

CHECK AGAINST DELIVERY

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RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

**Statement of the Chairman of the Drafting Committee
3 June 2005**

Mr. William Mansfield

Mr. Chairman,

It is my pleasure to present the second report of the Drafting Committee for the present session. This report is devoted to the topic "Responsibility of International Organizations" and is contained in document A/CN.4/L.666Rev.1 I should note that in addition a corrigendum will be issued for the Spanish text only. The Committee held 4 meetings on this topic on 25, 26 and 27 May 2005.

The Committee considered draft articles 8 to 16 which were referred to it by the Plenary at the current session.

Before introducing the report I wish to thank Mr. Gaja, the Special Rapporteur, for his guidance and cooperation. I would also like to thank the members of the Drafting Committee for their helpful suggestions and effective participation.

Mr. Chairman,

The Drafting Committee, in addition to draft articles 8 to 16, also considered and recommends a structure for the draft articles so far adopted. Let me first introduce the draft articles and then I will explain the structure.

Draft articles 8 to 15 proposed by the Special Rapporteur correspond to draft articles 12 to 19 in Chapters III and IV of State Responsibility. The Special Rapporteur explained in his report and in the Plenary that the issues involved in the breach of an international obligation on the part of an international organization and in responsibility of an international organization in connection with an act of a State or another international organization are for the most part identical to those in State Responsibility and therefore there is no reason for the Commission to take a different approach. The Special Rapporteur identified two issues which were specific to international organizations and needed to be addressed in paragraph 2 of draft article 8 and draft article 16. The Plenary agreed with the Special Rapporteur that to the extent that the issues were the same, the corresponding articles of State Responsibility should be retained with only minimal changes. This approach is necessary to avoid any future conflicting interpretations. The two exceptions which led to a substantial debate in the Plenary were referred to a Working Group and the texts proposed by that Group for paragraph 2 of draft article 8 and draft article 16 were also before the Drafting Committee.

Article 8

I shall now draw your attention to draft **article 8**. This draft article corresponds to article 12 of State Responsibility dealing with the existence of a breach of an international obligation.

Paragraph 1 of draft article 8 is identical to article 12 of State Responsibility except for the replacement of the word “State” with “international organization”. This paragraph provides that there is a breach of an international obligation by an international organization when an act of that organization is not in conformity with what is required of it by that obligation, regardless of its origin and character. I need not say any more since this paragraph was acceptable to the Plenary and the Drafting Committee made no changes to the text.

Paragraph 2 of draft article 8, led to considerable discussions in the Plenary. The views in general were divided as to whether such a paragraph was needed. The

Working Group established by the Plenary recommended that it would be better to retain paragraph 2 and proposed a text for it. The Working Group's recommendation was accepted by the Plenary and referred to the Drafting Committee. The Drafting Committee debated this paragraph extensively and some members reserved their position on it. But the Committee finally agreed to propose the text for paragraph 2 contained in document A/CN.4/L.666, which is very little changed from that recommended by the Working Group.

Mr. Chairman,

The difficulty for some members of the Drafting Committee with paragraph 2 was that in their view it did not add anything to what was already said in paragraph 1. Instead it created an unnecessary ambiguity about the nature of the rules of an international organization. The paragraph stated that some rules of the organization may give rise to international responsibility without providing any criteria or indications as to which rules had that potential. For other members the difficulty was identifying the law that applied in the context of paragraph 2. For example it was unclear whether it was the rules of the organization that give their breach the character of an internationally wrongful act or whether it was general international law that provided that violation of certain rules of the organization are internationally wrongful. Furthermore, in their view it was uncertain which law applied in terms of determining the consequences of such an internationally wrongful act; again whether the general international law, or the rules of the organization. Concern was also expressed that the uncertainty in paragraph 2 could lead international organizations to select themselves which rules of the organization fell within the scope of paragraph 2; a situation which was not desirable.

The majority of the members of the Drafting Committee were of the view that paragraph 2, although broadly covered by paragraph 1, added value to that paragraph by specifically stating that the breach of certain rules of the organization could be an internationally wrongful act. Paragraph 2 flagged an important point in the context of the responsibility of international organizations and although the matter could have been addressed in the commentary to paragraph 1, it was useful to highlight it in the text of the

article itself. The commentary to the draft article would explain the reasons for the inclusion of the provision and make it clear that it is not attempting to make a definitive statement about which rules of the organization are international law.

In terms of drafting, the Committee agreed that the words “in principle” did not provide the clarity necessary for a normative text. The Drafting Committee also decided, instead of referring to an “international obligation” as used in paragraph 1 and other draft articles, to use the construct of “breach of obligation under international law”. This was intended to highlight the point that the obligation referred to is one that arises under international law. The commentary will explain that this construct means the same as “international obligation”.

The title of draft article 8 is the same as the title of article 12 of State Responsibility.

Articles 9, 10, 11, 12, 13 & 14

Mr. Chairman,

I will introduce draft articles 9, 10, 11, 12, 13 and 14 together. These draft articles are identical to articles 13, 14, 15, 16, 17 and 18 on State Responsibility. In the Plenary they did not raise any problem and the Drafting Committee recommended only minimal changes.

Article 15[16]

I now draw your attention to draft article 15 which corresponds to draft article 16 as proposed by the Special Rapporteur. This draft article is new and has no equivalent in the articles on State Responsibility. You will recall that this draft article was extensively debated in the Plenary. The Working Group established by the Plenary introduced a revised text for the draft article which the Committee took as the basis of its work.

Mr. Chairman,

Draft article 15[16] was also discussed extensively in the Drafting Committee. The article deals with incidents in which an international organization uses decisions, recommendations and authorizations directed at its members to evade its own obligations. While draft articles 12 to 14 deal with attribution of responsibility to an international organization for the conduct of any State or international organization, draft article 15[16] deals with such responsibility in connection with the conduct of a State or international organization that is a member of the international organization in question. The difficulty with drafting this article was the lack of empirical reference. While the possibility of such incidents theoretically exists, we don't have clear examples in practice to assist in formulating the draft article. The other difficulty was with the broad category of decisions, recommendations and authorizations which encompass a large range of statements and utterances made in and by international organizations and by its various organs, having different normative and authoritative values as well as different purposes for which they were made. Moreover, the steps taken at the stage of compliance or implementation could be significantly relevant in the context of this article.

The Drafting Committee, following the approach taken by the Working Group, made a distinction between "binding" decisions and "non-binding" acts. Non-binding acts include recommendations and authorizations. It is important to bear in mind that the draft article is not limiting the list of non-binding acts to "recommendations" or "authorizations". They may be made under other titles, but it is the non-binding character of the acts that counts and the fact that they direct the membership toward certain behavior.

Paragraph 1 of draft article 15[16] is based on the text proposed by the Working Group and deals with binding decisions of international organizations. You may recall that the Working Group suggested a text that would provide for responsibility of an international organization if the organization adopts a decision binding a member state or organization to commit an act that would be internationally wrongful for the former organization. The Drafting Committee saw difficulties with the latter part of the paragraph specifying that the act must be one that would have been wrongful if

committed by the organization itself. In practice, international organizations adopt binding decisions for their membership to do certain things that they themselves cannot do. For example, they may adopt binding decisions requiring a state or an international organization to investigate and prosecute war crimes or crimes against humanity. But the organization itself does not have such capacity. The purpose of the paragraph was to address situations in which the organization uses decisions that are binding on its members to circumvent an international obligation of its own. Thus the Drafting Committee added to the latter part of the paragraph the notion of circumvention of the obligation by the international organization. As drafted now, the paragraph refers to a binding decision to commit an act that would be not only wrongful if committed by the international organization, but would also circumvent an international obligation of that organization. The commentary will further clarify the meaning of the phrase that the act would have been wrongful if committed by the international organization itself.

You will note that paragraph 1 does not require the commission of the act in question. This was a matter that was extensively discussed in the Plenary. The Special Rapporteur's proposal required the commission of the act as a precondition for entailing responsibility. The Working Group's recommendation did not require the commission of the act and that was the basis on which the provision was referred to the Drafting Committee. You will recall that the logic that was put forward for this approach was that the adoption of a binding decision of this character should suffice to entail the responsibility of the organization. It was considered that in this situation responsibility stems from the decision to place members in this quandary rather than being dependent upon whether the members carry out the act concerned. In addition if the commission of the act were to be a requirement for wrongfulness, a potentially injured State or international organization might not have the opportunity to request preventive measures before the act is committed.

I shall now move on to **Paragraph 2** of draft article 15[16] which deals with non-binding resolutions. Such resolutions are referred to as recommendations and authorizations. Paragraph 2 is identical to paragraph 1 with one exception. Here the act

in question must have been committed. That requirement is contained in subparagraph (b). The logic for the requirement of the commission of the act, in this paragraph, is that the member State or international organization is not compelled to comply with the recommendation or authorization. The responsibility of the international organization therefore arises only if the member State or international organization not only commits the act but does so in reliance on that recommendation or authorization. The requirement that a member state or organization has committed the act in reliance on the recommendation or authorization is to signify the crucial role played by such a recommendation or authorization.

Some members of the Drafting Committee were concerned that, taking into account the large number of non-binding resolutions adopted by international organizations, there must some safeguards put in place. This was necessary to preclude the possibility that responsibility arises for the organization in the situation where there is an abuse or unreasonable use of such non-binding resolutions by member States or international organizations. For example, the paragraph is not intended to cover situations in which an outdated recommendation or authorization has been relied upon for the commission of the act. Nor does the paragraph include situations in which a member State or international organization relies on a recommendation or authorization in a context in which it was not intended to apply or when the circumstances since the adoption of the recommendation or authorization have substantially changed. Reliance upon the authorization or recommendation in such situations would be unreasonable. Accordingly notions of “reasonableness” and “good faith” are both relevant in the application of this paragraph. The commentary would elaborate on these issues.

During the considerations of paragraphs 1 and 2, questions were raised as to whether there was an overlap between these two paragraphs and draft articles 13 and 14. You will recall that those draft articles dealt with direction and control and coercion in the commission of a wrongful act. The point is whether taking binding decisions or making recommendations or authorizations could fall within the scope of any of these other articles. It was agreed that an overlap was a possibility, at least with draft articles

12 and 13. The overlap with draft article 14 was more uncertain, because coercion, at least in the context of State Responsibility, was intended to be more factual and have the character of *force majeure*. It is unlikely that even binding decisions of an international organization would necessarily meet that high threshold. These are matters that would have to be determined in context of specific cases. But the Drafting Committee saw no particular problem with overlap between those articles and paragraphs 1 and 2 of article 15[16].

Paragraph 3 provides a further clarification with respect to paragraphs 1 and 2. It is based on the text proposed by the Special Rapporteur with some drafting adjustments. Paragraph 3 provides that the responsibility of the international organization in question is incurred under paragraphs 1 and 2 even if the act in question is not wrongful for the member state or organization to which that decision, recommendation or authorization is addressed.

Draft article 15[16] is entitled, “Decisions, recommendations and authorizations addressed to member States and international organizations”.

Article 16[15]

Mr. Chairman,

I shall now draw your attention to draft article 16[15]. This draft article was proposed by the Special Rapporteur as draft article 15. The text proposed by the Special Rapporteur was based on article 19 of State Responsibility, with slight changes. The discussions in the Plenary indicated support for the draft article with some questions as to whether its application should be limited to draft articles 12 to 14 as the Special Rapporteur had proposed. This proposal was limited because his draft article 16, paragraph 3, contained a specific “without prejudice” clause that also covered responsibility.

The Drafting Committee preferred draft article 16[15] as a general “without prejudice” clause. According to this text, the responsibility of the state or international

organization that has committed the wrongful act with aid and assistance, under direction and control or subject to coercion of the international organization remains intact whether the responsibility arises under the provisions of the articles of this topic or under any other rule of international law. Similarly, the draft article does not affect the responsibility of any other State or international organization.

The difference between article 19 of State Responsibility and the present draft article is the scope of the without prejudice clause. In article 19, international responsibility is preserved with regard to any other provisions of the articles of State Responsibility. In the present draft article, the without prejudice clause is more general, preserving the international responsibility that may be established not only in accordance with these draft articles but also under any other rule of international law. It was necessary to use a broad language here, because the provisions on State Responsibility are also relevant to the attribution of responsibility to a State.

You will also note that the draft article is now placed after draft article 15[16] and the opening clause is replaced with “This chapter is without prejudice...”. This change was made because the Drafting Committee agreed that this draft article was relevant not only to draft articles 12 to 14, but also to draft article 15 all of which are now placed in a single chapter. The title of the draft article is also changed and is identical to the title of draft article 19 of State Responsibility.

Structure

Mr. Chairman,

I have introduced articles 8 to 16[15] which were referred to the Drafting Committee. I now draw your attention to the structure that the Drafting Committee proposes for the draft articles so far adopted by the Commission. You will recall that comments were made in the Plenary that with 16 draft articles it would be helpful to structure the draft articles into parts and chapters. This was also the view of the Drafting Committee. A structure proved helpful in terms of drafting, for example, in relation to draft article 16[15] which I have just introduced. The Drafting Committee therefore

proposes that draft articles 1 to 16[15] be divided into chapters. Here also, the Drafting Committee followed the structure of the articles on State Responsibility to the extent that was relevant for the draft articles of this topic. Draft articles 1 to 16[15] belong to what was referred to as Part One in articles on State Responsibility, that defines the general conditions necessary for responsibility to arise. The title for Part One for this topic is the same as in the case of State Responsibility with one necessary adaptation; that is replacing the words “a State” with “an international organization”.

Chapter I comprises draft articles 1 to 3. With regard to State Responsibility chapter I was entitled “General principles”. In the context of this topic those rules were set in draft article 3, which is entitled “general principles”. Draft articles 1 and 2 do not deal with general principles, but the scope and use of terms. For this reason, the Drafting Committee decided to entitle chapter I, “Introduction”.

Chapter II comprises draft articles 4 to 7. These draft articles, as in State Responsibility, define the conditions under which conduct is attributable. The Drafting Committee therefore recommends retaining the same title as in the articles on State Responsibility with one necessary adjustment so the title of chapter II reads “Attribution of conduct to an international organization”.

Chapter III comprises draft articles 8 to 11 and, again as in the case of State Responsibility, spells out in general terms the conditions under which a conduct amounts to a breach of an international obligation. The Drafting Committee therefore retained the same title, which reads “Breach of an international obligation”.

Chapter IV comprises draft articles 12 to 16[15] and deals, as in the case of State Responsibility, with certain exceptional cases where an international organization may be responsible for the conduct of a State or another international organization. The title of this chapter is the same as in the case of State Responsibility with appropriate adjustment and reads “Responsibility of an international organization in connection with the act of a State or another international organization”.

Mr. Chairman,

This concludes my introduction of the report of the Drafting Committee. Thank you for your attention.