1. Introduction

For all the debate over the International Law Commission’s articles on responsibility of international organizations, on one thing there is virtual unanimity. The articles, drawing heavily on the Commission’s articles on State responsibility, have, for the most part, no or little practice to support the codification of the rules. In its comments on the then draft articles, the United Nations Secretariat acknowledged the paucity of practice, its non-exhaustive nature, and its occasional inconsistency with the proposed rule. In its 2011 commentaries on the articles, the Commission admitted as much. In explaining the reasons for the limited availability of pertinent practice—its relatively recent origin, the absence of third-party dispute-settlement procedures, and non-disclosure by States and international organizations—the Commission maintained the rule, but concluded that ‘[t]he fact that several of the present draft Articles are based on limited practice moves the border between codification and progressive development in the direction of the latter.’

The relationship between the ‘practice’ and the ‘rule’ in the formation of secondary norms on responsibility of international organizations deserves, however, a closer scrutiny. It requires, in the first place, an examination of whether the

2 Responsibility of international organizations. Comments and observations received from international organizations (A/CN.4/637/Add.1), 5, para. 5.
practice of the organization conforms to the proposed rule, contradicts it, or exists at all—in which case, whether the absence of practice is incidental, or inherent in the nature of the organization and thus unlikely ever to emerge. But it requires, in particular, an examination of whether an organization-specific practice is necessarily needed for the codification of the rule, including where the customary secondary norm has already been established in the practice of States.

An examination of the interplay between the practice and the rule in the formation of the articles on the responsibility of international organizations begins in article 6 on the attribution of conduct to an international organization—a case of near-perfect consistency between the practice and the rule.

2. Article 6 (Attribution of Conduct): the Convergence between the Practice and the Rule

The principle of attribution to an international organization of conduct of its organ or agent in the performance of their functions is a customary secondary norm, supported by a well-established, long-standing and consistent six-decade practice of the United Nations.

The responsibility of the United Nations for damage and injury caused in the course of its peacekeeping operations was formally acknowledged and practically implemented in scores of third-party settlement claims in virtually every peacekeeping operation since the UNEF operation in the 1950s. By the time it was articulated in the 1995 Secretary-General’s report on the limitation of UN third-party liability, the principle of UN responsibility for combat-related damage, and damage caused in the course of the operational activities of its forces, was generally accepted as a customary international law principle.

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4 The highest compensation payment ever made in a single UN operation was in the Congo operation (ONUC) in the 1960s. In a letter dated Aug. 6, 1965, to the representative of the Union of Soviet Socialist Republics concerning payment of indemnities to Belgian citizens residents of the Democratic Republic of the Congo, the Secretary-General stated: ‘It has always been the policy of the United Nations, acting through the Secretary-General, to compensate individuals who have suffered damages for which the Organization was legally liable’ (S/6597). For the settlement agreement with Belgium whose nationals suffered damage from ONUC military actions (one of many similar agreements concluded at the time), see Exchange of Letters Constituting an Agreement between the United Nations and Belgium Relating to the Settlement of Claims filed Against the United Nations in the Congo by Belgian Nationals, New York, Feb. 20, 1965, 535 UNTS 199.


6 The principle that acts performed by the United Nations or its agents acting in their official capacity entail the UN responsibility for the damage arising from such acts, was