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Responsibility of international organizations

Statement of the Chairman of the Drafting Committee
Mr. Pedro Comissário Alfonso

4 June 2008

Mr. Chairman,

It is my pleasure, today, to introduce the third report of the Drafting Committee for the sixtieth session of the Commission. This report, which deals with the topic "Responsibility of international organizations", is contained in document A/CN.4/L.725.

At its 2964th meeting, on 16 May 2008, the Commission referred 6 draft articles proposed by the Special Rapporteur in his sixth report, namely draft articles 46 to 51, to the Drafting Committee. At its 2968th meeting on 29 May 2008, the Commission, following a recommendation by the working group on Responsibility of international organizations, referred an additional draft article 47bis to the Drafting Committee.

The Drafting Committee has successfully completed its consideration of all the draft articles referred to it, and it did so in five meetings on 21, 22, 28, 29 and 30 May 2008. The Drafting Committee also adopted an

additional draft article containing a “without prejudice” clause (draft article 53).

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

Mr. Chairman,

I shall now turn to the report, beginning first with matters concerning the structure and placement of the draft articles.

You have before you eight draft articles. **Draft articles 46 to 53** deal with the **invocation of the international responsibility of an international organization**, and are intended to form a chapter of a Part Three of the draft articles which will deal with the **implementation of the international responsibility of an international organization**. This structure follows the model of the draft articles on responsibility of States for internationally wrongful acts. **Draft article 53**, which contains a “without prejudice” clause, is placed at the end of Part Three of the draft articles, and depending on what will emerge from the working group on Responsibility of international organizations, will be subject of further review.

The Drafting Committee has not addressed the concern, expressed by some members in the Plenary, that the draft articles proposed by the Special Rapporteur did not cover the invocation by an international organization of the responsibility of a State. It was felt that this question went beyond the

scope of a drafting exercise. Moreover, addressing this question in the present draft articles would probably require amending the text of other draft articles as well, including those on the responsibility of States for internationally wrongful acts.

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I shall now turn to the draft articles adopted by the Drafting Committee.

Mr. Chairman,

Draft article 46, entitled **Invocation of responsibility by an injured State or international organization,** corresponds in substance to article 42 on State responsibility. The text proposed in the sixth report of the Special Rapporteur was favourably received in the Plenary. The concerns expressed by some members in the Plenary about the possibility of an international organization being recognized the right to act on behalf of the international community as a whole were addressed by the Drafting Committee in connection with draft article 52 [51], paragraph 3.

The Drafting Committee introduced only minor changes to the text of draft article 46. You will recall that the words “party” or “parties” were criticized by some members in the Plenary as possibly conveying the wrong impression that the provision only referred to the parties to a treaty. Thus, the chapeau of the draft article, the introductory sentence to paragraph (b) as well as subparagraph (ii) of paragraph (b) have been modified accordingly by using the expressions “State or international organization” or, when appropriate, “States or international organizations”. These expressions are

repeated throughout the text of the draft articles. Since the chapeau of draft article 46 also plays a definitional role, the wording “an injured State or an injured international organization” has been used.

[In the introductory sentence to paragraph (b), the expression “**that** former international organization” was replaced by the expression “**the** former international organization” to bring about consistency with paragraph (a).**]**

The commentary to paragraph (b) would indicate that the group of States or international organizations referred to may be composed of States or international organizations, or a combination thereof.

Mr. Chairman,

Draft article 47, entitled **Notice of claim by an injured State or international organization,** also replicates a corresponding article 43 on State responsibility. This provision was favourably received in the Plenary, and the only suggestion made was to merge paragraphs 1 and 2 of the draft article. The Drafting Committee carefully considered this suggestion and finally agreed that the draft article could be simplified by merging paragraphs 1 and 2. Thus, the draft article as adopted by the Drafting Committee comprises only two paragraphs. Paragraph 1 enunciates the requirement that notice of the claim be given by the injured State or international organization, while paragraph 2, to which no change has been introduced, deals with the possible content of such a notice.

Mr. Chairman,

I will now turn to **draft article 48 [47bis]**, entitled **"Admissibility of claims"**. You will recall that the Special Rapporteur, in his Sixth report, did not propose a draft article on this issue, which could have corresponded to article 44 on State responsibility. The Commission, at its 2964th plenary meeting, established a working group which it also entrusted with the task of examining the advisability of including in the draft articles a provision on admissibility of claims. In order to take into account a preference expressed by several members in the Plenary, the Special Rapporteur presented to the working group an additional draft article on Admissibility of claims, and following a recommendation by the working group, the Plenary referred this additional draft article to the Drafting Committee at its 2968th meeting, on 29 May 2008.

The provision on admissibility of claims as adopted by the Drafting Committee contains two paragraphs dealing with two different requirements to which a claim against an international organization may be subject according to international law. Paragraph 1 deals with the requirement of **nationality of claims** and only applies to claims made by a State. Paragraph 2 concerns the requirement of the **exhaustion of local remedies** and covers both claims made by a State and claims made by an international organization. Although it was suggested by some members that claims by a State and claims by an international organization should be addressed separately also with regard to the exhaustion of local remedies, the Drafting Committee finally agreed to retain the structure proposed by the Special Rapporteur.

The wording of paragraph 1 did not give rise to discussions in the Drafting Committee.

In contrast, the Drafting Committee engaged in a long discussion on the requirement of the exhaustion of local remedies, regarding, in particular, its existence, scope and content in connection with a responsible international organization. Some members questioned transposing to claims against international organizations a requirement which was applicable to diplomatic protection in the context of inter-state relations. It was also observed that the expression “local remedies” was ambiguous when applied to a responsible international organization, and doubts were raised by some members as to the existence, within an international organization, of any available and effective remedies that would need to be exhausted.

In the final analysis, the Drafting Committee reached an agreement on a formulation whereby the scope of this provision is clearly circumscribed to those claims that are subject, by virtue of international law, to the requirement of the exhaustion of local remedies. Thus, the Commentary would emphasize that this provision does not aim at expanding the scope of the requirement of the exhaustion of local remedies to claims for which such a requirement does not already exist. Under current international law, this requirement applies to certain claims brought on behalf of an individual. In the context of the present draft articles, this would include claims brought against an international organization by a State which exercises diplomatic protection on behalf of one of its nationals, for example in connection with injuries inflicted to him or her by an international organization when administering a territory. Possibly, this would also include claims brought

against an international organization by another international organization for **personal** injuries inflicted to one of the agents of the claiming organization or to one of his or her family members – a situation which can be regarded as similar to diplomatic protection. Finally, the requirement of the exhaustion of local remedies would also apply in respect of certain claims alleging human rights violations by an international organization.

In contrast, it is understood that the requirement of the exhaustion of local remedies would **not** apply to claims arising from direct injuries inflicted by an international organization to a State or another international organization. This is also true when an international organizations exercises functional protection in favour of one of its agents for injuries caused to the agent in the exercise of his or her functions.

Moreover, the commentary would indicate that paragraph 2 of draft article 48 does not address a situation where the rules of an international organization would oblige the members of that organization to resort to certain internal procedures or mechanisms when invoking the responsibility of the organization.

The commentary would also indicate that, although the expression "local remedies" may entail some ambiguities when applied to an international organization, this terminology has been retained as a term of art in order to provide some indications regarding the kinds of situations where such a requirement is likely to apply. It would also clarify that the wording "remedy provided by the organization" primarily refers to those remedies that may be open to the individual concerned within the responsible international organization, while not excluding, however, the possible

existence of other available and effective remedies outside the organization. **[**A situation may occur, for example, in which the responsible organization has accepted the jurisdiction of domestic tribunals with respect to certain categories of claims brought by an individual, such as employment related claims.**]**

As regards the content of the requirement of the exhaustion of local remedies, a suggestion was made in the Drafting Committee that the commentary should also refer to the exceptions to the rule on the exhaustion of local remedies that are enunciated in draft article 15 on diplomatic protection.

Mr. Chairman,

Draft article 49 [48], entitled **Loss of the right to invoke responsibility**, which corresponds to article 45 on State responsibility, was adopted with no change by the Drafting Committee. Some discussions took place in the Committee on the relationship between paragraphs (a) and (b), on the formulation of paragraph (b), and on the nature and modalities of a waiver or acquiescence in the lapse of a claim by an international organization.

Some members of the Drafting Committee were of the opinion that, given the nature and structure of international organizations, an organization should not be easily considered as having waived a claim or acquiesced in its lapse. The point was also made that a waiver must be valid. In particular, it must not take place under coercion and, when it emanates from an international organization, it must be made by a competent organ in

accordance with the rules of the organization. In this context, compliance with the internal rules of the organization that waives a claim or acquiesces in its lapse may be relevant also *vis-à-vis* non-members of that organization.

The Drafting Committee nevertheless agreed that there was no reason to depart from the wording of the corresponding article on State responsibility. The commentary would provide some indications as to the specificities of a waiver by an international organization; in particular, it would emphasize that such a waiver must not be easily assumed. Moreover, in light of draft article 50 [49] relating to Plurality of injured States or international organizations, the commentary to draft article 49 [48] would clarify that a State or an international organization may only waive a claim on its own behalf, without prejudice to the rights of another injured State or international organization.

Mr. Chairman,

Draft article 50 [49], entitled **Plurality of injured States or international organizations**, corresponds to article 46 on State responsibility. Again, this draft article was received favourably in the Plenary and only minor adjustments have been made to its text by the Drafting Committee. Following a suggestion made by some members in the Plenary, the word “entity” or “entities” in the title and in the text of the draft article have been replaced, as appropriate, by the words “State or international organization” or “States or international organizations”.

Furthermore, the Drafting Committee agreed with the proposal by the Special Rapporteur that the expression “the responsibility of the

international organization which has committed the internationally wrongful act" be replaced by the expression "the responsibility of the international organization **for** the internationally wrongful act". This new formulation is intended to cover also situations, such as those envisaged in draft articles 12 to 15, in which an international organization may incur responsibility in connection with an internationally wrongful act committed by a State or another international organization. **[**Such situations could arise, in particular, in the event of an international organization aiding or assisting; exercising direction and control; or exerting coercion over a State or another international organization in the commission of an internationally wrongful act, or also in the case of decisions, recommendations and authorizations addressed by an international organization to member States or international organizations.**]**

A discussion took place in the Drafting Committee on the appropriateness of the expression "may **separately** invoke". The Committee decided to retain the current formulation, which is in line with the corresponding provision on State responsibility. However, a clarification would be provided in the commentary to the effect that the word "separately" is not intended to preclude a joint invocation of responsibility by some or all of the injured States or international organizations.

The commentary would also emphasize that a waiver or acquiescence in the lapse of a claim by one of the injured States or international organizations in accordance with draft article 49 [48] does not affect the rights of the other injured States or international organization to invoke the

responsibility of an international organization for an internationally wrongful act.

Moreover, the commentary would indicate that, in a situation where an international organization and one of its members are injured by an internationally wrongful act of another international organization, the internal rules of the former organization may regulate which entity is entitled to make the claim, without this affecting, however, the legal position of third parties.

Mr. Chairman,

I shall now turn to **draft article 51 [50]**, which is entitled **Plurality of responsible States or international organizations**. This draft article corresponds to article 47 on State responsibility, while also addressing the additional eventuality of subsidiary responsibility.

As with other draft articles, the Drafting Committee replaced the words “entity” or “entities” with the expressions “State or international organization” or, as appropriate, “States or international organizations”.

The Drafting Committee had a long discussion on the issue of subsidiary responsibility of an international organization. On this point, you may recall that a proposal was made in the Plenary for the inclusion, in the second sentence of paragraph 1 of the draft article proposed by the Special Rapporteur, of a specific reference to draft article 29. Moreover, a concern was expressed in the Plenary that the text of the draft article could be interpreted as precluding the possibility of a **simultaneous** invocation of responsibility against the organization incurring the primary responsibility

and against the member that would only incur subsidiary responsibility. In this regard, some members of the Committee raised the possibility of a conditional invocation of the subsidiary responsibility, pending the outcome of the invocation of responsibility against the organization bearing the primary responsibility for the internationally wrongful act.

In order to address these concerns, the Drafting Committee decided to delete the second sentence of paragraph 1 and to devote a separate paragraph to the issue of subsidiary responsibility. In this regard, I draw your attention to paragraph 2 of the revised draft article. This new paragraph contains a reference to draft article 29 through a wording which does not preclude the possibility of other situations of subsidiary responsibility. Also, a more flexible formulation has been retained as regards the timing and possible extent of the invocation of subsidiary responsibility. Such flexibility is conveyed by the expression “in so far as”, adopted in replacement of the initial formulation “only to the extent that”.

Apart from the words “entity” and “entities” that have been duly replaced, paragraph 3 of the current draft article corresponds to paragraph 2 of the draft article proposed by the Special Rapporteur. The qualifier “providing reparation”, in subparagraph (b), does not appear in the corresponding article on State responsibility; it was included, for the sake of clarity, in the draft article proposed by the Special Rapporteur.

Mr. Chairman,

Draft article 52 [51] is entitled **"Invocation of responsibility by a State other than an injured State or by an international organization other than an injured international organization"**.

You will recall that paragraph 1 of this draft article, which is based on article 48 paragraph 1(a) on State responsibility, gave rise to some comments in the Plenary. The concerns raised in the Plenary mainly related to the difficulties to which the interpretation of the notion of "collective interest of the group" could give rise. The Drafting Committee engaged in a long discussion on this issue. **[**Some discussions also took place on whether there was a need to introduce a distinction between the position of the members of a responsible international organization and that of non-members as regards their right to invoke the responsibility of the organization.**]**

Nevertheless, the Drafting Committee decided to retain the draft article proposed by the Special Rapporteur, with some minor linguistic changes and with the replacement of the word "entities" by "States or international organizations".

Some clarifications should be given in respect of the situations covered by paragraph 1. First of all, this paragraph does not deal, as such, with the obligations owed to the international community as a whole, which are specifically addressed in paragraphs 2 and 3 of the draft article. Paragraph 1 refers primarily to certain categories of multilateral treaties, to which an international organization may be a party, which establish

obligations that cannot be split into a series of bilateral obligations as between the parties. Thus, paragraph 1 does not cover all cases in which an obligation arising from a multilateral treaty has been breached or any situation in which there may be some collective interest among the members of a group of States or international organizations. This paragraph refers to specific cases, which indeed exist, where the obligation breached is owed to the parties "as a group", whereby each member of the group is entitled to claim compliance as a guardian of the collective interest. As possible examples of such situations, mention was made in the Drafting Committee of certain obligations arising from multilateral treaties in the fields of environment or human rights, as opposed to multilateral obligations relating, for example, to the treatment of aliens or to extradition, which would not fall under this provision.

Although some elements of vagueness are likely to remain as to the precise scope of paragraph 1, an attempt would be made in the commentary to offer some examples of the situations covered in paragraph 1, thus providing further clarification to the notion of an obligation "owed to a group of State or international organizations" and "established for the protection of a collective interest of the group". The commentary would also clarify that this provision does not cover every breach by an international organization of its obligations *vis-à-vis* its members: whether or not such a breach is covered would depend on the source and content of the obligation breached, which would determine whether the obligation is due to the members "as a group".

Some concerns were expressed in the Drafting Committee about conferring on the members of an international organization the right to invoke the responsibility of the latter under the general regime on international responsibility. In response to these concerns, some members of the Drafting Committee observed that this question was not specific to draft article 52 [51], but also concerned the invocation of responsibility under draft article 46. In this respect, it must be emphasized that draft article 52 [51], as well as draft article 46, only deals with the invocation of responsibility and does not address the issue of possible remedies; therefore, these draft articles must **not** be read as implying that the members of an international organization would be allowed to act towards that organization in a manner which is inconsistent with its internal rules. Furthermore, special rules applying between an international organization and its members could be addressed in a general provision on *lex specialis*.

Mr. Chairman,

Paragraph 2 of draft article 52 [51], which corresponds to article 48, paragraph 1 (b) on State responsibility, did not give rise to comments in the Plenary. Therefore, the Drafting Committee adopted the text of this paragraph as proposed by the Special Rapporteur. Only one minor change has been made to the text, by replacing the words “any State” by the words “a State”.

Mr. Chairman,

Paragraph 3 of draft article 52 [51] deals with the right of an international organization to invoke the responsibility of another

international organization for a breach of an obligation due to the international community as a whole. Based on comments received from States and international organizations, the Special Rapporteur proposed, in his Sixth report, a formulation aimed at limiting this right to situations in which the organization has been "given the function to protect the interest of the international community underlying that obligation". You will recall that this formulation gave rise to different reactions in the Plenary. While some members considered it too wide, other members believed that it was too restrictive.

The Drafting Committee engaged in a long discussion with a view to identifying the most appropriate formulation in order to reflect this limitation. In this context, reference was made to the "mandate" of the organization and to the "functions" that the organization has been "entrusted with". Finally, the Drafting Committee agreed to limit the entitlement of an international organization under paragraph 3 to those situations in which safeguarding the interest of the international community underlying the obligation breached "is included among the functions" of the organization concerned. The Commentary would clarify that this question has to be assessed by reference to the rules of the organization, including its character and purposes. Thus, the possibility envisaged in paragraph 3 is not limited to the case where an international organization has been given a "specific mandate" to protect the interest of the international community in a given situation.

Following a suggestion in the Drafting Committee, the word "protect" was replaced by "safeguarding" in order to avoid conveying the impression

that this provision referred to the “responsibility to protect” as enunciated most recently, for example, in the United Nations Summit Outcome of 2005.

However, some concerns were expressed in the Drafting Committee about granting a regional organization the right to act in defence of the interests of the international community as a whole. Mention of these concerns would be made in the commentary.

Mr. Chairman,

Paragraph 4 of draft article 52 [51] is based on article 48, paragraph 2, on State responsibility. No comments were made in the Plenary on this paragraph. Therefore, the Drafting Committee introduced only one minor linguistic change to the text, by replacing the expression “any State or international organization” by the expression “a State or an international organization”.

Paragraph 5 of draft article 52 [51] is based on article 48, paragraph 3, on State responsibility. The Drafting Committee adopted the text as proposed by the Special Rapporteur, with the addition of a reference to paragraph 2 of the **draft article 48 [47bis]**, concerning the situations in which a rule on the exhaustion of local remedy applies to a claim. Deliberately, no reference is made here to paragraph 1 of draft article 48, since the condition of nationality of claims does not apply to the invocation of international responsibility under draft article 52 [51]. The commentary would emphasize this point, while also indicating that this solution is in conformity with the correct interpretation to be given to article 48, paragraph

3, on State responsibility, despite an ambiguity contained in the latter provision.

Mr. Chairman,

Finally, as already mentioned, **draft article 53,** entitled **Scope of this Part**, contains a "without prejudice" clause relating to the invocation of the responsibility of an international organization by a person or entity other than a State or an international organization. This additional draft article was proposed to the Drafting Committee by the Special Rapporteur in order to respond to a concern raised in the Plenary. Although a similar provision is already contained in Part Two of the draft articles, dealing with the content of international responsibility, and although the articles on State responsibility do not include a similar provision in Part Three, the Drafting Committee, for the sake of clarity, considered it appropriate to spell out what was implied and to reiterate this "without prejudice" clause in Part Three of the draft articles.

The formulation retained by the Drafting Committee aims at preserving those situations in which a person or entity other than a State or an international organization would have a legal entitlement to invoke the international responsibility of an international organization. Thus, this "without prejudice" clause should not be read as conveying any presumption in favour of the existence of such an entitlement.

Depending on whether provisions on countermeasures will be included in the draft articles, necessary modifications may have to be

introduced to the title of this draft article as well as to the reference to “this Part”.

This concludes my introduction of the third report of the Drafting Committee. It is my sincere hope that the Plenary will be in a position to provisionally adopt the draft articles presented.

Thank you Mr. Chairman.