a partial solution since some of the unique policy considerations which arise in the context of the responsibility of international organizations may also apply to some extent to the responsibility of States for wrongful acts committed against international organizations. So, for example, a distinction might usefully be drawn between the invocation by an international organization of the responsibility of a Member State as opposed to that of a non-member State. Likewise, the resort to countermeasures by an international organization against a member State involves different considerations than such measures taken against a non-member State. In both these examples, it is likely that the rules of the organization in question will play a role in the assessment of the prevailing legal position, as is anticipated by the 2011 articles in the context of the responsibility of international organizations.

In other words, it might be said that when coming to the responsibility of States for their wrongful acts committed against international organizations, the analogy should be based on both the 2001 and 2011 articles developed by the ILC. Nonetheless, this is a gap which could merit further attention in the future. In case you might think the matter to be too abstract, let us not forget that the case at the origin of the modern conception of the separate personality of international organizations, the *Reparations* advisory opinion, involved, in our modern terminology, the invocation by an international organization (the United Nations) of the international responsibility of a State.

Position of Individuals

A third issue pertains to the position of individuals. Under contemporary international law, individuals are not subjects, like States and international organizations. While one can have a discussion on this point, the fact is that the Commission based both the 2001 and 2011 articles on that basic understanding. Accordingly, the position of individuals is not a major focus in either text. At the same time, it is not sufficient simply to state that the position of individuals is beyond the scope of both the 2001 and 2011 articles. While, generally speaking, that might be true, a closer assessment should be undertaken.

The question of the position of individuals arises in at least three contexts: first, in terms of wrongful acts committed against them; secondly, the possibility of their invoking the international responsibility of an international organization for its wrongful conduct; and third, the question of the responsibility incurred by the individuals themselves for the acts they commit ostensibly on behalf of international organizations. Let us deal with each issue in turn.

Under classical international law, claims arising from international wrongs committed against individuals are espoused

by their respective States of nationality. This is done by way of the institution of diplomatic protection. The ILC has also developed a set of rules, adopted in 2006, regulating the exercise of diplomatic protection. Those rules deal with the most common scenario of wrongful acts committed by States. However, in 2011, the ILC took the view that there was, in principle, no reason why the same rules could not apply to internationally wrongful acts against individuals committed by international organizations. This is implicit in Article 45, which, if you recall from our last lecture, subjects any claims on behalf of individuals against wrongdoing international organizations to the nationality of claims and exhaustion of local remedies rules.

Next, we have the question of claims brought at the international level by individuals. We have already dealt with this matter, in passing, when we considered Article 50, establishing the scope of Chapter I of Part Four of the articles. In sum, individuals do not have, as a matter of general international law, the standing to invoke the international responsibility of States or international organizations. Instead, as I just mentioned, claims relating to injury caused to individuals are typically espoused by the States of nationality. When those individuals are staff members or officials of an international organization, then the organization itself might bring a claim similar to diplomatic protection. Again, permit me to recall that this was precisely the fact pattern which provided the background to the *Reparations for Injuries* advisory opinion. There the United Nations sought recourse for wrongful acts committed against one of its officials.

This is not to exclude completely the possibility of individuals bringing claims at the international level in their own right. Such possibility, to the extent that it exists, is typically anchored in a treaty. Examples include some of the individual complaint procedures established under various human rights treaties. However, such procedures are limited by the scope of the treaty and to its parties,

to the extent to which they include international organizations within their respective scope *ratione personae*. The point here is that such possibility may be provided for by treaty, but does not arise by way of application of general international law. Nonetheless, it is envisaged in the saving clause found in Article 50, which seeks to preserve the possibility that individuals may be able to invoke the international responsibility of a wrongdoing international organization on a legal basis other than the ILC's articles.

Finally, also as discussed yesterday, Article 66 envisages the possibility that an individual might incur responsibility under international law for conduct committed while acting on behalf of an international organization. Such individual responsibility could arise, for example, as a matter of international criminal law.

Private Law Claims Under National Law

Up until this point, we have been discussing claims made at the international level. Of course, claims are also brought against international organizations at the national level, including by individuals.

The United Nations has had extensive experience with private law claims brought against it under national law. A lecture series on the responsibility of international organizations would not be complete without something being said about such types of claims. I will accordingly dedicate my next lecture to that class of claims.

LECTURE 5:

Claims of a Private Law Nature

Introduction

We have spent the last four lectures discussing in detail the responsibility of international organizations for their internationally wrongful acts. Today, we are going to change direction and I would like to focus on the particular responsibility of the United Nations to deal with claims of a private law nature brought against it by third parties.

As you will recall from my previous lecture, claims by individuals arising from international wrongs are generally espoused by their respective States of nationality. In the case of claims that are of a private law nature, individuals may seek direct recourse against the United Nations in light of the Organization's obligations under the 1946 Convention on the Privileges and Immunities of the United Nations — which I will refer to hereinafter as the General Convention — to provide for a mode of settlement for these types of claims. While individuals themselves do not have standing to bring claims against the Organization under the General Convention, they are direct beneficiaries of this particular obligation of the United Nations.

The United Nations has always articulated a broad concept of the notion of the responsibility of the United Nations for injuries caused to third parties. In a report to the General Assembly on claims arising from peacekeeping operations, former Secretary-General Boutros Boutros-Ghali noted that: “The undertaking to settle disputes of a private law nature submitted against [the United Nations] and the practice of actual settlement of such third-party claims ... evidence the recognition on the part of the United Nations that liability for damage caused by members of United Nations

forces is attributable to the Organization”.³⁷ The majority of claims brought against the United Nations are claims of a private law character, and in this lecture, I will be discussing various aspects of the governing legal framework for addressing these types of claims at the United Nations, as well as providing some insight into how this framework has been applied in practice.

Legal Framework

Whenever one discusses the legal framework applicable to the United Nations, one must start with its foundational document, the Charter of the United Nations. Paragraph 1 of Article 105 of the Charter provides that “[t]he Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes”.

The General Convention provides further details regarding the scope of these privileges and immunities. Article II, Section 2 of the General Convention provides the basis of the immunity of the United Nations from all forms of legal process except insofar as in any particular case it has expressly waived its immunity. Article VIII, Section 29 articulates the obligation of the United Nations to make provisions for “appropriate modes of settlement of (a) disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party”.³⁸

Disputes With States

It is well-understood that Section 29 of the General Convention does not address the situation of disputes between the United

³⁷ Report of the Secretary-General, A/51/389 (20 September 1996), paras. 6–8.

³⁸ Sub-paragraph (b) of the same section requires the United Nations to also make provisions for appropriate modes of settlement of disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.

Nations and States, though in practice the modes of settlement used in disputes with a State or a dispute with a third party may be similar.

In many bilateral agreements between the United Nations and its Member States, the mode for settlement of disputes is through direct negotiation or some form of amicable settlement. In other cases, there may also be a provision that allows for final recourse to arbitration, if necessary. These types of arbitration clauses appear, for example, in agreements establishing United Nations offices in Member States, as well as agreements with Member States to host United Nations conferences or to provide financial contributions. However, in practice, recourse to arbitration is almost never sought, though there have been a couple of examples of arbitration between United Nations related organizations and Member States. In one case, arbitration proceedings were invoked in a dispute between France and UNESCO to determine the issue of the tax regime governing pensions paid to retired UNESCO officials residing in France.³⁹ In another case, an arbitration was invoked in a dispute between a Peruvian municipality and the United Nations Office for Project Services (UNOPS) which ultimately was settled without an award.⁴⁰ Not surprisingly, most disputes between the United Nations and its Member States are settled through diplomatic channels.

The framework for resolution of disputes concerning privileges and immunities is separate and distinct. Under Section 30 of the General Convention, disputes under the Convention shall be referred to the International Court of Justice (ICJ), unless it is agreed by both parties to use another mode of settlement. If a difference arises between the United Nations and a Member State, a request shall be made for an advisory opinion from the ICJ. While advisory

³⁹ *France — UNESCO*, United Nations Reports on International Arbitral Awards, 14 January 2003, vol. XXV, pp. 231–266.

⁴⁰ *District Municipality of La Punta (Peru) v. UNOPS* under the UNCITRAL Arbitration Rules (PCA Case No. 2014-38).

opinions are non-binding, the opinion of the Court “shall be accepted as decisive by the parties”. The United Nations has sought an advisory opinion from the ICJ regarding the General Convention on two occasions, in the *Cumaraswamy*⁴¹ and *Mazilu*⁴² cases, each in relation to differences with a Member State regarding the immunity of an expert on mission for the United Nations.

Section 29 of the General Convention

In the case of disputes involving claims of a private law character, Section 29 of the General Convention places an obligation on the United Nations to (i) provide an appropriate “mode of settlement” for (ii) contractual disputes or other disputes of a private law character. Interestingly, Section 29 does not specifically delineate what constitutes an appropriate mode of settlement. The language in Section 29 is quite broad and leaves it open to the United Nations to determine what may be considered as an appropriate mode of settlement for any particular dispute. I will discuss the various appropriate modes of settlement in greater detail below.

Disputes of a Private Law Character

First, however, I want to delve into the concept of “disputes of a private law character”. This has become a topic of much discussion in recent years in light of certain cases involving the United Nations.

The General Convention does not provide a definition as to what constitutes a dispute of a private law character, nor do the *travaux préparatoires* provide sufficient information to ascertain a definitive meaning of this phrase. However, during the adoption of the Specialized Agencies Convention, which contains a similar

⁴¹ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion of 29 April 1999, (1999) I.C.J. Reports 62.

⁴² *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, Advisory Opinion, 13 June 1989, (1989) I.C.J. Reports 177.

dispute settlement provision,⁴³ the Rapporteur from the United Kingdom summarized the views of Sub-Committee 1 of the Sixth Committee with respect to this provision as follows:

“[I]t was observed that this provision applied to contracts and other matters incidental to the performance by the Agency of its main functions under its constitutional instruments and not to the actual performance of its constitutional functions. It applies, for example, to matters such as hiring of premises for offices or the purchase of supplies. The provision relates to disputes of such a character, that they might have come before municipal courts, if the Agency had felt able to waive its immunity, but where the Agency had felt unable to do so”.⁴⁴

It is clear from the above observation that a claim of a private law character does not extend to all types of claims and would certainly not extend to claims made against the Organization in relation to the exercise of its constitutional functions. Indeed, former Secretary-General Boutros Boutros-Ghali confirmed in his report to the General Assembly in 1995 that “the Organization does not agree to engage in litigation or arbitration with the numerous third parties that submit claims ... based on political or policy-related grievances against the United Nations, usually related to actions or decisions taken by the Security Council or the General Assembly in respect of certain matters”.⁴⁵ There is thus a category of claims which can be described as claims of a public law character

⁴³ Section 31 of the Convention on the Privileges and Immunities of the Specialized Agencies provides that “[e]ach specialized agency shall make provision for appropriate modes of settlement of: (a) Disputes arising out of contracts or other disputes of private character to which the specialized agency is a party”.

⁴⁴ Rapporteur W E Beckett (United Kingdom), Final Report of Sub-Committee 1 of the Sixth Committee, Co-ordination of the Privileges and Immunities of the United Nations and of the Specialized Agencies, UN-Doc. A/C.6/191, 15 November 1947, at 12, para. 32.

⁴⁵ Report of the Secretary-General, “*Procedures in place for implementation of article VIII, section 29, of the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946*”, A/C.5/49/65 (24 April 1995).

which would fall outside the scope of Section 29 and for which the United Nations is not under an obligation to provide for a mode of settlement to third party claimants.

On a number of occasions, the United Nations has determined that it would not entertain claims based on this distinction. For example, in 1996, the Government of Rwanda requested the establishment of a claims commission for the purpose of considering claims by fourteen Rwandan nationals arising out of the alleged failure of the United Nations Assistance Mission in Rwanda (UNAMIR) to provide protection in the context of the 1994 genocide. The claimants further alleged that the UNAMIR had failed to implement its mandate to ensure law and order. The United Nations declined the Government's request to establish a claims commission on the grounds that the claims of the Rwandan citizens against UNAMIR were not of a private law character within the meaning attributed to it in the General Convention or in the practice of the United Nations.

Similarly, in 2002, a claim was submitted on behalf of relatives of those killed after the fall of Srebrenica in 1995 alleging that the United Nations had failed to protect the inhabitants of Srebrenica and had thus violated the Security Council's resolutions and the mandate of the United Nations Protection Force (UNPROFOR). The United Nations found that these claims did not indicate any violation of the claimants' legal rights vis-à-vis the Organization.

I do not think there is any dispute that such a legal distinction exists between claims of a public or private law character when it comes to claims against the United Nations. Where disagreements can arise, however, is in the assessment of an actual claim. There are circumstances where claims may not fall neatly within one category or the other.

For the United Nations, disputes of a private law character have been understood to be disputes of the type that arise between two

private parties. In the practice of the United Nations, these types of claims have generally fallen under the categories of tort claims of a non-public nature for personal injury or property damage as well as claims arising under commercial agreements entered into between the United Nations and private firms or individuals. It is important to note that while disputes under Section 29 may be understood as disputes that arise from the types of claims that are generally regulated under the national laws of Member States, the claims themselves are not considered under the national laws of any particular Member State.

When assessing whether a claim falls under the scope of Section 29(a), the Organization does not rely solely on the allegations of the claim itself but also assesses the character of the claim in the context of all its circumstances. The mere allegation of tortious conduct does not make a claim one of a private law character. The nature of the duty allegedly owed by the Organization, the nature of the conduct or activity at issue, and other relevant circumstances are all pertinent to determining whether the claim involves a dispute of a private law character.

There have been two more recent cases where the issue has arisen whether a claim could be considered to be of a private law character.

In 2011, representatives of Roma, Ashkali and Egyptian communities in Kosovo filed a claim, seeking compensation for damages to their health suffered as a result of lead contamination in camps established by the United Nations Interim Administration Mission in Kosovo (UNMIK) for internally displaced persons (IDPs). In that case, where the claims involved injury to persons, one could argue that such claims should be of a private law character. However, as I indicated above, when the Organization looks at claims, it must look beyond the mere claim of tortious conduct as any claim can be framed in such terms. In this case, the United Nations did not find these claims to be of a private law character since they amounted to a review of the performance of UNMIK's mandate as an interim

administration, as UNMIK retained the discretion to determine the modalities for implementation of its interim administration mandate, including the establishment of IDP camps.

In late 2011, the United Nations also received a claim on behalf of a large number of victims of cholera in Haiti. In that case, the claimants alleged tortious injury and death, based on the United Nations alleged failures to adequately screen its troops for cholera, to properly manage its sanitation facilities and waste disposal at its camp in Haiti, and to take corrective measures to properly combat the disease after the outbreak. The United Nations determined in this case that the claim would necessarily involve a review of political and policy matters and could therefore not form the basis for a claim of a private law character.

When the United Nations determines that a claim is not of a private law character, although the individual claimant does not have further recourse against the Organization, Section 30 of the General Convention does provide for a mode of dispute settlement arising out of its interpretation or application between the United Nations and a State Party. In addition, as we discuss below, in the peacekeeping context, a State Party to a Status-of-Forces-Agreement (SOFA) may seek to resolve disputes on the interpretation or application of the SOFA through the dispute settlement provision provided for in that SOFA.

Claims in a Peacekeeping Context

Not surprisingly, the majority of third-party claims arise in the context of United Nations peace operations in the field. The most frequent types of claims encountered are claims for compensation for (i) third-party death/personal injury; (ii) loss or damage to third-party property; and (iii) non-consensual use of third-party property. Claims to be considered in this regard are claims of a private law character within the meaning of Section 29.

Modes of Settlement

SOFA Standing Claims Commission

Paragraph 51 of the Model SOFA⁴⁶ provides for the establishment of a “Standing Claims Commission”, which is designed to implement Section 29 of the General Convention. The Standing Claims Commission is to be composed of three members – one United Nations representative, one representative of the host state, and one jointly appointed chairman.

Although provision for a Standing Claims Commission is included in all SOFAs concluded between the United Nations and host Governments, such a Commission has never been established in practice. Instead, third-party claims brought against United Nations peacekeeping operations are typically handled by recourse to “Local Claims Review Boards”, and almost all claims are settled without formally invoking procedures under Section 29.

Local Claims Review Boards

Local Claims Review Boards are United Nations administrative panels that operate in each peacekeeping mission. The Board, which is composed of 4 United Nations staff members (including an officer from the mission Legal Office), reviews claims that are filed against the mission and makes recommendations to mission management (or to United Nations headquarters) for claims above a certain financial threshold) as to their settlement/disposition. The Local Claims Board’s review is typically preceded by exchanges between the mission’s Claims Unit (which presents the claims to the Local Claims Review Board) with the individual claimants. Upon settlement of the claim, a release from liability is obtained from the claimant.

⁴⁶ *Ibid.*, A/45/594.

What Law Is Applied and Standards of Compensation

Traditionally, third-party claims have been dealt with based on general principles of tort law and the amount of compensation paid to third-party claimants was determined by reference to local compensation standards, the prevailing practice in the mission area, as well as the past practice of the Organization.

General Assembly Resolution 52/247 and Temporal and Financial Limitations

This changed in the mid-1990s when, by resolution 52/247 of 17 July 1998, the General Assembly established certain temporal and financial limitations for third-party claims.

The history of resolution 52/247 is an interesting one. It shows the interplay between the United Nations and its Member States, since the resolution of claims is always tied to sufficient financial resources being made available by Member States. Resolution 52/247 was the result of the United Nations facing a large number of claims mostly in connection with loss or damage to property that arose in the different United Nations missions in the former Yugoslavia. Having been asked to provide the necessary financial resources to pay compensation, Member States requested that the Secretary-General develop in the first instance procedures for the handling of third-party claims, as well as for limitations of liability for activities of United Nations forces. The Secretary-General reports of 20 September 1996 (A/51/389) and 21 May 1997 (A/51/903), in response to this request, ultimately led to resolution 52/247 and since then, third-party claims in peacekeeping missions have been resolved in accordance with the parameters set out in that resolution.

General Assembly resolution 52/247 provides for temporal limitations, as well as financial limitations. As regards temporal limitations, the resolution provides that to be compensable, claims

must be submitted within six months from the time the injury or damage was sustained, or from the time it was discovered by the claimant, and in any event within one year from the end of the mandate of the peacekeeping operation. In exceptional circumstances, the Secretary-General may accept for consideration a claim made at a later date.

In relation to financial limitations, the resolution sets a financial ceiling in the amount of US \$50,000 for personal injury, illness, or death, which can only be exceeded with the approval of the General Assembly. The resolution also excludes, for example, compensation for non-economic loss, such as pain and suffering or moral damages. With regard to property-related claims, resolution 52/247 gives the Secretary-General considerable discretion in determining compensation. For instance, compensation for non-consensual use of property may be calculated on the basis of the fair local market rental prices or based on the pre-mission technical survey estimates. Loss or damage to premises may be compensated either on the basis of the rental value or at a fixed percentage of the cost of repair. Loss or damage to personal property may be compensated based on the reasonable costs of repair or replacement.

Exceptions to Liability/Limitations

I wish to bring to your attention certain exceptions to the Claims Review Board mode of settlement framework that I have described above: the first is an exception to the United Nations' liability for third-party claims; and the second is an exception to the limitations on liability set out in General Assembly resolution 52/247.

Operational Necessity – Exemption From Liability

The principle of “operational necessity”, as an exemption from liability reflected the practice of the United Nations and was endorsed by the General Assembly in resolution 52/247. As

explained by the Secretary-General in his reports A/51/389 and A/51/903 leading up to that resolution, the principle of “operational necessity” as an exemption from liability refers to damage resulting “from necessary actions taken by a peacekeeping force in the course of carrying out its operations in pursuance of its mandates”.

In deciding upon the operational necessity of any given measure, the following must be taken into account:

There must be a good faith conviction on the part of the force commander that an “operational necessity” exists;

The operational need that prompted the action must be strictly necessary and not a matter of mere convenience or expediency. It must also leave little or no time for the commander to pursue another, less destructive option;

The act must be executed in pursuance of an operational plan and not the result of a rash individual action; and

The damage caused should be proportional to what is strictly necessary in order to achieve the operational goal.

Gross Negligence — Exception From Financial Limitations

In resolution 52/247, the General Assembly also endorsed the proposal of the Secretary-General that no financial limitations be introduced with regard to claims arising as a result of gross negligence or willful misconduct of United Nations personnel. If such claims are established, the United Nations would assume liability to compensate a third party, retaining the right to seek recovery from the individual or the troop-contributing State concerned.

This reflects the view that the Organization cannot limit its responsibility when a member of a peacekeeping operation, while performing his/her duties, has committed a wrongful act willfully, with criminal intent, or because of gross negligence. But it is

precisely because of that element of gross fault or willful intent that the Organization is justified in seeking recovery from the individual or the troop-contributing State concerned. As explained by the Secretary-General, this approach is consistent with the prevailing practice in other fields of international law where limited liability is recognized for negligence, but not for gross negligence.⁴⁷

A good example of when this principle was applied was in relation to a claim that arose in UNMIK in 2007.

On 10 February 2007, approximately 2,500–3,000 people participated in a demonstration in Pristina, Kosovo, during which UNMIK formed police units discharged tear gas canisters and rubber bullets to disperse the crowd. This resulted in the death of two persons and injury to a number of others. Several third-party claims were filed against the Organization in connection with the event.

At first instance, the UNMIK Local Claims Review Board recommended that the claimants be compensated in accordance with the financial limitations in respect of third-party death and personal injury claims established in resolution 52/247.

When the matter was referred to Headquarters, the Office of Legal Affairs advised that, as a matter of established practice, the Organization has never invoked financial limitations in respect of third-party claims arising as a result of gross negligence or willful misconduct of United Nations personnel performing duties on behalf of the Organization. Furthermore, the Secretary-General's report of 21 May 1997 (A/51/903), upon which General Assembly resolution 52/247 was based, states that for any United Nations limitation of liability to be effective against third parties, the following three factors would be "necessary and sufficient": (i) a General Assembly resolution containing the limitations, (ii) a liability clause in the relevant Status-of-Forces Agreement reflecting the limitations; and

⁴⁷ See A/51/903, para. 14, and resolution 52/247, para. 7.

(iii) a similar provision in the terms of reference of the relevant Claims Review Board. The requirements for (i) and (iii) are self-evident. The purpose of a liability provision in the relevant Status-of-Forces/Status-of-Mission Agreement (SOFA/SOMA) is to give the force of law to the limitation in the area of the peacekeeping operation concerned. As UNMIK was an interim administration mission for the territory of Kosovo established by the Security Council under Chapter VII of the Charter, there was no SOFA or SOMA, nor had the limitations in General Assembly resolution 52/247 otherwise been incorporated into the applicable law in Kosovo (e.g., by way of a UNMIK Regulation). Accordingly, the limitations in General Assembly resolution 52/247 did not apply in respect of these claims.

Alternative Modes of Settlement

Although the Claims Review Board process reflects how third-party claims arising in the peacekeeping context are typically disposed of, there are some significant exceptions to this. For example, as a matter of long-standing practice of the Organization, claims arising from United Nations vehicles or United Nations aircraft accidents are dealt with through commercial insurance.

In addition, other modes of settlement have been used in the past to settle such claims. One of the more interesting examples of settling claims for injury is the example from the days of the United Nations Operation in the Congo (ONUC). In 1965, the United Nations received claims from 1,400 nationals of Belgium alleging that they had suffered injury or damage to property attributable to acts of ONUC personnel. The claims were investigated by the United Nations and ultimately claims of damage which were found to be solely due to military operations or military necessity were excluded, as were claims caused by persons other than United Nations personnel. Based on both practical and legal grounds, including to avoid costly and protracted proceedings necessary to deal with a large number of individual claims, the United Nations considered that it

would be advantageous for the Government of Belgium to act as an intermediary to make any payments for compensation. The Belgian Government agreed to this, and ultimately, the United Nations settled the Belgian claims for \$1.5 million. Similar arrangements were undertaken in relation to claims from nationals of Switzerland, Greece, Italy, Luxembourg, and Zambia. I note that in the case of ONUC, the agreement with Belgium was somewhat unique, insofar as the dispute settlement provision contained in the agreement on the status of ONUC allowed for individuals who had suffered loss or damage to submit claims for arbitration if the matter could not be settled. The recourse to arbitration for individuals under a SOFA or SOMA no longer exists. Nonetheless, this example offers a type of mode of settlement by which a large number of claims can be settled efficiently, but it is dependent on a State's willingness to espouse claims on behalf of its nationals.

There have also been occasions when, failing agreement between the claimant and the United Nations on the settlement amount, the parties have agreed to refer the matter to arbitration. This has happened in the past (albeit rarely). Two cases, both of which arose out of the United Nations Operation in Somalia II (UNOSOM II), provide examples of this.

The first case involved a large claim for compensation for UNOSOM II's use and occupancy of a large compound in Mogadishu, Somalia, during the period of May 1993 to February 1995.

When UNOSOM II was established in May 1993 and the United States military withdrew, the United Nations took over the compound, but without any written agreement due to the difficulties of determining the rightful owner. Accordingly, in the absence of a lease, no rent was ever paid.

Under the circumstances, the Organization agreed to enter into an Arbitration Agreement with all claimants purporting to be the rightful owners of the compound. In accordance with the terms of

the Arbitration Agreement, the Arbitral Tribunal was to rule on the sole issue of the amount of reasonable compensation, if any, payable by the United Nations for UNOSOM II's use and occupation of the compound. The Arbitration Agreement further provided that if the claimants were unable to agree on the distribution between them of the amount awarded by the Arbitral Tribunal, then the amount of any such award would be placed in escrow pending such agreement.

In the second case, the claimant alleged that both the United States and the United Nations were responsible for preventing it from retrieving a large number of shipping containers which the company had shipped to Somalia prior to the beginning of the civil war. The Unified Task Force (UNITAF) was deployed in Somalia under the United States central command and began using some of the containers upon arrival in Mogadishu.

On 4 May 1993, UNOSOM II took over the peace-keeping operations, and UNITAF was terminated. UNOSOM II forces took over control of the principal positions occupied by UNITAF forces, which included the use of the containers to the extent that they had been incorporated into these positions.

Following negotiations, the Organization informed the claimant that, notwithstanding the absence of any contract, the Organization would be prepared to submit the company's claim against the United Nations to arbitration subject to the conclusion of an appropriate agreement setting forth the parameters for the arbitration. As a result, the Organization and the claimant agreed that the sole issue to be determined in the arbitration would be the amount of reasonable compensation, if any, payable, as a matter of law, by the United Nations only for the use and actual possession by UNOSOM II of any of the containers during its operation in Somalia.

It should be noted that the instances in which the Organization has agreed to arbitrate with third-party claimants have been rare. In such cases, the terms of the Arbitration Agreement with the

claimant(s) were also carefully negotiated between the parties. Most particularly, in light of the privileges and immunities enjoyed by the Organization, great care was taken to ensure that the Arbitrator's jurisdiction was limited to the specific issues that the United Nations had consented to arbitrate as per the terms of the Arbitration Agreement.

Claims at Headquarters – HQ Regulation No. 4 With Limits on Liability

In 1986, the General Assembly limited the Organization's liability for third-party claims arising from acts within the United Nations headquarters district in New York, pursuant to section 8 of the 1947 Headquarters Agreement between the United States and the United Nations, and adopted a special regulation, known as Headquarters regulation No. 4.

This regulation was issued in conjunction with the United Nations' decision to self-insure after liability insurance premiums had sky-rocketed (increased seven-fold within the previous decade) with the aim to place reasonable limits on the amount of compensation payable by the Organization for third-party claims arising from death, personal injury or illness or damage or loss to property arising from acts or omissions at United Nations headquarters.

To the extent that the United Nations may be required to indemnify a third party, Headquarters regulation No. 4 limited the damages payable to:

Economic damages to amount payable to United Nations staff for service-incurred injury or death;

Non-economic loss (e.g., pain and suffering) up to a maximum of \$100,000; and

No entitlement to punitive or moral damages.

The Office of Legal Affairs has since assisted in the settlement of many such third-party claims.

Claims Arising Out of Contracts

As already discussed, Section 29 of the General Convention requires the United Nations to provide an appropriate mode of settlement of disputes arising out of contracts.

As explained by the Secretary-General in his 1995 report to the General Assembly, it has been the long-standing practice of the Organization to make provision in its commercial agreements for recourse to arbitration in the event of disputes that cannot be settled by direct negotiations.⁴⁸ The Secretary-General's report further stated that the standard arbitration clause used in the Organization's commercial agreements invoked the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL"), which were approved by the General Assembly in 1976.⁴⁹ In 1996, the General Assembly, on the recommendation of the Fifth Committee, took note of the Secretary-General's 1995 report.⁵⁰ Pursuant to the mandate of the General Assembly, the United Nations consistently provides in its contracts that arbitrations shall be conducted in accordance with the UNCITRAL Arbitration Rules.

At the outset, I would like to note that the Organization always aims at settling contractual disputes amicably and this is an area

⁴⁸ Report of the Secretary-General, "*Procedures in place for implementation of article VIII, section 29, of the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946*", A/C.5/49/65 (24 April 1995).

⁴⁹ See General Assembly resolution 31/98 (15 December 1976), stating that the Assembly "[r]ecommends the use of the Arbitration Rules of the United Nations Commission on International Trade Law in the settlement of disputes arising in the context of international commercial relations, particularly by reference to the Arbitration Rules in commercial contracts".

⁵⁰ General Assembly decision no. 50/503 (17 September 1996).

in which the lawyers in the Office of Legal Affairs are very actively engaged. For instance, between 2015 and 2018, the Office of Legal Affairs has worked on claims against the Organization valued at \$103.50 million that were settled for a total of \$8.23 million (eight per cent of the initial value claimed), saving the Organization some \$95.3 million.

Arbitration is a costly way of resolving disputes and is therefore used only as the last resort when all reasonable efforts to settle the dispute amicably have failed. Since the late 1990s, i.e., over the past two decades, with United Nations' peacekeeping operations having increased, there have been around 40 arbitrations initiated by commercial vendors against the United Nations in which the Office of Legal Affairs acted as the Organization's counsel. Only roughly a quarter of these resulted in an arbitral award, and the remainder were settled amicably during the proceedings.

Of these arbitrations, the majority arose from complex multimillion-dollar contractual arrangements between the United Nations and suppliers providing logistics support to peacekeeping operations, including the provision of fuel, food rations and catering services, transport services (by air, land, and sea) and peacekeeping-related construction projects.

In addition to commercial contract disputes, the UNCITRAL Arbitration Rules have also been the standard settlement mechanism for disputes arising from United Nations contracts with individuals who do not have access to the Organization's internal system of administration of justice, such as consultants, individual contractors, and United Nations Volunteers. Arbitration is the formal resolution mechanism for these non-staff personnel as per the terms of their contracts with the Organization.

Responding to Third-Party Claims When There Is No Legal Liability

While today's lecture has focused on the Organization's handling of claims of a private law nature brought against it by third parties, which necessarily entails considerations of issues of legal liability on the part of the United Nations, it is important to keep in mind that certain claims may raise issues and considerations that are not solely or exclusively of a legal nature. This touches upon issues of accountability and the Organization's role in providing some form of appropriate assistance and redress, albeit non-legal, to the affected individuals and communities.

Ex Gratia Payments

For example, in appropriate circumstances, certain claims that do not involve clear legal liability on the part of the Organization may be addressed through the mechanism of *ex gratia* payments. Under the United Nations financial rules, *ex gratia* payments may be made in cases where, although in the opinion of the Legal Counsel there is no clear legal liability on the part of the United Nations, payment is in the interest of the Organization.⁵¹ In order for an *ex gratia* payment to be made, therefore, there must first be a finding that no clear legal responsibility exists. An example of where an *ex gratia* payment has been made in the past would be where a third-party civilian was killed in crossfire between United Nations personnel and members of an armed group. While the source of the bullet that caused the civilian death could not be established, the tragedy of the situation and the negative effect of the incident on the peacekeeping mission in question was such that it was deemed to be in the interest of the United Nations to make an *ex gratia* payment to the family of the deceased civilian.

⁵¹ United Nations Financial Regulation 5.11; United Nations Financial Rule 105.12.

“New Approach” to the Haiti Cholera Claims

Another example of where what I would refer to as non-legal redress mechanisms have been adopted is in the United Nations’ response to the cholera outbreak in Haiti.

The Secretary-General has made it clear that, while the cholera-related claims have been deemed not receivable under Section 29 of the General Convention and that the immunity of the United Nations before national courts should be upheld, this does not in any way diminish the commitment of the United Nations to do all that it can to help the people of Haiti overcome the cholera epidemic. Since the outbreak, the United Nations has expended considerable efforts and resources in combatting the disease and improving Haiti’s water and sanitation system.

In November 2016, the Secretary-General announced a “New Approach” by the United Nations to cholera in Haiti. The new approach has two tracks. Track 1 involves intensifying the Organization’s support in order to reduce and ultimately end the transmission of cholera, improve access to care and treatment and address the longer-term issues of water, sanitation and health systems in Haiti. Track 2 involves developing a package that will provide material assistance and support to those Haitians most directly affected by cholera.

The General Assembly has welcomed the New Approach to cholera and has called upon all Member States, relevant United Nations bodies, and other international governmental and non-governmental partners to provide their full support.⁵² Despite this call from the General Assembly, however, significant funding shortfalls for the New Approach remain. Nevertheless, the Organization, together with many partners from the international community, has played an important role in implementing the

⁵² General Assembly resolution 71/161 (16 December 2016).

efforts to eliminate cholera, reduce the number of affected individuals, and provide the necessary assistance and support to the affected communities.

Similarly, notwithstanding that the claims of lead contamination in Kosovo were deemed not receivable, in May 2017, the Secretary-General announced the establishment of a Trust Fund to implement community-based projects for the benefit of the Roma, Ashkali and Egyptian communities that suffered from lead poisoning and other serious health hazards. Regrettably, however, despite fundraising efforts by United Nations headquarters and by UNMIK, contributions to the Trust Fund have been lacking.

The Haiti case and the UNMIK Roma case have given rise to some interesting discussions in the academic literature of different forms of accountability for international organizations, including those that are outside of the traditional third-party liability regime.

However, while the various academic proposals may present alternatives to accountability, they are still theoretical at this stage. I also believe that any solution would necessarily require the involvement of Member States through the General Assembly.

Closing Remarks

The topic of claims is a complex one. Today, we have discussed the main aspects of the governing legal framework for addressing claims of a private nature brought against the United Nations, as well as some of the related practices and procedures. As I hope this lecture has demonstrated, this topic raises challenging questions about the immunity of the Organization from legal process before national courts, which is a *sine qua non* for the United Nations to be able to operate in 193 Member States, as well as the obligation of the Organization to provide “appropriate modes of settlement” for “disputes of a private law character”.

I would also like to close this lecture today by leaving you with the following thoughts. While the Haiti cholera claims, and to a lesser extent, the UNMIK Roma cases were among the first cases in which the United Nations had to consider these types of large-scale claims, they will likely, and unfortunately, not be the last, particularly if one considers the increasingly challenging and complicated environments in which the Organization carries out its work. Notwithstanding the position of the Organization that claims of this nature are not receivable and the immunity of the Organization must be upheld, the United Nations is committed to do all that it can to help the affected communities. The Member States, of course, play a key role in ensuring that the Organization has the necessary resources and mandate in this respect. For its part, the United Nations must do its utmost to mitigate the risks associated with its work and be prepared to respond to the challenges arising from its operations effectively.

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