

Check against Delivery

## RESPONSIBILITY OF INTERNATIONAL ORGANIZATION

### Statement of the Chairman of the Drafting Committee, Mr. James L. Kateka

Mr. Chairman,

I have the honour to introduce the third report of the Drafting Committee for the 55<sup>th</sup> session, dealing with the topic Responsibility of International Organizations. The report is contained in document A/CN.4/L.632.

The Committee held two meetings on the topic on 3 and 4 June 2003 during the first part of the session.

Before proceeding to the introduction of the Committee's report, I wish to thank the Special Rapporteur for the topic, Mr. Giorgio Gaja, for his guidance. I would also like to express my appreciation to the other members of the Committee for their active participation and cooperation with the Chair. Last but not least, I thank the Deputy Secretary of the Committee for her useful advice and assistance.

Mr. Chairman,

The Special Rapporteur proposed 3 articles in his first report and all 3 were referred to the Drafting Committee at the current session. The Drafting Committee considered the 3 articles and adopted texts for them. This is an encouraging development which gives hope that the Commission would make rapid progress towards the early completion of the work of the Commission on this topic.

Mr. Chairman,

It is worth recalling the understanding reached in the Commission that this topic was in fact a sequel to the draft articles on Responsibility of States for internationally wrongful acts. This understanding does not mean that the Commission would merely copy the articles of State responsibility, but rather it would follow the basic trend set out in that topic. Neither did such understanding require following the structure of the

draft articles of State responsibility. However, to the extent that any particular article, in the new topic, is expressing the same legal principle or statement as in an article in State Responsibility, the language should remain the same in order to avoid any confusion and ambiguity.

I will now turn to article 1.

### **Article 1 (Scope of the present draft articles)**

Article 1 deals with the scope of the topic and as was proposed by the Special Rapporteur comprised of two sentences. The Commission, in principle, agreed with the scope of the topic as proposed by the Special Rapporteur, but expressed a preference for placing these two sentences in two paragraphs. The Drafting Committee has accordingly placed the two sentences in two paragraphs.

### **Paragraph 1**

Paragraph 1 corresponds to the first sentence of article 1 proposed by the Special Rapporteur and finds its origin in article 57 of the articles on State responsibility. The paragraph provides for the main category of cases falling within the scope of the topic; that is the responsibility of international organizations for acts that are wrongful under international law. The Drafting Committee retained the text proposed by the Special Rapporteur with two drafting changes. First it deleted the word “question” which was deemed to be superfluous. So the text now refers simply to “the responsibility of international organizations” and not to “the question of responsibility of international organizations”. The second drafting change applies to the latter part of the paragraph which is now drafted in singular and not in plural as was proposed by the Special Rapporteur. This is simply stylistic and consistent with the Commission’s work in previous codification exercises. So the last part of the paragraph reads “for an act that is wrongful under international law” and not “for acts that are wrongful under international law”.

There was also a suggestion to change the latter part of the paragraph to read “for its internationally wrongful act”. The Drafting Committee did not follow this suggestion since it could have been argued that that formulation did not cover cases in which an international organization was responsible for wrongful acts of its members

under circumstances similar to those which were considered under chapter IV, Part One of the articles on State responsibility. These are situations of aid or assistance, direction and control and coercion. Therefore for the sake of clarity and for precluding any ambiguity, the Drafting Committee decided to retain the style of drafting proposed by the Special Rapporteur. This is to avoid a direct linkage, at this stage, between the wrongful act and international organization through a possessive pronoun.

Some suggestions were also made in the Plenary for dealing with attribution in article 1. The Drafting Committee carefully considered the question and decided that it was not prudent to address that issue at this stage for the fear of limiting the scope. For example, it is not certain, at this point, if the articles should exclude situations in which an organization undertakes certain obligations which have to be performed by one of its members and then it is that member which does not comply. Under such a situation the wrongful act may, in principle, be attributable to that State but the Commission may decide that under certain circumstances the organization would have to bear responsibility. In short, there is no need to tie the act, at this stage, too closely to the organization since it would prejudge the question of responsibility in such other situations. Paragraph 1 therefore is drafted in general terms. It does not give any indication of whose act it is for which an organization may be responsible or the circumstances under which a State may be responsible for an act of the organization. The commentary will explain that this article simply indicates what sorts of issues the articles cover without providing a solution in advance. It provides a general scope on the basis of which the work will continue.

Paragraph 1 is drafted in such a way that it covers also the responsibility of an international organization which is a member of another international organization.

## **Paragraph 2**

Mr. Chairman,

The second paragraph corresponds to the second sentence of article 1 proposed by the Special Rapporteur and deals with the responsibility of a State for an internationally wrongful act of an international organization. This paragraph deals

with a lesser portion of the scope of the topic stated in the first paragraph, but it complements the first paragraph and in fact fills a vacuum.

The Committee made some drafting changes. To be consistent with the first paragraph, the word “question” has been deleted. Also in the latter part of the paragraph the words “the conduct of an international organization” have been replaced with the words “the internationally wrongful act of an international organization”. This is to make it clear that we are talking about possible responsibility of a State for a wrongful act of an international organization.

It will also be noted that the paragraph does not refer to responsibility of a “member State” of an organization, but simply to responsibility of a “State”. This is deliberate in order to cover also situations covered by the articles of chapter IV, of Part One of State responsibility in which a State, even though it may not be a member of an organization, may, for example, direct, assist, or coerce an organization to commit a wrongful act.

Article 1 is entitled “Scope of the present draft articles”.

## **Article 2 (Use of Terms)**

Mr. Chairman.

Article 2 defines the term “international organization”. It will be recalled that there was an extensive discussion in the Plenary about this article and it was finally referred to an open-ended Working Group. The text that was formulated by the Working Group and was subsequently referred by the Plenary to the Drafting Committee was the basis on which the Committee worked.

Even though the article is entitled “Use of terms”, it defines, for the time being only one term, “international organization”. If there would be a need for its definition of other terms, they would be added here.

Mr. Chairman,

During the Plenary debate, reference was made to the variety of organizations which may consider themselves “international”, operating across the globe and

carrying various functions. These organizations have different memberships, from States, to non-State entities. It would be difficult to cover all these organizations. It should be clear which types of these “international organizations” are going to be covered by the topic. However, this does not imply that the principles and rules, which would eventually transpire from this topic or at least some of them, would not apply to other organizations. This is an issue which will be explained in the commentary.

In the Plenary debate, some members found the definition of “international organization”, as proposed by the Special Rapporteur, rather abstract. They asked for some explanation as to the types of international organizations that are currently operating so as to have a clearer understanding on what should be placed in the definition. Others, however, while they had no objections with providing more examples of various international organizations, were of the view that the definition would have to rely on some general and verifiable characteristics. The text that emerged from the open-ended Working Group was formulated on that basis. The article identifies three elements which should exist for an international organization in order to fall within the scope of this topic: first, the mode of establishment; second, the legal personality of the organization; and third the membership of the organization. The Drafting Committee made only some modifications to the text, which emerged from the Working Group.

The text before you comprises two sentences. The first sentence deals with the first two elements; namely, the mode of establishment and the legal personality of the organization. The second sentence deals with the membership requirement.

As regards the mode of establishment, an “international organization” falling within the scope of this topic should be established by a “treaty” or “other instrument” governed by international law. The general view in the Drafting Committee was that an international organization covered by these articles should be created by some form of an act under international law, clearly expressing the consent of the parties. In accordance with article 2, “international organization”, “for the purposes of these articles”, should be created by a “treaty or other instrument governed by international law”. The word “treaty” is defined, broadly, in article 2, paragraph (1)(a) of the

Vienna Convention on the Law of Treaties. The same definition was repeated in article 2, paragraph (1)(a) of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. That definition also refers to the word “instrument”. The inclusion of both terms in the definition is useful in order to retain the broad meaning intended here which includes declaration, resolution, covenant, act, statute, etc. The term “instrument” in the Vienna Conventions conveys the meaning that an instrument must be in a form of a “document”. The Drafting Committee considered other alternatives, such as “agreements”, “forms of expression of consent”, “acts of international law”, “other means”, but could not agree on any other terms and finally settled for the word “instrument” as the most appropriate for this topic.

Article 2 also provides that such treaties or instruments should be “governed by international law”. Again this is the formulation that comes from article 2, paragraph (1)(a) of the Vienna Conventions. It intends to distinguish between treaties and instruments that are regulated by international law and other instruments, which are regulated by national law.

The second element in the definition is that such an international organization should possess “its own legal personality”. In the definition proposed by the Working Group there was a bracketed phrase reading “distinct from that of its members”. The Drafting Committee, following the general view in the Plenary, found the bracketed phrase superfluous since that understanding was already implied in the requirement of independent legal personality and therefore deleted that phrase.

The third requirement for an organization to fall within the scope of this topic is that among its members there must be “States”. This requirement takes account of the various forms of existing international organizations, which include as members other international organizations, territories and non-governmental organizations. At the same time it limits the scope by requiring that among the members of an international organization, there must be States. Hence, the presence of “States” as members of an international organization is indispensable. This requirement is necessary in order to exclude non-governmental organizations.

The words “other entities” at the end of the sentence refer to international organizations, territories and non-governmental organizations. The definition does not expressly mention international organizations that are composed only of international organizations. In the view of the Drafting Committee such international organizations are rare. The Drafting Committee agreed, however, that, in principle, there is no reason why these articles should not apply also to such international organizations.

### **Article 3 (General principles)**

Mr. Chairman,

Article 3 reproduces articles 1 and 2 of the articles on State Responsibility, replacing the word “State” with the word “international organization”. The article as proposed by the Special Rapporteur had considerable support in the Plenary. The Drafting Committee retained the text as proposed by the Special Rapporteur with the exception of changing the word “is attributed” in subparagraph (a) to the word “is attributable” so as to be consistent with the wording of the article 2 of State Responsibility.

Mr. Chairman,

The point was raised in the Plenary, that the general principle covered by article 3 is incomplete. It covers only the responsibility of an international organization for an internationally wrongful act. It does not cover the case of the responsibility of a State for a wrongful act of an international organization, an issue covered in paragraph 2 of article 1. The Drafting Committee agreed with this understanding, but was of the view that at this stage the Commission is not in a position to pronounce a principle on the responsibility of a State for a wrongful act of an international organization. While article 1 on the scope of the topic should clearly state the issues that are covered by the topic, the article on general principles need not be complete at this point. Once the work on this topic progresses further and there is a better understanding of how and under what circumstances a State may incur responsibility for a wrongful act of an international organization, then the Commission can address the question whether general principles should also be stated with regard to that issue. Formulation of a legal principle without a better understanding of circumstances for entailing such a responsibility and possible exceptions to it would be premature.

The Drafting Committee agreed to proceed in this manner with the understanding that my report to the Plenary would indicate that at some point the Commission would have to consider the issue. The Drafting Committee also took note of a proposal that was made in the Plenary to address this issue which read as follows:

“ An internationally wrongful act of an international organization may also entail the international responsibility of a State because:

- (a) The State has contributed to the wrongful act of the international organization;
- (b) The International organization has acted as a State organ.”

The Drafting Committee further considered an issue, which was raised again in the Plenary namely that there is no provision equivalent to article 3 of State Responsibility dealing with the characterization of an act of a State as internationally wrongful under international law being affected by its characterisation as lawful under internal law. The Drafting Committee was of the view that this provision did not apply in the case of international organizations, and the commentary would explain this issue.

Article 3 is entitled “General principles”.

Mr. Chairman,

This concludes my introduction of the third report of the Drafting Committee