

RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

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

28 July 2006

Mr. Chairman,

I have the honor to introduce the fifth and the final report of the Drafting Committee. The fifth report is contained in document A/CN.4/L.687/Add.1 and Corr.1, and deals with the topic Responsibility of International Organizations.

You will recall that the Drafting Committee already reported to Plenary, during the first part of the session, on draft articles 17 to 24 on 8 June. During the current part of the session, the plenary, on 14 July 2006, referred to the Drafting Committee the remaining draft articles proposed by the Special Rapporteur in Addenda 1 and 2 of his fourth report, namely draft articles 25 to 29 dealing with the responsibility of a State in connection with the act of an international organization. The Plenary also entrusted the Drafting Committee to consider the appropriateness of the inclusion of a draft article similar to article 19 of State Responsibility. The Drafting Committee considered the draft articles during 2 meetings on 18 and 19 July 2006.

Before I proceed with the introduction of the Committee's report, I wish to thank the Special Rapporteur, Mr. Giorgio Gaja, who for the second time, during this session of the Commission, assisted the Drafting Committee patiently and guided our work with his helpful explanations and suggestions. I would also like to thank members of the Drafting Committee

and other members of the Commission who participated in the work of the Committee for their cooperation and valuable contributions.

Mr. Chairman,

The draft articles that are before you deal with responsibility of a State in connection with the act of an international organization. These articles will have to be included in a chapter of the draft. Since we still don't know to which Part of the report this draft belongs, it has been identified as chapter (x) indicating the tentative status of its location.

Mr. Chairman,

You will recall that Chapter IV of Part One of the articles on State Responsibility deals with aid or assistance, direction or control and coercion by one State in the commission of an act by another state. That chapter does not address the question of such relationships between a State and an international organization. Draft articles 25 to 27 proposed by the Special Rapporteur cover that gap and largely correspond to articles 16 to 18 of State Responsibility. Draft articles 28 and 29 are unique to this topic and have no equivalent in the articles of State Responsibility. New draft article 30 which emerged from the Drafting Committee corresponds to article 19 of Chapter IV of Part One of State Responsibility.

Article 25. Aid or assistance by a State in the commission of an internationally wrongful act by an international organization

Draft article 25 is the first article in this chapter and, as I have already said, corresponds to article 16 of the articles on State responsibility.

The text proposed in the fourth report of the Special Rapporteur was favorably received in the plenary. The Committee therefore retained the text without change. You will recall that two issues in particular were raised in Plenary.

A first issue concerned the possible deletion of subparagraph (b) on the basis that this draft article should also cover situations in which a State aids or assists an international organization in breach of an obligation which binds only the organization. However, the Committee was of the view that subparagraph (b) should be maintained in order to ensure consistency between this draft article and the corresponding provision in the articles on State responsibility, as well as the text of draft article 12 on this topic dealing with the aid or assistance by an international organization to a State or another international organization in the commission of an internationally wrongful act.

Another issue raised in Plenary was the need to distinguish the notions of “aid” or “assistance” in the commission of an internationally wrongful act from the ordinary participation of a member State in the decision-making process of an international organization. Questions were also raised as to whether aid or assistance could include conduct prior to making a decision as well as conduct after such a decision has been made. It was agreed that the commentary was the more proper place to make these clarifications. The Committee was of course aware that these are difficult questions that can only be answered definitively taking into account the factual context of any particular case. It was also agreed that the commentary should make it clear that this draft article applies to States whether or not they are members of an international organization.

Draft articles 26. Direction and control exercised by a State over the commission of an internationally wrongful act by an international organization

Draft article 26 corresponds to article 17 of the articles on State Responsibility. There was general agreement in Plenary on the text proposed in the fourth report of the Special Rapporteur and the Committee therefore retained the text without change.

The observations made with respect to draft article 25, including the indications concerning the issues that should be addressed in the commentary, apply *mutatis mutandis* to draft article 26.

Draft article 27. Coercion of an international organization by a State

Draft article 27 corresponds to article 18 of the articles on State Responsibility. The text proposed in the fourth report of the Special Rapporteur was favourably received in Plenary. The Committee therefore retained the text without change.

Some observations made with respect to draft article 25, including the indications concerning the issues that should be addressed in the commentary, apply *mutatis mutandis* to draft article 27.

Draft article 28. International responsibility in case of provision of competence to an international organization

Draft article 28 has no equivalent in the articles on State responsibility. The text proposed by the Special Rapporteur in his fourth report raised a number of questions in Plenary.

Most of the concerns and questions related to paragraph 1, which the Committee decided, therefore, to redraft.

You will recall that there were concerns in Plenary about the scope of the draft article. Some members preferred a narrower scope, limiting the draft article to cover only situations in which a State acts in bad faith or commits an abuse of rights. But there were also views expressed both in Plenary and in the Drafting Committee that the requirement of establishing intention on the part of a State was too high and not always possible. Fairness to injured parties would require a formulation that would not condition the application of the draft article to the proof of intention and bad faith in order to hold a State responsible. The Committee favored this approach.

The Committee also followed the suggestion made in Plenary to use the term “circumvents” instead of the expression “avoids compliance” that appears in the draft proposed by the Special Rapporteur. The commentary would clarify the point that the notion of “circumvention” does not necessarily imply a specific intention or bad faith on the part of the State concerned.

There were also comments in Plenary that, while the notion of “transfer” of functions was appropriate for certain types of organizations, namely integration organizations, it was misleading if applied to international organizations in general. Therefore, the Committee replaced the word “transferring” with the word “providing”, in order to cover also cases in which an organization is entrusted with competences that have not been “transferred” to it by member States because they do not possess it themselves, but the organization was empowered by its members with certain competence. The commentary should adequately reflect this point.

As redrafted, there are three elements in paragraph 1. First there must be a circumvention of an international obligation on the part of the State, member of an international organization. Second, that circumvention must be the result of empowering that organization with, or transferring to it, a certain competence. Third, if the act that was committed by the international organization had been committed by that State, it would have constituted a breach of an international obligation of that State. You will note that the third element relates back to the first element, but it is necessary in order to make the paragraph and sequence of events and the causal relationship clear. This means that the act committed by an international organization may not constitute a wrongful act for that organization, even when it is a wrongful act of that State member of the organization. This is a point that has been further clarified in paragraph 2.

The text of paragraph 2 is the same as proposed by the Special Rapporteur. The Committee considered the view, expressed by some members in Plenary, that paragraph 2 should be deleted because only the State, and not the international organization, would be responsible in the situations dealt with in this draft article. The Committee recognized that draft article 28 is mainly intended to cover situations in which the act may not be wrongful for the international organization, for example because the latter is not bound by the obligation in question. However, the Committee was of the opinion that paragraph 2 should be retained, in order to make it clear that the State concerned is responsible whether or not the act is internationally wrongful for the organization.

Finally, in view of the specificities of this draft article and of the new wording adopted, the Committee changed the title which now reads

“International responsibility in case of provision of competence to an international organization”.

Draft article 29. Responsibility of a State member of an international organization for the internationally wrongful act of that organization

Draft article 29 as proposed by the Special Rapporteur gave rise to a number of comments on several aspects in Plenary. Taking into account those comments and suggestions, the Committee redrafted the draft article. The text now before you comprises two paragraphs.

You will recall that in Plenary, some members of the Commission questioned the soundness of the negative formulation of the text of the article as proposed by the Special Rapporteur. The Committee discussed at length the possible implications of the choice between a negative and a positive formulation. Finally, it decided to retain the latter, which had been favored by several members in Plenary, and which is in line with the general approach taken in the articles on State Responsibility. The point was made in the Committee that the choice between the two formulations was only a question of emphasis. The majority of the Committee agreed with this assessment and found that the positive formulation of the chapeau was more appropriate.

It was also suggested that it would be preferable to change the introductory words of paragraph 1 by introducing a “without prejudice” clause referring explicitly to draft articles 25 to 28. This new formulation was consistent with the positive formulation of the chapeau of this paragraph.

The Committee decided to retain subparagraphs (a) and (b) of the text proposed by the Special Rapporteur, which deal, respectively, with the

acceptance by a State of the international responsibility and with the situation in which a State has led the injured party to rely on its responsibility.

Concerning subparagraph (a), the wording was shortened and simplified by the Committee. The commentary would indicate that the acceptance of the responsibility by a member State may occur prior to the commission of the internationally wrongful act by the international organization (for example, in the constituent instrument of the organization) or subsequently to that act. The commentary should also clarify that acceptance of responsibility may be explicit or implicit, but such acceptance of responsibility needs to have effect vis-à-vis a third party and not only vis-à-vis the international organization.

As to subparagraph (b), the Committee was of the view that the conduct of the State that has led to reliance is not necessarily equivalent to implicit acceptance. The Committee discussed at length the adequacy of the expression “injured party”, which might be perceived – at least in French – as giving the impression of the existence of an agreement. Finally, the Committee retained this wording. The commentary should clarify that the term “injured party” may refer to a State, an international organization, or another person or entity.

The Committee added a second paragraph to the draft article based on comments in Plenary. This paragraph deals with the character of the responsibility of a State under this draft article. It provides that the responsibility of a State in accordance with paragraph 1 is presumed to be subsidiary. The commentary should explain that the State concerned may incur joint and several responsibility, depending on the nature and content of

its acceptance, or on the circumstances surrounding the conduct by which the State has led the injured party to rely on its responsibility.

The title of the draft article was retained with a minor drafting change.

Article 30. Effect of this chapter

Some members, in Plenary, favored the inclusion in the draft articles of a “without prejudice” clause equivalent to that contained in article 19 of State Responsibility. The Commission entrusted the Committee with the drafting of this clause if it deemed it necessary or useful.

The Committee agreed that, although technically a provision of this nature may not be necessary, it was preferable to include it. The text of this draft article follows, *mutatis mutandis*, the wording of article 19 of State responsibility. However, the reference to the responsibility of “any other State” was deleted, since this topic does not deal with State responsibility and the question of a State being responsible for an act of international organization is only addressed in this chapter.

The function of this draft article is to make clear that this chapter deals with responsibility of a State for an act of an international organization, and is without prejudice to the responsibility of the international organization itself that commits that act or the responsibility of any other international organization, which might be addressed in other provisions of this topic.

The title of the draft article is “Effects of this chapter”.

Mr. Chairman, this concludes my introduction of the final report of the Drafting Committee for the present session and I thank you for your attention.