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Responsibility of international organizations

Statement of the Chairman of the Drafting Committee
Mr. Chusei Yamada

31 July 2007

Mr. Chairman

It is my pleasure, today, to introduce the second report of the Drafting Committee for the fifty-ninth session of the Commission. This report, which deals with the topic "Responsibility of international organizations", is contained in document A/CN.4/L.720.

At its 2935th meeting, on 12 July 2007, the Commission referred 14 draft articles proposed by the Special Rapporteur in his Fifth report, namely draft articles 31 to 44 to the Drafting Committee. At its 2938th meeting on 18 July, the Commission also referred to the Drafting Committee a supplementary draft article proposed by the Special Rapporteur, taking into account the written proposal by a member of the Commission and the debate in Plenary.

The Drafting Committee has successfully completed its consideration of all the draft articles referred to it and it did so in 5 meetings on 18, 19, 20 and 25 July 2007.

Before addressing the details of the report, let me first pay tribute to the Special Rapporteur, Mr. Giorgio Gaja, whose mastery of the subject,

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guidance and cooperation greatly facilitated the work of the Drafting Committee. I also thank the members of the Drafting Committee for their active participation and valuable contributions to the successful outcome.

Mr. Chairman

I shall now turn to the report, beginning first with matters concerning the structure of the draft articles. You have before you 15 draft articles. Draft articles 31 to 45 deal with Part Two concerning Content of the International Responsibility of an International Organization, that is to say the legal consequences for a responsible international organization arising from the new legal relationship that ensues from the commission of an internationally wrongful act.

This Part Two contains three Chapters. Chapter I, consisting of draft articles 31 to 36, sets forth a series of general principles. Chapter II entitled "Reparation for injury" comprising draft articles 37 to 43 addresses the various forms of reparation and their relationship with each other, including the consideration implicated by the contribution of the victim to the injury. Chapter III, comprising draft articles 44 [43] and 45 [44], focuses on a particular category of legal consequences: those arising from serious breaches of obligations under peremptory norms of general international law.

These draft articles correspond to articles 28 to 41 on responsibility of States for internationally wrongful acts. It may be noted however that draft article 43 is new and has no corresponding provision in the draft articles on State responsibility.

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I shall now turn to the draft articles adopted by the Drafting Committee. The first chapter contains six draft articles, namely draft articles 31 to 36. Draft articles 31 to 34 correspond to draft articles 28 to 31 on responsibility of States for internationally wrongful acts. The Drafting Committee did not make any changes to these draft articles as proposed by the Special Rapporteur.

Draft article 31 sets out the general parameters of the operation of Part Two of the draft articles, linking Part One already provisionally adopted to the present Part Two. Draft article 32 addresses the continued duty of performance. While a breach of an obligation under general international law would not as such affect the underlying obligation, the commentary would indicate that there were situations in which the duty of continuing performance may cease. This may be the case in treaty relations when a material breach of a bilateral treaty may cause the injured international organization to terminate the treaty. While there was a suggestion in Plenary to have an explicit proviso to this effect in draft article 32, the Drafting Committee viewed it as sufficient to explain this matter in the Commentary.

Draft article 33, on cessation and non-repetition, addresses two separate but inter-related aspects arising from the breach of an international obligation although they are not *per se* legal consequences of such breach, namely cessation of the wrongful act and assurances and guarantees of non-repetition. These are addressed in sub-paragraphs (a) and (b), respectively. It was pointed out in the Plenary, and acknowledged in the Drafting Committee, that the specificities of the decision-making processes of the

responsible international organizations may make it difficult to envision a situation in which an offer of assurances and guarantees on non-repetition by an international organization may be applicable. The commentary would draw attention to this aspect. While practice in this area concerns mostly States, the Drafting Committee did not see any merit of providing for a different rule in respect of international organizations.

Draft article 34 lays down the legal principle stated in the *Factory at Chorzow's* case: "…[T]he breach of an engagement involves an obligation to make reparation in adequate form" and in this respect the responsible organization must endeavour to "wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed". The Drafting Committee acknowledged the paucity of relevant practice in this area, most of it being related to settlement of disputes concerning employment and contractual relationships. This, however, was not considered to be a sufficient reason to depart from the well-established principle. The Drafting Committee also acknowledged that it may be worthwhile to highlight in the commentary the peculiarity that may arise in respect of international organizations where full reparation may be contingent upon the extent of involvement of the international organization and its members.

Unlike the preceding draft articles, draft article 35, which largely corresponds to draft article 32 of the draft articles on State Responsibility, was a source of detailed discussion in the Drafting Committee. This draft article deals with the irrelevance of the rules of the organization. In particular, the discussion focused on the proviso proposed by the Special

Rapporteur, intended to cover the special situation of international organizations where rules of the organization may themselves be the basis of a breach of an international obligation. As will be recalled, draft article 4 defines rules of the organization as including, in particular, the constituent instruments; decisions, resolutions and other acts taken by the organization in accordance with those instruments; and established practice of the organization. Moreover, under draft article 8, a breach of an international obligation is contemplated where there is a breach of an obligation established by the rule of the organization. It was therefore necessary to address the situation where the rules of the organization may have a bearing on responsibility as it relates especially to members of the organization.

A number of issues were raised by the proviso, in particular, whether the proviso was itself necessary; whether the proviso was sufficiently clear, and whether it would apply to situations contemplated in draft articles 44 [43] and 45 [44].

The concern of those who had doubts about the proviso centered mainly on its seemingly broad scope. It was feared that it would be used by the responsible organization to obviate the consequences that could arise as a result of a breach of an international obligation, in particular in respect of serious breaches of obligations under peremptory norms of general international law.

However, it was clearly understood in the Drafting Committee that the proviso had a more limited scope: it applied in relation to members of the

organization and did not apply to obligations towards the international community as a whole.

Concerning whether the proviso was sufficiently clear, there was some concern that the proviso seemed to trump the main rule. It was therefore suggested that the proviso be de-coupled from the main rule and that the main rule, namely the non-reliance on rules of the organization as justification, be set forth upfront. It was thus agreed that the main rule be reflected separately as paragraph 1. In other words, the responsible organization may not rely on its rules as justification for failure to comply with its obligations under this Part. The reference to "pertinent" rules was deleted from the earlier formulation as being unnecessary and the present formulation follows more closely the language of the corresponding State responsibility article.

Turning to the proviso itself, it was wondered whether when captured in a separate paragraph it should be reflected as a "notwithstanding" clause, that is to say that, notwithstanding the main rule contained in paragraph 1, the rules may provide otherwise in respect of the responsibility of the organization towards one or more of its members.

The formulation as a "notwithstanding" clause, however, posed a number of difficulties. It remained unclear, particularly in its combination of "notwithstanding" and "may provide otherwise". It also seemed to affect the basic rule. Ultimately, it was considered appropriate to formulate it as a "without prejudice" clause. Paragraph 2 thus provides that: Paragraph 1 is without prejudice to the applicability of the rules of an international

organization in respect of the responsibility of the organization towards its member States and organizations. The commentary will develop further on the consequences of a breach of an international obligation arising from a breach of a rule of the international organization *vis-à-vis* non-members.

It should also be noted that this draft article bears on any provision that may be formulated in future on *lex specialis*.

The final draft article in this chapter concerning the scope of the international obligations set out in this Part was also a source of considerable debate. Draft article 36 corresponds to draft article 33 of the Draft articles on State Responsibility.

The initial problem was whether there was any justification for limiting the obligations set out in Part Two as being owed to only other organizations, States or the international community as a whole, without extending such obligations as being owed to any other person or entity. It was argued in this regard that the possibility of obligations of a responsible organization affecting such other persons or entities was more preponderant than with respect to a responsible State, which the draft articles on State responsibility were concerned about.

It was, however, recalled that the scheme under Part II did not exclude the possible situation in which an internationally wrongful act would involve legal consequences with regard to relations between a responsible international organization for that act and persons or entities other than a State or an international organization. After all, article 1 of the draft articles

provides that the draft articles applied to the international responsibility of an international organization for an act that was wrongful under international law. The only limitation consisted in the fact that Part II did not apply to obligations concerning reparation to the extent that such obligations would arise towards or would be invoked by a person or entity other than a State or an international organization. The right of such person or entity other than a State or international organization, as pointed out in paragraph 2 proposed by the Special Rapporteur, was not thereby prejudiced. This understanding contributed to an agreement that there was no need to change paragraph 1.

This, however, only led to the transfer of some concerns to paragraph 2. In the main, it was suggested that paragraph 2, which has a corresponding provision in the State Responsibility articles, was unclear and may occasion misinterpretation by judicial bodies to the effect that the articles had nothing to do with the rights of persons or entities other than States or international organizations. At any rate, the phrase “which may accrue” seemed to cast doubt as to the existence of the right of the person or entity other than a State or international organization.

It was also pointed out that there was an asymmetry between paragraphs 1 and 2. Whereas paragraph 1 addressed “obligations”, paragraph 2 talked about “rights”. Paragraph 2 therefore ought to be recast to conform with the language of paragraph 1.

It was clarified that “may accrue” was a reference to the contingency of a direct claim arising rather an expression of doubt regarding the existence of such a right.

After extensive discussion, it was suggested that paragraph 2 should be reformulated to read as follows: “This Part is without prejudice to any right of a person or entity other than a State or an international organization, arising from the international responsibility of an international organization.”

While initially there were differing views as to whether this language broadened or narrowed the scope of the original formulation, ultimately there seemed to be some general understanding that, in substance, the two options were the same.

However, different conclusions were drawn from such an understanding. One group felt that it was necessary to maintain the integrity and consistency between the texts on State responsibility and on international responsibility of international organizations. To ensure certainty and predictability in legal interpretation the Commission would be hard pressed to find a justification for any departure from the language used in the draft articles on State responsibility, even if such a change was only of a drafting nature. In other words, it would be difficult to explain the more direct language, when in fact the draft articles on State responsibility did not seek to downplay the rights of persons and entities other than States and when no evolution has taken place. This group viewed it important to retain the text provided by the Special Rapporteur. It was clearly understood that the commentary would reflect the nuanced differences between the role of persons and entities in respect of State responsibility and in respect of responsibility of international organizations.

The other group was of the view that the more direct language captured by the alternative text was clearer and conveyed the import of the paragraph in better terms. The situation regarding State responsibility was not entirely similar to the situation of responsibility of international organizations. The fact that "rules of the organization" were part of international law offered a different situation justifying the use of more direct language. This situation presented wider prospects for the assertion of rights relating persons or entities other than States or international organizations in the realm of international responsibility of international organizations. This group was in favour of changing the text, it being understood that the commentary would indicate that the use of different language was not intended to change the substance of the text from the corresponding paragraph in the State responsibility articles.

In the final analysis a straw vote was cast, indicating preference for the retention of the language proposed by the Special Rapporteur.

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I shall now turn to the draft articles building up Chapter II of Part Two. This chapter, dealing with reparation for injury, contains seven draft articles, namely draft articles 37 to 43. Draft articles 37 to 42 correspond to articles 34 to 40 on responsibility of States for internationally wrongful acts. The Drafting Committee did not make any changes to these draft articles as proposed by the Special Rapporteur but for a minor correction in draft article 41. As to draft article 43, to which I will revert in a moment, it is an amended version of the supplementary draft article referred to the Drafting Committee on 18 July 2007.

Draft article 37 introduces the various forms of reparation for injury caused by an internationally wrongful act. Since there is no reason to consider that the obligation to provide reparation should apply differently to States and to international organizations, nothing seems to justify a departure in the current draft from the generic language used in article 34 on State responsibility. Hence draft article 37 describes restitution, compensation and satisfaction, either singly or in combination, as the various forms of reparation of an injury caused by the wrongful act of a responsible international organization.

Draft article 38 sets out restitution as the first form of reparation owed by a responsible international organization. As with the other forms of reparation, the practice concerning international organizations in that regard is limited. However, instances that can be found in practice confirm the applicability to international organizations of the obligation to make restitution. Comments made in Plenary as to the drafting of the provision were not prompted by some specificity that the situation of international organizations would present in that respect. Accordingly, the Drafting Committee retained for draft article 38 the same wording as in article 35 on State responsibility, with the usual replacement of “State” by “international organization”.

The Drafting Committee came to the same conclusion in respect of draft article 39, dealing with compensation. The Special Rapporteur pointed out that the suggestion made in Plenary that a choice between restitution and compensation be offered to the injured party would be more properly

addressed in Part Three of the draft, on the implementation of responsibility. There is actually a provision to that effect in article 43, paragraph 2 (b), on State responsibility.

Draft article 40 lays down the obligation to give satisfaction and details its various possible forms and conditions of exercise. Unlike draft articles 37 to 39, it gave rise to an extensive debate in the Drafting Committee. As pointed out in Plenary, satisfaction may well appear as a form of reparation more frequently resorted to by international organizations than restitution or compensation; at the same time, it raises some specific issues which the Drafting Committee has carefully considered.

As you may recall, some members of the Commission expressed doubts as to the need to maintain the reference to a “formal apology” in draft article 40, paragraph 2, as well as to the mention of a humiliating form of satisfaction in paragraph 3. They argued, especially in respect of the latter point, that considerations which applied to States in that regard were of doubtful relevance as far as international organizations were concerned. In any event, for an injured party to claim for a humiliating form of satisfaction would be, according to one view, an abuse of right, making it unnecessary to keep an express reference in the draft article. Arguably, a situation where a responsible international organization would be humiliated in giving satisfaction is not likely to occur often in practice. However, the Drafting Committee felt that the possibility of such a humiliation could not be excluded in practice. It also considered that the deletion of the relevant language in paragraph 3 could have the undesirable effect of implying that

even a humiliating form of satisfaction could be required from the responsible organization.

In the course of the discussion on draft article 40, paragraph 3, in the Drafting Committee, it was also suggested that the words “or its organs” be added after “responsible international organization”, so as to take account of the limited composition and specific powers of some organs which would be particularly targeted by a request for a humiliating form of satisfaction. Such a situation would, however, necessarily affect the responsible organization through its organs and, thus, did not require a specific addition to the provision.

The possibility of adding “or its members” at the end of draft article 40, paragraph 3, attracted more support within the Drafting Committee, as it appeared to make the prospect of a humiliating form of satisfaction more realistic. One could for instance think of a peace-keeping force whose acts would be attributed to the United Nations and, if wrongful, entail its international responsibility. The injured party might request that the organization gives some form of satisfaction humiliating the State providing the force. In such a case, the legal personality of the organization would not be affected as the obligation to give satisfaction would still rest upon it, and not upon the State. The State, however, could be indirectly humiliated in being specifically targeted by the injured party.

While they agreed that such a case might well occur in practice, several members of the Drafting Committee considered that the suggested addition to draft article 40, paragraph 3, would put too much emphasis on

member States in a situation where the international organization was responsible and obliged to give satisfaction. In practical terms, the organization would be expected to consult with its member States and opt for a form of satisfaction which would be humiliating neither for it nor for them.

After a straw vote was cast, it was decided to retain draft article 40 in its formulation initially proposed by the Special Rapporteur, on the understanding that the commentary would address the issue of member States being humiliated by a specific form of satisfaction requested from the organization.

Draft article 41 deals with the interest on any principal sum, due in order to ensure full reparation. It had been suggested in Plenary that a proviso be added to paragraph 2, stating that the injured party might waive the interest or stop it from running at anytime before the obligation to pay is fulfilled. The possibility of a waiver is not confined to the payment of interest, as it is indeed not infrequent in practice that an injured party does not require full reparation. Moreover, it should be noted that the issue of waiver of a claim is addressed in Part Three of the articles on State responsibility. The Drafting Committee has adopted draft article 41 unmodified but for the replacement of “payable” by “due” in the first sentence, in order to align the text with that of article 38 on State responsibility.

Draft article 42 relates to the contribution to the injury. You will recall that some comments were made in Plenary to the effect that some general

orientation should be given regarding the distribution of responsibility according to certain categorical distinctions. Arguably, the responsibility of an international organization for a recommendation should be limited compared to that of a State acting on the basis of that recommendation. This, however, is not an issue dealt with in draft article 42, which is concerned with the contribution of the victim to the injury caused by the internationally wrongful act.

Two other issues raised in Plenary have also been addressed during the discussion on draft article 42 in the Drafting Committee. First, confirmation was given that the phrase “wilful or negligent” applied to the omission as well as to the action of the injured party. Secondly, the Special Rapporteur indicated his willingness to specify in the commentary that draft article 42 is without prejudice to the duty of the victim of the internationally wrongful act to mitigate damages.

Similar comments to those previously made in relation to draft article 36 were expressed during the discussion on draft article 42 in the Drafting Committee. It was recalled for instance that article 1 on diplomatic protection considered the natural or legal person as directly injured by the internationally wrongful act, whereas draft article 42 only referred to any person or entity “in relation to whom reparation is sought”. This limitation seemed to some members all the more difficult to accept that some of the most frequent issues occurring in practice concerned breaches of labor contracts within international organizations. In such cases, the contribution of the victim to the injury could play a predominant role.

The Drafting Committee felt nonetheless that any modification to draft article 42 in that respect would not be consistent with decisions previously made regarding the scope of the draft articles. The commentary to the draft article would make an explanatory reference to the articles on diplomatic protection, in order to clarify the difference in conceptual approaches respectively adopted in that text and in the current draft. It has already been acknowledged that this draft should only cover the responsibility of an international organization towards a State or another international organization, and the obligations stemming therefrom. This does not mean that persons or entities other than States and international organizations cannot be considered as injured under other rules of international law.

Draft article 43 is an amended version of the supplementary draft article referred to the Drafting Committee on 18 July 2007. You will recall that the initial proposal made in Plenary had been modified before it was sent to the Drafting Committee, with the inclusion of a reference to the rules of the organization. While some members of the Commission considered that member States of an international organization were obliged under general international law to provide the organization with the means to effectively give reparation, several others were of the view that no such obligation existed outside the rules of the responsible organization. For that reason, they considered that there was no need to add to the draft articles a provision imposing on States the obligation embodied in the Supplementary draft article.

The Drafting Committee held an extensive discussion on the supplementary draft article. According to one view, the proposed text could be read as stating that member States were bound by the obligation contemplated by the provision unless the rules of the organization provided otherwise. In order to clarify the relationship between the organization and its members in that regard, it was suggested that the phrase “in accordance with” be replaced by “according to”, “under” or “following the rules of the organization.” Notwithstanding potential issues of translation, it was considered that “in accordance with” was a standard phrase, making it sufficiently clear that member States had to abide by the rules of the organization.

The Drafting Committee agreed that the sentence “in accordance with the rules of the organization” should be placed between the words “take” and “all appropriate measures”. This shift would go along with the broadly shared view that the obligation contemplated by draft article 43 originated in the rules of the organization. The commentary to the draft article would also make it clear that, even if the rules of the organization did not contain any express provision to that effect, they encapsulated a general obligation of cooperation. In compliance with this obligation of cooperation, member States would have to consider giving the organization the means for fulfilling its obligation of reparation.

Some members of the Drafting Committee indicated that were concerned that the Supplementary draft article placed the onus on member States. According to this view, the obligation here contemplated should be

termed in a way which would bind the international organization rather than its members. The following text was proposed:

> "The responsible international organization shall take all appropriate measures in accordance with its rules in order to ensure that its members provide the organization with the means for effectively fulfilling its obligations under the present chapter."

For its proponents, this text would better fit in a set of draft articles devoted to the responsibility of international organizations; it could also prompt international organizations to adapt their internal rules in order to meet their obligations under Part Two.

Whereas the view was expressed that both provisions were complementary and could actually be combined in a single article, several members of the Drafting Committee considered that the provision stressing the obligation of the international organization had a different subject-matter than that embodied in the supplementary draft article. It was also indicated that the proposal made in the Drafting Committee would state an obligation without specifying how it was to be fulfilled. The commentary could make it clear that the responsible international organization should strive to develop rules in order to meet its obligations towards injured parties.

Given the variety of views expressed on this issue, the Drafting Committee resolved to adopt the text of the supplementary draft article as amended in the course of its debate, accompanied by a footnote which would mention the proposal quoted above as one that was supported by some of its

members. The differences of views will also be reflected in the commentary to the draft article.

As regards the placement of the draft article, it was agreed that it should be placed at the end of Chapter II as it related to all the obligations of reparation, and that it should be entitled “Ensuring the effective performance of the obligation of reparation”.

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I shall now turn to the last chapter in Part Two, namely Chapter III, which is composed of two draft articles dealing with serious breaches of obligations under peremptory norms of general international law. These draft articles, which correspond to draft articles 43 and 44 as proposed by the Special Rapporteur, have been renumbered after the inclusion of a new draft article 43 at the end of Chapter II.

Draft article 44 [43] defines the parameters of application of Chapter III. In Plenary, some doubts were expressed regarding the necessity of drawing a specific category of breaches of obligations of *jus cogens* by international organizations. There is however a broad agreement within the Commission as well as in the replies by States to the question raised in Chapter III of the 2006 report to the General Assembly. As there appears to be no reason to differentiate in that respect the situation of a State and that of an international organization, draft article 44 [43] lays down the application of Chapter III of Part Two to infringements by international organizations of obligations under peremptory norms of general international law.

Draft article 45 [44] sets out particular consequences of a serious breach within the meaning of draft article 44 [43]. As may be clearly inferred from its paragraph 3, the purpose of draft article 45 [44] is not to provide an exhaustive description of all the particular consequences entailed by a serious breach by an international organization of an obligation under *jus cogens*. Some specific rules might indeed entail resort by States and international organizations to further consequences than those stated in draft article 45, paragraphs 1 and 2. These provisions should be interpreted as laying down general consequences applying as a minimum in case of serious breach by an international organization of an obligation under *jus cogens*.

The level of generality of the draft article, combined with the "without prejudice" clause embodied in paragraph 3, make it unnecessary to include in the provision the additions suggested in Plenary. It would also be odd to extend to international organizations obligations which have not been contemplated in the corresponding article on State responsibility, namely article 41.

You will recall that it was suggested in Plenary to extend to subjects than other States and international organizations the obligations set out in paragraphs 1 and 2, namely the obligation to cooperate to bring the breach to an end as well as the duty not to recognize the situation as lawful and not to render aid or assistance in maintaining it. This suggestion, which raises similar issues to those addressed in relation to draft articles 36 and 42, has also been considered by the Drafting Committee. Again, it appeared that an express reference in the draft article to other subjects would substantially affect the scope of the text, which deals with obligations of international

organizations towards States and other international organizations. Nevertheless, the commentary to draft article 45 [44] will make it clear that the particular consequences contemplated in paragraphs 1 and 2 are without prejudice to the obligations other entities might have in the event of a serious breach by an international organization of an obligation under a peremptory norm of general international law.

The commentary to draft article 45 [44] will also state in clear terms that the obligation to cooperate to bring such a breach to an end shall not be understood as requiring from international organizations any action outside their competences and functions as defined by their constitutive instruments or other pertinent rules.

This completes my introduction of the second report of the Drafting Committee and I commend the draft articles contained in the report for provisional adoption by the Commission on first reading.

Thank you.