

**General Assembly – 66th Session
18th Meeting of the Sixth Committee**

**Statement by Ms. Patricia O'Brien,
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Monday, 24 October 2011, Conference Room 2

Thank you, Mr. Chairman, for giving me the floor.

Before I begin, and following the Chairman's initiative I would like to take a further moment to express our shared sadness at the death of Judge Antonio Cassese. Judge Cassese was of course an extraordinarily distinguished international lawyer whose brilliant intellect, vision, courage, leadership and humanity have been an inspiration to so many across the globe. I know I speak for all of us in this room when I say that we will hugely miss Judge Cassese, or Nino as he was known to so many of us.

Allow me, Mr. Chairman, to take this opportunity to congratulate you and your distinguished colleagues of the Bureau on your election. The Office of Legal Affairs, and in particular its Codification Division, will continue to provide dedicated servicing during the 66th session of the General Assembly. Allow me also to assure you of my full personal support for your important work.

At the end of the quinquennium, I also wish to express my sincere gratitude to the Chairman and the distinguished Members of the International Law Commission for their dedicated work and indispensable contributions to the codification and further development of international law. In many ways the debate of the report of the ILC is a highlight of the work of this Committee.

Mr. Chairman,

I am delighted to have the opportunity to address you this morning on the important topic of “the Responsibility of International Organizations.” This topic has been of great interest to my Office.

In today’s world, in which international organizations are playing an increasingly dynamic and wide ranging role, this topic is of particular relevance. International organizations have grown in number and complexity. They are undertaking an unprecedented range of activities in an increasing number of fields along with many more actors; and in an age of globalization they are having a greater impact than ever before. The Commission’s work goes a long way in helping to frame the relevant legal principles at a time when issues of responsibility are very much at the top of the international agenda. I would like to take this opportunity to express my appreciation to the ILC for the important contribution that they have made to the development of the law in this area.

Without any prejudice to the final form the draft articles may eventually take, they are already exerting considerable influence in the jurisprudence of regional and national courts, and may have significant implications for the United Nations and other international organizations in the future. Because of the importance of the draft articles for international organizations both now, and for years to come, I would like to make some comments on a number of issues that we consider to be of particular significance for your consideration of the draft articles.

I would like to recall that after the first reading, the ILC submitted the draft articles to States and international organizations for their comments and observations. We took advantage of this opportunity to conduct a review of our practice of over 60 years of dealing with issues of responsibility. In preparing our comments, we faced the challenge of applying the principle of international responsibility of international organizations in an ever-growing number and diversity of activities. The principle of international responsibility of international organizations is well established; - its scope, limitations and practical application are yet to be defined. And they remain to be defined not only in the current activities of the United Nations, such as peacekeeping operations, but also in new fields of activities such as the

establishment of judicial and non-judicial accountability mechanisms, and UN transitional administrations. They furthermore remain to be not only defined with regard to subsidiary organs of the United Nations, but also with regard to principal organs, in respect of which legal responsibility has generally not received much attention.

Mindful of this daunting challenge, my Office conducted a thorough review of our practice with a view to examining the conformity of the draft articles to our existing practice, and their propriety in cases where no such practice exists. We concluded that while some of the draft articles were supported by well-established practice, others were either inconsistent with practice, or appeared to be based on no practice at all. In some cases, we could not envisage how the principles might apply to the United Nations.

In our submission, we made a number of broad, cross-cutting observations. These included the weight that should be given to the draft articles where the practice of international organizations is limited or non-existent; the need to accord appropriate recognition to the differences between States and international organizations when applying principles of the Articles of State Responsibility *mutatis mutandis* to international organizations; the differences between international organizations in terms of the principle of "speciality"; and finally as the draft articles concern secondary rules, the dichotomy between primary and secondary rules. This is particularly pertinent as the scope of application of some of the primary rules in respect of international organizations is yet to be circumscribed.

We have now had a chance to review the draft articles as adopted on the second reading, and are pleased to see that a number of our suggestions were addressed in the revised draft. The General Commentary introduces a number of important caveats as to the application and weight of the draft articles. Regarding the application of the draft articles, the General Commentary notes that because of the diversity among international organizations, the draft articles give weight to the specific character of an international organization, especially its functions, and that the principle of *lex specialis* has particular prominence in this context. This was of importance to the United Nations, particularly in light of our practice in the

context of UN peacekeeping operations where the General Assembly has established financial limitations for injury or damage on the basis of the nature and timing of the operation.

Regarding the legal effect of the draft articles, the Commission acknowledges the lack of practice to support a number of the draft articles, and states that the “fact that several of the draft articles are based on limited practice moves the border between codification and progressive development in the direction of the latter”. It concludes that the draft articles do not necessarily have the same authority as the Articles on State Responsibility, and that their authority will depend on their reception. This addressed our concern as to a number of the draft articles which we considered were not based on the practice of international organizations.

We also noted that the Commission followed our suggestion concerning the refinement of the definition of an “agent” in Article 2, to limit it to those persons or entities who are charged by the international organization with carrying out, or with helping to carry out, a function of the organization. The changes introduced by the ILC bring the definition more into line with the definition of the International Court of Justice in its Advisory Opinion on *Reparation for Injuries*. As numerous UN bodies are increasingly working together with implementing partners, and engaging contractors to provide goods and services in a wide range of situations, it was considered important that the definition of agent should be limited to those who perform the functions of the Organization. Without such qualification, the definition of an agent could have been perceived as being so broad as to expose us to unreasonable liability in respect of persons or entities over whom we have little or no control, and who do not carry out the functions of the UN, but rather provide goods and services which are incidental to our mandated tasks.

Draft Article 10 concerns the existence of a breach of an international obligation, and provides that a breach may also arise under the “rules of the organization”. In our comments to the ILC, we recommended that a distinction be made between internal rules on the one hand, and rules of international law on the other, to make clear that a violation of the rules of

the organization entails the responsibility of the organization not for the violation of the rule as such, but for the violation of the international law obligation it contains. We note that the Commission has addressed this concern with the addition of the new draft article 5, and with its explanations in the commentary to draft article 10. These clarify that it is international law which determines whether an act of an international organization is wrongful, including in cases where such acts breach the rules of the organization. Thus, in the practical application of the principle to the United Nations, it is our understanding that the failure to perform a mandate cannot *per se* be considered an international wrongful act, unless the mandate contains an international law obligation to be performed.

We also appreciated the work of the Commission in clarifying the issue of attribution of conduct to an international organization. In its commentary on the draft articles, the ILC has re-affirmed the principle – long established in UN practice – that military operations conducted under national or regional command and control – rather than under UN command and control – do not entail the responsibility of the Organization, the authorization of the Security Council notwithstanding. In the words of the Commission:

“the articles do not say, but only imply, that conduct of military forces of States or international organizations is not attributable to the United Nations when the Security Council authorizes States or international organizations to take necessary measures outside a chain of command linking those forces to the United Nations”.

In draft Article 7, the Commission established the test of “effective control”, which is applicable in the relationship between the United Nations and an organ put at its disposal, or as in the practice of UN operations, between the UN and the troop contributing countries. It conditions the responsibility of the Organization on the extent of its effective control over the conduct of the troops in question. In the Secretariat’s comments on the draft article, we expressed the view that for a number of reasons, the UN’s practice of maintaining the principle of UN responsibility *vis-à-vis* third parties in connection with peacekeeping operations and reverting as appropriate to the lending State is likely to continue, but that the Secretariat nevertheless

supported the inclusion of the draft article as a guiding principle in the determination of responsibilities between the UN and its member States.

In our comments, we also highlighted a number of draft articles the inclusion of which we questioned on the basis that there was no practice to support them in their current form, - and that it was difficult to conceive of situations in which they could have any practical application to international organizations. These include the provisions on “countermeasures”; draft Articles 15 and 16 under which an international organization would be internationally responsible for the act of a State or another international organization if it “directed and controlled” or “coerced” the State or international organization in the commission of the wrongful act; and draft Article 17 which provides that an international organization would incur responsibility by circumventing an obligation by authorizing a State or international organization to commit the wrongful act. While we are concerned that there is a possibility that they could give rise to some confusion, we considered these articles to be of little effect in the practice of the Organization.

While some of the draft articles are not, in the view of the Secretariat, likely to impact any future practice of the United Nations, other draft articles may very well influence the future practice of the Organization. Draft Article 14 on “Aid or assistance in the commission of an internationally wrongful act” is of direct relevance to the experience of the United Nations Peacekeeping Operation in the Democratic Republic of the Congo (MONUC – now MONUSCO). Under its mandate from the Security Council, MONUC provided support to the national army (FARDC) to disarm foreign and Congolese armed groups. Following reports by NGOs and the media that members of the FARDC, who were provided with logistical supplies by the UN, were looting, killing and raping the very population that they were supposed to be protecting, a policy was devised by the Secretariat, which was subsequently endorsed by the Security Council, to prevent any perception of association by MONUC with such violations. The policy specified that MONUC would not participate in, or support operations with FARDC units if there were substantial grounds to believe that there was a real risk that such units would violate international humanitarian, human rights or refugee law in the

course of the operation. The policy now applies across the board where the UN is considering providing some form of support to non-UN security forces, and is an example of a policy decision taken by the Organization to avoid being implicated, or being perceived to be implicated in aiding or assisting or in any other way facilitating the commission of a wrongful act. By this, I am not suggesting that the case of MONUC was one where the responsibility of the United Nations may have been engaged. For example, according to Article 14, "knowledge of the circumstances of the internationally wrongful act" would have still been required.

Finally, while it is still early days in the regime of the responsibility of international organizations, the real test will be in its practical application. As this area of the law develops, it will be interesting to see how practice affects the development of the principles, and the degree to which the principles will influence the practice. I understand that Specialized Agencies and International Financial Institutions may also make observations about the draft articles. I am confident that this Committee will give due consideration to all views expressed.

I again wish to express my appreciation to the Commission, and to wish you ladies and gentlemen a productive session of the 6th Committee.

Mr. Chairman, distinguished delegates,

Thank you very much for your kind attention.

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