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Responsibility of international organizations

Statement of the Chairman of the Drafting Committee
Mr. Marcelo Vázquez-Bermúdez

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Mr. Chairman,

It is my pleasure, today, to introduce the first report of the Drafting Committee for the sixty-first session of the Commission. This report, which deals with the topic "Responsibility of international organizations", is contained in document A/CN.4/L.743.

At its 3009th meeting, on 22 May 2009, the Commission referred 6 new draft articles proposed by the Special Rapporteur in his seventh report, namely draft articles 15bis, 19, and 61 to 64, to the Drafting Committee. It also referred to the Committee the proposal made by the Special Rapporteur regarding the restructuring of the draft and some modifications or revisions suggested in respect of 7 draft articles which had already been provisionally adopted by the Commission, namely draft articles 2, 4(2), 8, 15(2)(b), 18, 28(1) and 55.

The Drafting Committee has successfully completed its consideration of all the draft articles referred to it. It did so in six meetings on 25, 26, and 27 May, and on 2 June 2009.

In my statement of today, I will introduce the structure of the draft articles as well as draft articles 2, 4(2), 8, 15(2)(b), 15bis, 18, 19, and 55, as contained in the report of the Drafting Committee. I will introduce the results of the consideration by the Drafting Committee of the other draft articles on responsibility of international organizations referred to it later on, during the second part of the Commission's current session.

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 restructuring and placement of the draft articles.

The **restructuring** of the draft articles proposed by the Special Rapporteur in its seventh report was favourably received in the Plenary. The Drafting Committee agreed with this proposal, on the understanding that the general structure and placement of the draft articles could be reviewed at the end of the consideration of the topic by the Drafting Committee, so as to ensure the consistency of the final text to be adopted on first reading.

As it appears in the report, the restructuring of the draft articles is as follows:

- A new Part One, entitled “Introduction”, shall consist of articles 1 and 2;

- The present title of Part One shall become the title of Part Two: “The internationally wrongful act of an international organization”. The same applies to current Parts Two and Three;

- In the new Part Two, a new Chapter I entitled “General Principles” would be introduced;

- Chapter (X) shall be relocated as Part Five;

- The General Provisions shall be grouped in a final Part Six.

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

Mr. Chairman,

As provisionally adopted by the Commission, **draft article 2**, entitled **“Use of terms”**, only dealt with the term “international organization” for the purposes of the draft articles. The proposal by the Special Rapporteur to move paragraph 4 of draft article 4, which contains a definition of the rules of the organization, to draft article 2 was favourably received in the Plenary. It will also be recalled that during the debate on the seventh report, a suggestion was made to also move paragraph 2 of draft article 4, dealing

with the term “agent”, to draft article 2, so as to offer in the introductory part of the text a comprehensive provision on the use of terms.

The Drafting Committee has addressed these two proposals in turn, starting with the **inclusion of the definition of the rules of the organization** in draft article 2. The move of this provision from draft article 4 to draft article 2 has not given rise to any difficulty in the Drafting Committee, which has decided to reshape the provision accordingly. The phrase “For the purposes of the present draft articles” shall be placed as a common *chapeau* for the various subparagraphs which state how a given term is to be understood in this context. It was also felt that there was no need to use the phrase “the term” at the beginning of each subparagraph.

In addition to these drafting suggestions, the Drafting Committee has considered whether the wording of the new subparagraph (b) could be perfected. Some members were of the view that a distinction should be made between rules having a purely internal character and those defining the relationship of an international organization with other persons and entities. It was also suggested that the rules of the organization should, for the purposes of the draft articles, be defined by reference to their binding character. The use of the phrase “in particular” was also questioned as bringing some uncertainty within the provision.

As emphasized by the Special Rapporteur, the definition now contained in draft article 2, subparagraph (b), closely reproduces the wording of article 2, paragraph 1 (j) of the 1986 Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, with the mention of “other acts” that an

organization may adopt in addition to decisions and resolutions. The phrase "in particular", already included in the 1986 Convention, gave some useful flexibility and should be retained, as the rules of the organization also covered, for instance, agreements with the host State entered into by the organization.

Some members also indicated that the definition of the rules of the organization contained in article 1, paragraph 1 (34), of the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character provided a better formulation, referring to "relevant decisions and resolutions". This wording, however, did not capture the width of the scope of the definition of "rules of the organization" needed for the purposes of the draft articles, which went beyond what was needed as far as State representation was concerned.

On this understanding, the Drafting Committee refrained from modifying the substance of the provision. Only a few drafting changes were made to the previous text, regarding the punctuation and the replacement of the word "taken" with "adopted" in draft article 2, subparagraph (b).

Mr. Chairman,

Let me now turn to the **second proposal** made in respect of draft article 2, namely, to include as a new subparagraph (c) the substance of the provision regarding the use of the term "**agent**" currently contained in paragraph 2 of draft article 4. It will be recalled that the possibility of such a move had already been foreseen by the Commission, a footnote to draft article 4 explaining that all definitions of terms could eventually be placed in

article 2. The Drafting Committee has confirmed this solution after considering other possible options: while it was true that the term “agent” had particular significance in the chapter dealing with attribution of conduct to an international organization, it was deemed preferable to place all terms used for the purposes of the draft articles in a single article included in the introductory part. Accordingly, the definition of the term “agent” has been moved as subparagraph (c) of draft article 2, the most logical sequence being to start with the use of the terms “international organization” and “rules of the organization” before explaining what may be understood by referring to an “agent” of the organization.

The issue of the placement of the provision once settled, the Drafting Committee has dealt with its **wording**. You will recall that, in its seventh report, the Special Rapporteur had suggested adding, after “officials and other persons or entities through whom the organization acts”, the phrase “when they have been charged by an organ of the organization with carrying out, or helping to carry out, one of its functions”, taken from the Advisory Opinion of the International Court of Justice on the *Reparation for injuries suffered in the service of the United Nations*. This proposal had met with some approval in the Plenary, although a variety of other views had been expressed, in favour of the previous formulation or of the deletion of the phrase “through whom the organization acts” if the new wording were to be retained.

This debate has been amply reflected in the opinions voiced by members of the Drafting Committee. As indicated by the Special Rapporteur and acknowledged by some members of the Committee, some international

organizations had expressed concerns as to the exact scope of the provision, which did not seem to specifically address the issue of outsourcing the exercise of functions of an organization. The suggested phrase to be added was intended to deal with this concern.

For other members of the Drafting Committee, however, the added language could give the misleading impression that the agent would have to be mandated by the organization, a condition which could run contrary to draft article 6. Several members also shared the view that keeping "through whom the organization acts" and the proposed phrase could be interpreted as unnecessarily limiting the ambit of the definition of the term "agent".

After an extensive debate, the Drafting Committee resolved to keep the phrase "through whom the organization acts" on the understanding that the commentary would indicate that, in most cases, the agent will have been charged by the organization to carry out one of its functions. This basic condition would not contradict the case, envisaged in draft article 6, of attribution to an international organization of the conduct of one of its agents even acting in excess of authority.

The use of the term "**includes**" was also questioned during the debate. Some members in the Drafting Committee were of the view that, as subparagraph (c) encompassed all cases of persons or entities to be considered as agents of the organization, the verb "means" would be more appropriate. On final analysis, the word "includes" was retained, so as to address the concern expressed by some international organizations that attribution of conduct should not be unduly narrowed, particularly in the absence in the draft articles of a provision comparable to article 8 on State

responsibility, dealing with direction and control of a person or a group of persons. The commentary will provide the necessary explanations, with reference to relevant provisions in the articles on State responsibility.

Mr. Chairman,

Draft article 4, entitled "**General rule on attribution of conduct to an international organization**", is also reproduced in document A/CN.4/L.743, although it did not give rise to a separate debate in the Drafting Committee. It was felt necessary to provide members of the Commission with the new version of this draft article, resulting from the transfer of the definition of "rules of the organization" and of "agent" in subparagraphs (b) and (c) of draft article 2. If only by reference, the commentary to articles 2 and 4 will have to be adjusted to reflect these modifications.

Mr. Chairman,

Let me now turn to **draft article 8**, on the "**Existence of a breach of an international obligation**". In his seventh report, the Special Rapporteur had suggested redrafting paragraph 2, so as to make it clearer that, but for some exceptions, rules of the organization could create international obligations, the breach of which would belong to the realm of the draft articles. While it attracted some support in the Plenary, this proposal also met with some criticism, some members questioning the use of the terms "in principle" while others called for the deletion of paragraph 2 or the addition of appropriate language in paragraph 1.

The Drafting Committee did not question the need to mention expressly the case of a breach of an international obligation stemming from the rules of an organization. It looked for the most appropriate way to express that possibility without giving the impression that any obligation created by a rule of an organization would necessarily be of an international character for the purposes of the draft articles.

In final analysis, the Drafting Committee decided to combine the current wording of draft article 8, paragraph 2, and that proposed by the Special Rapporteur. It did not retain the terms “in principle”, but the use of the word “includes” was considered appropriate so as to clarify the relation between the two paragraphs embodied in the provision. More importantly, the Drafting Committee added the phrase “that may arise” between “an international obligation” and “under the rules of the organization”, in order to introduce a constructive ambiguity regarding the creation of international obligations through the rules of an international organization. Finally, the wording “international obligation” was preferred to “obligation under international law”, so as to preserve the consistency in drafting of the text.

Mr. Chairman,

You will recall that the Special Rapporteur had proposed replacing the phrase “in reliance of”, in **draft article 15, paragraph 2 (b)**, with “as a result of”, so as better to emphasize the role that the recommendation or the authorization should play in the commission of the wrongful act. Several suggestions were made both in the Plenary and in the Drafting Committee,

as to the most appropriate way to render that link. Terms like “pursuant to” or “on the basis of’ were deemed insufficient to indicate adequately that the State or organization concerned must have acted in reaction to the authorization or recommendation. On the contrary, phrases stating that the act in question would not have been committed but for the authorization or recommendation would go too far in singling them out as the sole cause for the wrongful conduct. More generally, it was felt that a requirement to identify the specific cause of a given conduct would impose too heavy a burden and prove too difficult in practice. The phrase “because of” was finally preferred, as striking the right balance between the need for a more restrictive approach than a mere reliance and the necessity to preserve an effective and practical criterion.

Mr. Chairman,

Let me now turn to **draft article 15bis**, which had been introduced by the Special Rapporteur in order to fill a gap and address, as far as international organizations which are members of other organizations are concerned, a situation comparable to that envisaged in draft articles 28 and 29 for States that are members of an international organization. That proposal had been well received in the Plenary. Hence, the Drafting Committee simply considered the best way to convey the exceptional character of that situation, without implying that, if the conditions were met, responsibility could be avoided.

Some members in the Drafting Committee expressed their preference for the wording proposed by the Special Rapporteur, according to which responsibility "may arise" for an international organization under the conditions set out in articles 28 and 29. In their view, this drafting would have better reflected the unlikely character of the case at stake. The Drafting Committee however concluded that this formulation could be misleading, in so far as international responsibility necessarily arises if the conditions here referred to are met.

You will certainly note that the word "also" has been added before "arises". Read in conjunction with the "without prejudice" reference opening the draft article, the phrase "also arises" intends to convey that the case of responsibility here envisaged is additional to that covered in draft articles 12 to 15.

Finally, the Drafting Committee has considered that a simple title such as "Responsibility of an international organization member of another international organization' would be appropriate for draft article 15bis.

Mr. Chairman,

In contrast to the previous provision, **draft article 18** has given rise to an extensive debate in the Drafting Committee. This could not be a surprise, given the importance of the discussion in the Plenary on the issue of **self-defence**.

You will recall that, following the debate, the Special Rapporteur had withdrawn his initial proposal of deleting draft article 18 and proposed that the Drafting Committee be mandated to reconsider the wording of the provision.

On that basis, a variety of views have been expressed in the Drafting Committee. For some members, the mere use of the word “self-defence” was inappropriate as it would extend to other actors a right belonging to States; accordingly, the draft article should either refer to the notion of “self-protection” or simply state that, if such a right were to exist for international organizations, the wrongfulness of the act done in self-defence would be precluded.

Some other members were of the view that self-defence was an inherent right of every subject. For the purposes of the draft articles, it was not necessary to detail the content and scope of this right but rather to recognize its effect on the wrongfulness of an act committed by an international organization.

The Drafting Committee explored various options to reconcile these views. The insertion of a “without prejudice” clause, for instance, was considered as a way to preserve the question of the exercise of self-defence by an international organization, given the legal uncertainties surrounding the matter. It was however felt possible to draft a provision stating more directly that the wrongfulness of an act of an international organization would be precluded if that act were committed in the exercise of self-defence.

In that regard, the Drafting Committee thoroughly considered the proposal put forward during the debate in the Plenary to the effect of establishing a correspondence between the act of an international organization and a lawful measure of self-defence taken by a State in conformity with the Charter of the United Nations. The fact that the concept of self-defence had been developed for States as a reaction to an armed attack did not prevent from admitting that international organizations also had a right of self-defence. It made it uneasy, however, simply to rely on Article 51 of the UN Charter as far as international organizations were concerned; hence, a proposal for a draft article which would refer *mutatis mutandis* to the conditions for the exercise of self-defence prevailing under the Charter.

That analogy was well received by some Members within the Drafting Committee, according to whom the limitations included in Article 51 could be considered as part of general international law and thus applied, as appropriate, to international organizations. Other members of the Drafting Committee, however, were of the view that the correspondence between the right of international organizations and that of States pursuant to the Charter would unnecessarily create problems of interpretation.

More generally, two main reasons prevented the Drafting Committee from including an express reference to the Charter in draft article 18. The first one pertains to the reluctance or certain members of the Committee to establish some parallelism between States and international organizations in respect of the exercise of self-defence. According to them, the rights entailed were substantially different; if it was necessary to allow for the exercise of

self-defence by the agents of the organization, the narrow ambit of that right could not be equated to that of States.

The second reason relates to the view, broadly shared within the Drafting Committee, that there was no need to state, in the text of draft article 18, the conditions for the exercise of self-defence by international organizations. The issue could be appropriately dealt with in the commentary. For the purposes of the text itself, it was deemed sufficient to acknowledge the effect that the exercise of self-defence would have on the wrongfulness of an act committed by an international organization.

On that understanding, the Drafting Committee finally resolved to refer, in draft article 18, to the lawful measure of self-defence that an international organization may take "under international law". Although it may appear redundant with the reliance on international law, the word "lawful" is intended to allude to the conditions surrounding the exercise of self-defence by an international organization. Finally, the phrase "if and to the extent that" has been included in order to convey the idea, prevailing in the Committee, that the right of self-defence may belong also to international organizations, but in a manner that could not be equated to that of States.

Mr. Chairman,

Let me know turn to **draft article 19 on "Countermeasures"**, which has, like draft article 18, given rise to an extensive exchange of views in the Drafting Committee.

It will be recalled that the proposal contained in the seventh report of the Special Rapporteur first addressed the preclusion of wrongfulness of countermeasures taken by an international organization against a State or another international organization. Paragraph 2 of draft article 19 as proposed by the Special Rapporteur dealt with the specific case of countermeasures taken by an organization against one of its members. Before coming to the delicate issues entailed by paragraph 2, I will introduce paragraph 1 as adopted by the Drafting Committee.

During the debate in the Plenary, several members of the Commission had expressed doubts regarding the mere mention of "lawful" countermeasures taken by an international organization. To reflect the thrust of that debate, the Special Rapporteur introduced a revised version of draft article 19, paragraph 1, before the Drafting Committee, including a reference to the substantive and procedural conditions for the taking of countermeasures, as was suggested in the Plenary, together with a reference to Chapter II of Part Four, dealing with countermeasures taken against another international organization.

As explained by the Special Rapporteur, a reference to that chapter could not be sufficient for the purposes of draft article 19, given that the former only deals with countermeasures against international organizations, while the latter also covers countermeasures taken by an international organization against a State.

That proposal was well received within the Drafting Committee and I wish to reiterate here that the Special Rapporteur is to be commended for his

flexibility and his constant search for solutions which could be agreeable to all.

In addition to some drafting suggestions, the Drafting Committee decided to keep the reference to Chapter II of Part Four, as part of the substantive and procedural conditions required by international law for the resort to countermeasures by international organizations. The commentary will make it clear that, as far as countermeasures taken by an international organization against a State are concerned, the articles on State responsibility may be applied by analogy.

Mr. Chairman,

Let me now turn to **draft article 19, paragraph 2**, that is, to the sensitive issue of countermeasures taken by an international organization against one of its members. You will recall that, in its seventh report, the Special Rapporteur had proposed subjecting the resort to such countermeasures to the unavailability of reasonable means, in accordance with the rules of the organization, for ensuring compliance with the obligations of cessation and reparation. A number of changes proposed during the debate in the Plenary have been considered in turn by the Drafting Committee, in order to find a meaningful text.

The Drafting Committee thoroughly considered the reference to the “reasonable means” available to the organization. The use of the word “procedures” instead of “means”, favoured by some members as being more specific, was not retained: the word “means” was deemed more

comprehensive and, thus, more adequate for the purposes of a provision which intends to restrain the possibility for an international organization to take countermeasures against its members.

To the same effect, a lengthy discussion took place so as to determine whether it was necessary to qualify the available means and, in the affirmative, which qualifier should be retained. For some members, it was not necessary to speak of “reasonable”, “appropriate” or “effective” means; according to them, if the means were qualified, the organization would always find it possible to legitimize the resort to countermeasures; it was sufficient to say that, if other means were available, countermeasures were prohibited. Other members of the Drafting Committee however felt that a qualifier was needed, especially if the reference to the rules of the organization disappeared from the provision: according to them, an element of comparison between the means and the countermeasures was necessary, if only to avoid the paradoxical case in which an organization would be entitled to resort to measures of a more drastic nature – like expulsion or suspension – than countermeasures.

As to the word that could more adequately be used to qualify the “means” available to the organization, a wide range of views was expressed. The phrase “effective means”, for instance, received some support but was ultimately abandoned as setting too high a threshold and making the taking of countermeasures too attractive. It was also suggested to speak of “lawful means”: if this restrictive proposal was not ultimately retained, it was felt that a phrase such as “appropriate means” could help expressing this indispensable element of lawfulness, which would be further emphasized in

the commentary, and give some flexibility as to the most adequate way for an international organization to obtain cessation and reparation.

On the basis of a revised proposal made by the Special Rapporteur, the Drafting Committee decided to rephrase draft article 19, paragraph 2, with a double negative – "an international organization may not take countermeasures … unless" – so as to better reflect the exceptional character that countermeasures taken by an organization against its members should keep. In subparagraph (a), the phrase "not inconsistent with the rules of the organization" was retained, in order to ensure that, in taking countermeasures, an international organization would not depart from its rules. In subparagraph (b), the Drafting Committee opted for the word "appropriate" to qualify the means and decided to refer to means available "for otherwise inducing compliance". This phrase is intended to convey the existence of an alternative to the unavailability of means, without creating an element of comparison with countermeasures. The word "inducing" was also preferred to "ensuring compliance" so as not to make too easy the resort to countermeasures.

Mr. Chairman,

Let me conclude my statement with a few words regarding draft article 55, entitled "**Countermeasures by members of an international organization**". I shall be very brief on that provision, as changes brought to it were made to ensure consistency with draft article 19, paragraph 2. The commentary to these provisions will explain that, by referring to "the"

countermeasures in subparagraph (a), the articles intend to cover both the taking of countermeasures in general and the actual countermeasures resorted to in a particular situation.

Mr. Chairman,

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

Thank you Mr. Chairman.