Check against delivery

RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

Statement of the Chairman of the Drafting Committee Mr. Roman A. Kolodkin

8 June 2006

Delivered by Mr. William Mansfield

Mr. Chairman,

I have the honor to introduce the fourth report of the Drafting Committee on behalf of its Chairman, Mr. Kolodkin. The fourth report is contained in document A/CN.4/L. 687 and deals with the topic Responsibility of International Organizations.

The Commission at its 2879th Plenary meeting, on 19 May 2006, referred draft articles 17 to 24 on circumstances precluding wrongfulness to the Drafting Committee. The Committee considered the draft articles during 3 meetings from 30th to 31st May 2006.

Before I proceed to introduce the Committee's report, I wish to thank the Special Rapporteur, Mr. Giorgio Gaja for guiding the work of the Committee and his helpful explanations and suggestions. I would also like to thank members of the Drafting Committee for their cooperation and valuable contributions.

Mr. Chairman,

Draft articles 17 to 24 deal with Chapter V on Circumstances precluding wrongfulness. You would also recall that these draft articles did not raise serious concerns in plenary. There were, of course, some members

of the Commission who were of the view that some of the provisions in this chapter should be deleted altogether since there was no corresponding practice on the part of international organizations to rely on and that the exercise resembled more legislation than codification. But the Commission agreed to retain the articles and the Committee followed suit.

Draft Article 17. Consent

Draft article 17 is the first article in this chapter and corresponds to article 20 of the articles on State Responsibility.

The text that was proposed in the fourth report of the Special Rapporteur was favorably received in plenary and the Committee, therefore, retained the text without change.

You will recall that two issues in particular were raised in plenary; one related to the inclusion, in the article, of language to the effect that consent to any act that is contrary to *jus cogens* should not be considered a valid consent. The other was that the issue of consent in the case of international organizations should take account of situations where consent may be given to an international organization not by a state, but by another entity such as a territory or autonomous region that has not attained the status of a state. The Committee was of the view that the issue of validity of consent should be addressed, in general terms, in the commentary. This would include the reference to draft article 23, concerning compliance with peremptory norms. On the contrary, the commentary should avoid discussing the circumstances or conditions under which consent may be given by entities other than states or international organizations. Nor should it deal with the issues of what would be considered as State consent and how

it should be expressed. These are matters that are beyond the scope of the present exercise.

Article18. Self-defence

Draft article 18 corresponds to article 21 of the articles on States Responsibility.

You will recall that a number of issues were raised by members in plenary during the consideration of this draft article. The issues were: whether a distinction should be made between self-defence for states and self-defence for international organizations; whether the notion of inherent right to self-defence applied only to states; whether self-defence should be limited to peacekeeping operations and administration of territories; whether a distinction should be made between self-defence and acts taken by a force in defence of the mandate of the organization; or whether to address the issue of collective self-defence, when a member of the organization is attacked.

Following the prevailing view in plenary, the Committee agreed that these are difficult questions, some of which were equally relevant to State Responsibility but were not addressed there. The point that self-defence could be invoked only by those organizations that deployed forces or administered territories could not be easily and clearly dealt with in the text of an article and should be left for the commentary. The Committee was also of the view that consistency between these draft articles and those on State Responsibility should be maintained to the extent possible in order to avoid any unintended implication for the interpretation of the latter. A better approach would therefore be to refer to various issues in the commentary, indicating their complexity and relevance.

In plenary discussions, the issue was also raised as to whether the lawfulness of self-defence should be measured on its "conformity with the Charter of United Nations", the same requirement as in the corresponding provision of State Responsibility. You will recall that some members were concerned that the Charter requirements applied to States and it was unusual to extend them to international organizations. Those members did not question that the principles embodied in the Charter on self-defence also applied by analogy to international organizations. The Committee borrowed the language of article 52 of the Vienna Convention on the Law of Treaties which refers to "the principles of international law embodied in the Charter of the United Nations". The Committee made no further changes to the text that was proposed by the Special Rapporteur.

Article 19. Countermeasures

Draft article 19 deals with countermeasures and, as you will note, for the time being, the Committee proposes no text.

The concern of the Committee was that, at this stage, a simple and general text on countermeasures could be misleading. You will recall that in the case of State Responsibility, the conditions under which countermeasures precluded wrongfulness were stated by reference to its chapter II of part Three. In the present study, the substantive provisions on countermeasures have not yet been considered by the Commission and would be discussed only in the context of implementation of responsibility. Clearly countermeasures by international organizations raised specific questions: for example, whether sanctions are countermeasures or should be subject of a different regime, etc. The Committee was of the view that it might be premature to simply provide for a text on countermeasures, a

subject that was controversial, without working out its details and complexities in order to provide a more informed and complete picture of the parameters of countermeasures. The Committee also considered the option of not including any provision on countermeasures, but requesting the views of governments. But, it decided against this option, because it would be preferable to address questions to governments at the time when the substantive provisions on countermeasures were to be discussed. The Committee, therefore, decided that the better course of action was to keep the place of the article, so that it is clear that a provision on countermeasures would eventually be formulated and include a footnote explaining the reason for not introducing a text at this time.

Article 20. Force majeure

Draft article 20 corresponds to article 23 of the articles on State Responsibility.

This article was generally accepted in the plenary. The only issue that raised concerns was the extent to which an international organization may use financial distress as force majeure for non-compliance with its obligations. You may recall that the Special Rapporteur had mentioned this event as a possible example for force majeure. The Committee was of the view that there may be various reasons for financial distress of an international organization, such as poor management, non-payment of dues by member States, unanticipated expenses, etc., most of which could not be considered cases of force majeure. Financial distress of an international organization could amount to force majeure only in exceptional circumstances.

The Committee agreed that the conditions for force majeure that apply to States also apply to international organizations. There was, therefore, no reason to make any distinction between the two. It was further agreed, that, while there may be circumstances that financial distress of an international organization may satisfy the requirement of force majeure, it was not prudent to use it as a prime example of a case of force majeure even in the commentary, since it might be misleading.

Article 21. Distress

Draft article 21 corresponds to article 24 of the articles on State Responsibility.

This draft article did not raise many questions in plenary. The only issue that led to some discussion was whether the qualification for the invocation of distress in the latter part of paragraph 1 should be limited to "saving the author's life or the lives of other persons entrusted to the author's care". It was thought that this requirement was too narrow and did not take account of situations where the lives of persons who were not in the author's care would be in danger and the author was in a position to intervene to prevent the loss of life. For that reason, some members suggested to use a formulation that was not so restricted. Suggestions were made to include also the criterion of a "special relationship" as was used in the commentary to article 24 of State Responsibility which would expand the scope somewhat, but not enough to cover other situations.

The Committee discussed this issue at some length. It was aware that there may even be situations where an international organization would intervene to prevent loss of life for individuals with whom it had no special relationship. An example would be where UN forces were on the ground in

a specific geographical location and their mandate was limited to that particular area. What if incidents were occurring just across that area that would result in loss of life of innocent civilians and the UN forces were in a position to prevent it? Should not that intervention by UN forces fall within the scope of this provision? The Committee agreed that this was a difficult question. The policy concerns behind it equally applied to the same article in the context of State Responsibility. That question involved much larger issues of the responsibility to protect and humanitarian intervention, subjects which were not suited to be dealt with in the context of the present topic. The Committee was also concerned that any changes in the approach might have unintended implications for the corresponding article in State Responsibility.

The Committee was also of the view that it was not always easy to distinguish between distress and necessity covered in the next article. Specific scenarios, such as the example I just mentioned, could be covered by the draft article on necessity. The Committee therefore agreed to maintain the text as proposed by the Special Rapporteur and consistent with the corresponding article in State Responsibility, but address the issue in the commentary, particularly indicating the concerns that the formulation may be perceived to be too narrow.

Article 22. Necessity

Draft article 22, corresponds to article 25 of the articles on State Responsibility.

You will recall that there were some discussions in the Commission as to the scope of this article. In practice, organizations, on occasion, have invoked necessity, such as operational necessity, or for access to confidential

data. The general view was that international organizations should be able to invoke necessity. But it was the general view that such a right should be circumscribed carefully. The questions revolved around the text of subparagraph 1(a). In the context of State Responsibility, the act for which necessity is invoked should be "the only way for the State to safeguard an essential interest against a grave and imminent peril". The Special Rapporteur had modified that text to apply to international organizations and made it limited to "the only way for the organization to safeguard against a grave and imminent peril an essential interest that the organization has the function to protect". The wording that was proposed by the Special Rapporteur raised the question as to the meaning of "essential interest" and whether it included the essential interest of a member state or member organization.

The Committee was of the view that the term "essential interest" had to be given a limited scope, with a high threshold indicating the extraordinary situations to which it could apply. In order to express this exceptional situation for which necessity may be invoked by an international organization, the Committee redrafted paragraph 1(a) of the text proposed by the Special Rapporteur to include more clearly two elements. First the essential interest would be only those of the "international community as whole". This formulation would exclude parochial interests of the organization itself. The Committee considered linking the "essential interest" to the constituent instrument of the organization or its mandate to protect and decided against both since neither seemed consistent with the understanding that the "essential interest" in the context of this article is one of paramount interest to the international community as a whole. The constituent instrument of an international organization may include a

number of objectives, not all of which would reach the threshold set in this provision. The same would apply to a specific mandate that might be given to an international organization by its members.

The Committee, however, agreed that, there must be a legal framework within which an international organization could lawfully claim that it was authorized to act to protect that essential interest. This was necessary in order to exclude any organization from invoking the protection of an essential interest of the international community even if it was not within its competence or function. To cover this gap, the Committee introduced a reference to "international law". Therefore the subparagraph includes such essential interest of the international community as a whole that the organization has, "in accordance with international law, the function to protect".

Some questions were raised that the present formulation sets the bar too high in that it would preclude regional organizations or organizations which do not have universal membership from invoking necessity in order to protect an essential interest of their members. The Committee was of the view that a formulation to cover such other situations would make the provision too broad and susceptible to abuse. Therefore, on balance, it was held preferable to keep the scope of this provision narrow, and not include the essential interest of a member State or a member organization as justification for invoking necessity by an international organization. The commentary would however point out that member States were not precluded from protecting their essential interests acting in cooperation with the international organization.

Subparagraph 1(b) sets yet a further limitation on the invocation of necessity and recognizes that there may be competing essential interests that

would have to be weighed against one another. Therefore, the act of the international organization, even if it is for the safeguard against a grave and imminent peril of an essential interest of the international community as a whole, must not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. There were questions about whether the reference to the "international community as a whole" should be kept in this subparagraph since it might appear illogical to say that any act for the protection of an "essential interest of the international community as whole" referred to subparagraph 1(a) should not impair an "essential interest of the international community as a whole" in subparagraph 1(b). The Committee, however, concluded that there were more than one essential interests of the international community as a whole and that it was important to make sure that the protection of one essential interest would not seriously impair another essential interest.

You will recall that there were some discussions as to whether the essential interest of another international organization should also be included in this subparagraph. The Committee decided against such an inclusion. Since the essential interest of an international organization did not seem to be sufficiently high to permit invocation of necessity under subparagraph 1(a), its inclusion in subparagraph 1(b) as a further limitation was not coherent.

Paragraph 2 corresponds to the same paragraph in the State Responsibility articles and lays down the two limitations on the invocation of necessity. The Committee made no changes to the text proposed by the Special Rapporteur.

Article 23. Compliance with peremptory norms

Draft article 23 corresponds to article 26 of the State Responsibility articles and deals with compliance with peremptory norms.

This article was generally supported in plenary. Some questions were raised on the applicability of peremptory norms to international organizations. But the Committee agreed to retain the draft article. The Committee was mindful that the whole subject of peremptory norms involved difficult issues that could not be resolved in any definite and detailed description in a text of a provision. A better approach was to address this subject in general terms both in the text of the draft article and in the commentary.

Article 24. Consequences of invoking a circumstance precluding wrongfulness

Draft article 24 corresponds to article 27 of the State Responsibility articles. It is a without prejudice clause dealing with certain consequences of invocation of circumstances precluding wrongfulness.

This draft article was also generally supported in plenary. Some comments were made that the provision should deal with compensation more extensively. The Committee was of the view that for the purposes of consistency with the articles on State Responsibility, it was better to retain the text as proposed by the Special Rapporteur.

A suggestion was also made to replace the words “no longer exists” at the end of subparagraph (a) with the words “does not exist”. The Committee agreed that the latter formulation was more accurate since “no longer” had a temporal element, and the issues involved may go beyond the time element. Nevertheless, for the purposes of consistency with the State Responsibility

articles, it decided to retain the text as proposed and make reference to this particular question in the commentary.

Mr. Chairman,

This concludes my introduction of the fourth report of the Drafting Committee and I thank you for your attention.