

JUSTITIA ET PACE
INSTITUT DE DROIT INTERNATIONAL

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**The Legal Consequences for Member States of
the Non-fulfilment by International Organizations
of their Obligations toward Third Parties**

(Fifth Commission, Rapporteur : Mrs Rosalyn Higgins)

(The English text is authoritative. The French text is a translation.)

The Institute of International Law,

Mindful of the tensions existing between the importance of the independent responsibility of international organizations on the one hand, and the need to protect third parties dealing with such international organizations, on the other hand ;

Taking into account the considerable diversity of international organizations, both in their membership and their structure and functions ;

Realizing that solutions which are adequate for some organizations are not necessarily suited for others ;

Taking also into account the uncertainties of the present international practice in solving the above mentioned tensions ;

Seeking also to promote the credibility of international organizations ;

Attempting to identify the existing international law on the legal consequences for member States of the non-fulfilment by international organizations of their obligations towards third parties ;

Attempting further to make useful recommendations for future practice of international organizations ;

Adopts the following Resolution :

A. Use of Terms

Article 1

This Resolution deals with issues arising in the case of an international organization possessing an international legal personality distinct from that of its members.

Article 2

For the purposes of this Resolution :

- a) “third parties” means persons other than the organization itself, whether they are private parties, states or organizations. It includes States members of an organization acting in a capacity other than as an organ or as a member of an organ of the organization ;
- b) “liability” means both concurrent and subsidiary liability.
 - i) Concurrent liability means a liability that allows third parties having a legal claim against an international organization to bring their claim, at their choice, against either the organization or its members.
 - ii) Subsidiary liability means a liability by which third parties having a legal claim against the international organization will have a remedy against States members only if and when the organization defaults.
- c) “Rules of the organization” means the constituent instruments of the organization and any amendments thereto, regulations adopted thereunder, binding decisions and resolutions adopted in accordance with such instruments and the established practice of the organization.

B. Current Law

Article 3

An international organization within the meaning of Article 1 is liable for its own obligations towards third parties.

Article 4

- a) The obligations that an international organization has to third parties may arise under international law (including the Rules of the organization) or under the law of a particular State.

b) Whether States have concurrent or subsidiary liability for the fulfilment of such obligations due solely to their membership in an international organization is a matter of international law, whether a claim by a third party is made in an international court or tribunal or a national court.

Article 5

a) The question of the liability of the members of an international organization for its obligations is determined by reference to the Rules of the organization.

b) In particular circumstances, members of an international organization may be liable for its obligations in accordance with a relevant general principle of international law, such as acquiescence or the abuse of rights.

c) In addition, a member State may incur liability to a third party

i) through undertakings by the State,

or

ii) if the international organization has acted as the agent of the State, in law or in fact.

Article 6

a) Save as specified in Article 5, there is no general rule of international law whereby States members are, due solely to their membership, liable concurrently or subsidiarily, for the obligations of an international organization of which they are members.

b) No inference of a general rule of international law providing for liability of States is to be deduced from the fact that the Rules of some organizations make specific provision :

i) for the limitation or exclusion of such liability,

or

ii) for the dissolution of these organizations.

c) No liability of a State arises merely by virtue of

- having participated in the establishment of an international organization to serve the State's own purposes ;

- the fact that the act of the organization giving rise to its liability to a third party is claimed to be *ultra vires*.

Article 7

Unless the Rules of the organization direct otherwise, no distinction is to be made between claims in contract and other claims for purposes of determining whether any liability exists for member States for the obligations of an international organization.

C. Desirable Developments

Article 8

Important considerations of policy, including support for the credibility and independent functioning of international organizations and for the establishment of new international organizations, militate against the development of a general and comprehensive rule of liability of member States to third parties for the obligations of international organizations.

Article 9

1. Important considerations of policy entitle third parties to know, so that they may freely choose their course of action, whether, in relation to any particular transaction or to dealings generally with an international organization, the financial liabilities that may ensue are those of the organization alone or also of the members jointly or subsidiarily. Accordingly, an international organization should specify the position regarding liability :

- a) in its Rules and contracts ;
- b) in communications made to the third party prior to the event or transaction leading to liability ; or
- c) in response to any specific request by any third party for information on the matter.

2. A failure to take any of the above actions should be taken as a relevant factor in considering the liability of the States members.

3. Member States may, unless prohibited by the Rules of the organization, exclude or limit their liability for the obligations of the organization, provided that they do so before any relevant dealings with third parties and provided that such limitation or exclusion is specified in appropriate detail, in accordance with paragraph 1. This is without prejudice to the duty of member States at all times to pay their assessed and apportioned contributions, or subscription to capital, as the case may be.

Article 10

If, pursuant to its Rules, member States have an obligation to put an international organization in funds to meet its obligations, this obligation should (unless the Rules make different provision) be proportionate to their contribution to the regular budget or to their subscription to the capital, as the case may be.

Article 11

a) International organizations should contain provisions in their Rules for the discharging of outstanding liabilities upon their dissolution. Where the obligation to third parties is that of the organization alone, upon the extinction of its legal personality there should be a first call upon its assets for the purpose of discharging such obligation. A failure to specify arrangements in the Rules of the organization should, unless the prevailing facts indicate otherwise, be taken as an implied acceptance by the States members that the duty to discharge outstanding obligations, not met by the remaining assets of the dissolved organization, will fall upon them. In this last case, the principles of Article 10 will apply.

b) The liability of members withdrawing from an international organization less than a year before its dissolution should be determined as if they were still members upon its dissolution.

Article 12

Where liability of member States is provided for, the Rules of the organization should provide for international arbitration or other mechanisms leading to a binding decision to resolve any dispute arising between the organization and a member State or between member States over the liability of the latter *inter se* or to put the former in funds.

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(1st September 1995)