

Responsibility of international organizations

Statement of the Chairman of the Drafting Committee

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Mr. Chairman,

I shall continue today with the second part of my report, which will deal with the topic “**Responsibility of international organizations**”. The report is contained in A/CN.4/L.725/Add.1.

On 15 July 2008, the Commission received the oral report of the Working Group on Responsibility of international organizations and referred draft articles 52 to 57, paragraph 1, to the Drafting Committee, together with the recommendations of the Working Group. The Drafting Committee held 2 meetings on 15 and 16 July 2008. I am pleased to report that the Drafting Committee has successfully completed the consideration of all the draft articles referred to it. It also adopted an additional draft article on countermeasures by members of an international organization, as recommended by the Working Group.

Mr. Chairman,

This structure follows the model of Part Three of the draft articles on responsibility of States for internationally wrongful acts with adaptations necessary to the topic “Responsibility of international organizations”. Accordingly, Part Three is entitled “**The implementation of the international responsibility of an international organization**”. Draft articles 46 to 53, which have been adopted by the Commission during the first part of the current session, form **Chapter I** of Part Three, dealing with the “**Invocation of the responsibility of an international organization**”. **Chapter II**, entitled “**Countermeasures**”, is composed of draft articles 54 to 60, which are contained in the present report of the Drafting Committee.

It is to these draft articles that I shall now turn.

Mr. Chairman,

It will be recalled that **draft article 54 [52]**, entitled “**Object and limits of countermeasures**”, had been the focus of extensive discussion in the Working Group. The Group had recommended that paragraphs 4 and 5 of the draft article, as proposed by the Special Rapporteur, be reformulated and placed in a separate draft article. I will revert to this new draft article (draft article 55) in a moment.

As to **paragraphs 1 to 3** of draft article 54, they did not give rise to substantial discussions in the Drafting Committee. In paragraph 1, the words “an injured” were added between “State” and “international organization” so

that the wording “an injured State of an injured international organization” does not have to be repeated in the subsequent provisions. Apart from this modification, paragraphs 1 to 3 have been adopted unchanged from the text proposed in the sixth report of the Special Rapporteur, as they correspond in substance to article 49 on State responsibility.

In contrast, the Drafting Committee engaged in a substantial discussion on draft article 54, **paragraph 4**. This new paragraph had been proposed by the Special Rapporteur. It followed the conclusion reached by the Working Group that the need for countermeasures to be taken in a manner respecting the specificity of the targeted organization should be expressed in the draft articles. The Drafting Committee considered the most appropriate wording to render this restriction on the use of countermeasures. Some members asked for the deletion in the proposed text of the words “as far as possible”, which left open the possibility that countermeasures could impede the functioning of the organization. Against this suggestion, the view was expressed that countermeasures would necessarily affect, at least partially, the exercise by the organization of its functions. According to this opinion, there was no justification for granting the responsible organization with a minimum guarantee against countermeasures taken by the injured State or organization.

As the Special Rapporteur put it, draft article 54, paragraph 4, was not intended at applying the principle of proportionality, which related to the injury suffered and was embodied in another provision. The concern here at stake was to preserve the functions usefully exercised by an international organization, especially those performed in the collective interest of the

international community. Upon the suggestion of one of its members, the Drafting Committee decided to retain the phrase “as far as possible” and to use the wording “limit their effects on” rather than a stronger term, such as “impede”. The commentary will make it clear that the significant functions performed by an international organization should not be hampered by countermeasures.

Mr. Chairman,

Draft article 55 [52 *bis*], entitled “**Countermeasures by members of an international organization**”, is a new draft article proposed by the Special Rapporteur, following the recommendation of the Working Group that the specific relationship between a responsible organization and one of its injured members taking countermeasures be addressed in a separate provision. While it had left to the Drafting Committee the task of drafting this provision, the Working Group had indicated that it should state in substance that an injured member of a responsible organization may not take countermeasures against that organization so long as the rules of the organization provide some reasonable means for ensuring compliance with its obligations under Part Two.

The Drafting Committee first considered how this new draft article should be related to the other provisions in Chapter II of Part Three. Some members viewed it as unnecessary to indicate that the provision stated an additional rule specific to the situation of injured members. However, given the decision to devote a separate provision to this particular instance of countermeasures taken against a responsible organization, it was felt

preferable to add the wording “In addition to the other conditions set out in the present Chapter” at the beginning of the sentence.

The Drafting Committee then had an exchange of views on the mention of the “reasonable means” for ensuring compliance by the organization with its obligations. It was emphasized that there should be reasonable prospects for compliance at the time when countermeasures were envisaged. Once the means available in the given circumstances had been tried unsuccessfully – that is, when it could be legitimately assessed that there was no more reasonable prospect for compliance –, countermeasures could be resorted to. This will be reflected in the commentary.

Finally, some members indicated that, in all likelihood, the rules of the organization would not expressly address the issue dealt with in draft article 55. Accordingly, instead of envisaging the case that these rules “provide” reasonable means, the Drafting Committee decided to refer to reasonable means “available in accordance with the rules of the organization”, those being understood in the broad sense retained in draft article 4, paragraph 4.

Mr. Chairman,

I will now turn to **draft article 56 [53]**, entitled “**Obligations not affected by countermeasures**”. This provision corresponds in substance to article 50 on State responsibility, with the replacement of a reference, in paragraph 2, b), to diplomatic or consular agents by the mention of agents of the responsible international organization. The Drafting Committee decided

to use the wording “any inviolability of agents” of the organization in order to better reflect the fact that only certain agents benefit from a measure of inviolability.

Mr. Chairman,

Draft article 57 [54], entitled “**Proportionality**”, is the replication of article 51 on State responsibility. The Special Rapporteur recalled that the text of the provision, closely modeled on the relevant statement of the International Court of Justice in its judgment on the *Gabcikovo-Nagymaros Project*, linked proportionality to the injury rather than on measures required to ensure compliance. One member wondered whether the functions of the responsible organization should not be taken into account in that regard. It was however felt that that issue was sufficiently addressed in draft article 54, paragraph 4, whereas proportionality related to the rights of the injured State or organization and the injury it had suffered. Accordingly, no change was made to the text of the provision.

Mr. Chairman,

The same holds true for **draft article 58 [55]**, entitled “**Conditions relating to resort to countermeasures**”. The Drafting Committee considered whether the phrase “or any other body” should be added after “a

court or tribunal” in paragraph 3, b), as had been suggested in Plenary. In the opinion of one member of the Committee, the issue was now taken care of by draft article 55 in respect of injured members of a responsible organization; however there still remained the possibility that an organ other than a court or tribunal would have the authority to make binding decisions on non-members of the organization. Other members of the Drafting Committee however argued that paragraph 3, as reinforced by paragraph 4, put a clear emphasis on judicial mechanisms and litigation, which should not be broadened. It was also felt necessary to preserve the consistency with the articles on State responsibility, to which the suggested extension should equally apply if it was now adopted. Accordingly, the text of draft article 58 has not been modified and the commentary will explore further the relationship between this provision and draft article 55.

Mr. Chairman,

Draft article 59 [56], entitled “**Termination of countermeasures**”, has been adopted unchanged by the Drafting Committee, without giving rise to any discussion.

Let me now turn to **draft article 60 [57]**, entitled “**Measures taken by an entity other than an injured State or international organization**”. Draft article 60 corresponds in substance to paragraph 1 of article 57 introduced in the sixth report of the Special Rapporteur, with the substitution

of the usual wording “is without prejudice” for “does not prejudice” and an updated reference to article 52, paragraphs 1 to 3.

A few issues of substance were also raised in respect of this provision. The suggestion made in Plenary to replace “lawful measures” by “countermeasures” was not retained, as it was felt preferable to keep the purposely ambiguous wording adopted in article 54 on State responsibility. The Drafting Committee also considered whether it was necessary to open the possibility for non-injured international organizations to react against a responsible organization. It concluded that the use of a “without prejudice” clause sufficiently made it clear that the question of the existence of such an entitlement was left open by the Commission.

Mr. Chairman,

Let me finally turn to **draft article 53**, entitled **Scope of this Part**, which has already been adopted by the Commission on the understanding that the Drafting Committee would revert to it once a decision would have been made on the inclusion of provisions dealing with countermeasures. The Drafting Committee considered the issue and concluded that the location, title and text of draft article 53 could remain unchanged.

This concludes my introduction of the [ninth] report of the Drafting Committee. It is my sincere hope that the Plenary will be in a position to take note of the draft articles presented, in view of their provisional adoption

together with that of the commentaries at the next session of the Commission.

Thank you Mr. Chairman.