



IRELAND

STATEMENT

by

**Ms Patricia O'Brien
Legal Adviser
Department of Foreign Affairs**

AT

**THE SIXTH COMMITTEE OF THE
60TH SESSION OF THE UNITED NATIONS**

ON

**AGENDA ITEM 80
REPORT OF THE INTERNATIONAL LAW COMMISSION
ON THE WORK OF ITS FIFTY-SEVENTH SESSION**

New York, 24 October 2005

Check against delivery

**PERMANENT MISSION OF IRELAND TO THE UNITED NATIONS
885 SECOND AVENUE, NEW YORK, NY 10017 TELEPHONE 212 421-6934 FAX 212 752-4726
ireland@un.int**

The International Law Commission's Draft Articles on the Responsibility of International Organisations

Mr. Chairman,

On behalf of Ireland, I wish to thank the Commission for its comprehensive report outlining its work over the past twelve months and in particular for undertaking the important and difficult task of formulating a regime of responsibility of international organisations. As this is the first time the delegation has taken the floor, I would like to express our thanks to you for taking on the demanding role of chairing our debates on the important issues before the Committee.

Given the proliferation of international organisations and their ever increasing significance, both as members of the international community and as subjects of international law, the Commission's attention to this matter is both welcome and timely. We acknowledge the complexity of the project, a task made all the more difficult by the paucity of practice upon which to draw in formulating these Articles. However, we are fortunate in that the Commission's previous extensive work on the Articles on State Responsibility now provides us with a valuable analysis which serves to guide us in articulating a corresponding regime for international organisations.

Having considered draft Articles 1 to 16, together with the Commission's comprehensive commentary and the three reports of the Special Rapporteur, we would like to offer a number of comments. We shall limit these comments to two matters, namely, the interaction between draft Articles 3, 4 and 15 and the reference to rules of the organisation in draft Article 8.

The interaction between Articles 3, 4 and 15

Mr. Chairman, the first point which we would like to raise is the need to develop further the relationship between draft Articles 3, 4 and 15.

While Article 15 provides for an international organisation to be held responsible for the acts of its member states in certain circumstances, Article 3, which contains the general rule, is silent on the matter. We note that in its Commentary of 2003 the Commission states that “[t]he statement of general principles in article 3 is without prejudice to the existence of cases in which an organisation’s international responsibility may be established for conduct of a state or of another organisation”. However, in my delegation’s opinion, it would be preferable if Article 3 were to make appropriate explicit provision for the responsibility of international organisations for the acts of their member states in some cases. Article 3 states that international responsibility is derived from a wrongful act *of* an international organisation itself. Given the complex interplay between international organisations and their member states, my delegation believes that Article 3 should be amended to include provision for responsibility of international organisations for acts carried out by member states of that international organisation.

In this connection, regard should also be had to Article 4, which provides for international organisations to be held responsible for the acts of its agents or organs. The term “agent” potentially includes any legal person. It is not difficult to envisage situations where a member state may act as the agent of an international organisation. It is unclear from Article 4 and the Commission’s commentary whether the references to agents in Article 4 are intended to include member states of international organisations. In Ireland’s view it could be useful to provide that, in certain circumstances, states are to be regarded as agents of organisations of which they are members.

Having regard to the manner in which the international obligations of international organisations are often fulfilled, we particularly welcome Article 15. This provision provides that the responsibility of an international organisation is engaged if a

member state acts due to a binding decision taken by the international organisation. However, Article 15 does not cover the situation where the act of the member state would not have incurred international responsibility if committed by the international organisation.

Mr Chairman,

Ireland seeks to ensure that the completed articles will have the capacity to provide a comprehensive legal regime which reflects the manner in which the international obligations of international organisations are fulfilled in practice. International organisations may possess a distinct legal order with comprehensive legislative and treaty-making powers which are derived from a transfer of competence from their member states. Many of their laws, including their international obligations, may be directly applicable within those member states. Therefore, the international obligations of international organisations may fall to be fulfilled by those member states.

A recent important case before the European Court of Human Rights in Strasbourg, *Bosphorus Airways v Ireland* ([2005] ECHR 440), has illustrated the manner in which international organisations and their member states interact in international fora. It raised the question as to whether and, if so, in what circumstances, a member state of a regional international organisation which, in this case, was the European Community, should be held responsible for conduct which it was obliged to carry out by the law of that international organisation.

The *Bosphorus* case arose in the context of trade sanctions imposed by the United Nations on the former Socialist Federal Republic of Yugoslavia during the 1990's. A Security Council Resolution requiring UN Member States to impound any aircraft found in their territory originating from the former Federal Republic was implemented in European Community law by way of an EC Regulation. In this particular case, of course, Ireland was in any case bound by its obligations under the Charter and, as my Government argued before the European Court of Human Rights, Article 103 of the Charter applied when determining the interaction between Ireland's obligations under the Charter and the Convention. The Court's judgment, however, focuses on the

obligations of High Contracting Parties to the Convention which are also Member States of the European Community.

The European Court of Human Rights has no jurisdiction to pronounce on acts of the European Community as the Community is not a party to the European Convention on Human Rights. Accordingly, in this instance, although Ireland was acting at the behest of the Community, because the Community itself is not bound in international law by the Convention, Article 15 of the Commission's draft Articles would not apply.

The Applicant alleged that Ireland's compliance with an EC Regulation, under which Ireland was obliged to impound the aircraft, constituted a breach of Ireland's obligations under the Convention. As a matter of European Community law, Regulations are both legally binding and directly applicable in the legal systems of the Member States and no room is left for the exercise of discretion by the Member States. As was noted by the Court, and indeed by the Commission in its commentary on Article 15, Ireland had no choice in this regard and was obliged to implement the Regulation. Therefore, the alleged violation did not involve the exercise of any discretion by Ireland, but rather, amounted to compliance by Ireland with its legal obligations flowing from European Community law. It is not clear whether Article 4 applies so as to render Ireland an agent of the Community for the purpose of attributing responsibility for the act in question, namely the impounding of the aircraft.

On the facts of the particular case, the European Court of Human Rights found that by virtue of the fact that the European Community, as the relevant international organisation, had afforded equivalent protection of fundamental human rights to that afforded by the Convention, it was unnecessary in this instance for it to review the Regulation for compliance with the Convention. It should be recognised that the Community legal order itself ensures such compliance with fundamental human rights and this is enforced both by the courts of the Member States and by the European Court of Justice in Luxembourg. Hence, the Court held that Ireland had not breached its obligations under the Convention.

It may be of interest to note that the Court of First Instance of the European Communities has ruled in two very recent judgments that the Community itself is bound by Article 103 of the Charter by virtue not of the provisions of international law but by the provisions of the EC Treaty itself; (see Case T-306/01, *Yusuf v Council and Commission*, judgment of 21 September 2005 and Case T-315/01, *Kadi v Council and Commission*, judgment of 21 September 2005). The Treaty on European Union also gives the Convention a certain status in EU law. Nonetheless, the position under international law is rather unclear and it is therefore desirable that the ILC's articles be drafted in such a way as to ensure clarity and coherence.

Whilst on the facts of the *Bosphorus* case, Ireland's different international obligations were found not to conflict with each other, the case nevertheless does throw the issues which are being debated here into relief and has heightened the need for clarity in this matter. As outlined above, Article 15 does not apply to the facts of the case. The acts carried out by the member state of the international organisation would not have incurred the international responsibility of the organisation as that organisation is not a party to the European Convention on Human Rights. Article 15 would only entail international responsibility for a breach of an international obligation of the international organisation. This leaves a lacuna where a member state breaches an international obligation, which is not an obligation of an international organisation, as a result of its membership of that international organisation.

Similarly, it is unclear whether a Member State would be regarded as an agent of the European Community within the meaning of Article 4 and Article 3 is silent on this issue.

Accordingly, Mr Chairman, Articles 3, 4 and 15 do not appear to my delegation to resolve the potential difficulties that may arise in attributing responsibility to international organisations. For this reason we suggest that the current wording of these articles should be redrafted to cover the full range of circumstances in which conduct and responsibility may need to be allocated between states and organisations.

As is noted in the Commission's Report, an international organisation should not be allowed to escape responsibility by "outsourcing" its actors. Similarly, we would not

wish for states to escape their responsibilities by seeking refuge behind the protective screen of an international organisation. The European Court of Human Rights in the *Bosphorus* case has made it clear that such an approach is not acceptable under the system of protection and legal obligations imposed by the European Convention on Human Rights. As was suggested by the Special Rapporteur in his Second Report, accommodation should be made for the sharing of responsibility between the member state and the international organisation for actions which are carried out by a member state in fulfilling its obligations to an international organisation.

If the present draft articles are intended to embrace the possibility of “responsibility without attribution of conduct” it is desirable, we suggest, given the significance of the issue to international organisations and their member states, that this be achieved in a manner that is explicit and internally coherent.

For the reasons stated, we suggest that the wording and interplay of Articles 3, 4 and 15 should be re-examined. We suggest that the provisions in Article 3 should explicitly allow for the attribution of responsibility to international organisations for acts of their member states. We also suggest that Article 4 should be re-examined to see if it should definitively include or exclude the acts of member states of international organisations. Article 15 should, we believe, be expanded to include acts which, although incurring the international responsibility of the member state, would not have incurred international responsibility if carried out by the international organisation.

Article 8

Mr. Chairman, our second comment relates to the inclusion of a reference to the rules of the organisation in Article 8(2).

We note that the status of the multiplicity of such rules is of a highly uncertain nature in international law. The International Law Association has devised a substantial set of “Recommended Rules and Practices” representing a significant contribution to the project of setting out the content of an organisation’s internal obligations. In a similar

vein to Article 8, the International Law Association has also avoided pronouncing on the legal status of such rules. The rubric "Recommended Rules and Practices" was deliberately chosen so as not to prejudge whether any particular rule should be seen as a recommendation for sound internal practice or whether it should operate on a legal level.

For the draft articles to state that a breach of an organisation's internal rules constitutes an international wrong would be a progressive development of the law and would mean that accountability for their breach would sound in the legal sphere. There does not appear to be sufficient agreement in international law to support the view, at this point in time, that all breaches of internal rules of an organisation are also internationally wrongful acts. As noted by the Commission in its latest Commentary, there is disagreement not only as to the general status of such rules, but also as to the specific status of the rules of treaty-based international organisations and international organisations which have achieved a high degree of integration. At present, action taken against international organisations for breaches of internal rules tend to have been of a more political or administrative nature.

We would suggest that the draft articles avoid pronouncing on the legal status of such rules and for this reason we welcome the wording of Article 8(2). This provision leaves open the possibility of a breach of the rules of an organisation being an internationally wrongful act, depending upon the nature of each individual breach. However, it does not mean that all breaches of the internal rules of international organisations are internationally wrongful acts. We support this position as it recognises the reality of the status of internal rules of international organisations without stating that breaches of all such rules are internationally wrongful acts.

In closing, Mr Chairman, Ireland would again like to commend the Commission on its important work so far in devising a scheme of responsibility of international organisations and, as ever, we greatly look forward to its next report on this challenging topic.