

Responsibility of international organizations

Statement of the Chairman of the Drafting Committee

Mr. Marcelo Vázquez-Bermúdez

6 July 2009

Mr. Chairman,

It is my pleasure, today, to introduce the third 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/Add.1.

You will recall that, at its 3009th meeting, on 22 May 2009, the Commission referred 6 new draft articles proposed by the Special Rapporteur in his seventh report to the Drafting Committee, together with a proposal regarding the restructuring of the draft and some modifications or revisions suggested in respect of draft articles which had already been provisionally adopted by the Commission.

In my first statement on the topic “Responsibility of international organizations” on 5 June 2009, I introduced 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, which was then adopted by the Plenary.

In my statement of today, I will introduce the results of the consideration by the Drafting Committee, on 2 June 2009, of the other draft articles on responsibility of international organizations referred to it, namely draft article 3, 28(1), and 61 to 64.

Before addressing the details of the report, let me once again pay tribute to the Special Rapporteur, Mr. Giorgio Gaja, whose invaluable expertise has made it possible for the Commission to be in a position to adopt a whole set of draft articles on responsibility of international organizations on first reading during the current session. I also thank the members of the Drafting Committee for their active participation and valuable contributions.

Mr. Chairman,

I shall now turn to the substance of the report, beginning first with **draft articles 3 and 3bis**.

You will recall that, in its seventh report, the Special Rapporteur had proposed that draft article 3, which provides a general description of the conditions to be met for the international responsibility of an international organization to arise, be singled out as the only article in a new Chapter I of Part Two, entitled “General Principles”. This proposal was well received in the plenary and further endorsed by the Drafting Committee. This modification however rendered it necessary to reconsider the title of draft article 3. As provisionally adopted, that draft article embodied provisions

parallel to those actually contained in two separate articles on State responsibility, namely articles 1 and 2.

As the draft article would now be placed in a separate Chapter of the text, the Drafting Committee perceived no obstacle in following the structure eventually adopted for the articles on State responsibility. Accordingly, it decided that former paragraph 1 of the provision would be retained as draft article 3, entitled “Responsibility of an international organization for its internationally wrongful acts”, while former paragraph 2 would provide the substance of a new draft article 3bis, entitled “Elements of an internationally wrongful act of an international organization”. The text of the two articles, as previously adopted by the Commission, remains unchanged.

Mr. Chairman,

Let me now turn to **draft article 28**, initially entitled “**International responsibility in case of provision of competence to an international organization**”. It will be recalled that, in its seventh report, the Special Rapporteur had considered various possibilities to restrict the responsibility of member States in such cases and eventually proposed to redraft paragraph 1 of article 28 so as to better single out the conditions for responsibility in these circumstances and to avoid using the notion of circumvention. The suggestion eventually contained in the report was to refer to a member State which “purports to avoid compliance with one of its international obligations by availing itself of the fact that the organization has been provided with competence in relation to that obligation”, with the additional condition that the organization should commit an act corresponding to a breach of the obligation by the State.

A number of drafting suggestions were made in the Drafting Committee in order to further improve the text of draft article 28, paragraph 1. The phrase “purports to avoid compliance” was thus replaced with “seeks to avoid complying”, which adds some clarity while retaining a necessary subjective element of intent on the part of the member State. It was also considered more appropriate to refer to a member State “taking advantage” of the situation rather than “availing itself” of it.

The Drafting Committee further considered whether it was necessary to keep mentioning expressly the provision of competence by the State to the organization. For some members, such an explicit reference was needed in order to consolidate the linkage between the act of the organization and the intention of the member State. It was however felt that the use of this phrase would put too much emphasis on a temporal element – the provision of competence preceding the commission of the act. In any event, by stating clearly that the organization “has competence”, draft article 28, paragraph 1, already implies in a sufficient manner that the member State must have contributed to the provision of that competence.

The Drafting Committee also considered in depth the need to establish a causal link between the advantage taken by a member State from the competence of an organization and the commission of a given act by the latter. Some members in the Committee were of the view that such a linkage was unnecessary and indeed misleading as it would favour the subjective aspect entailed by the intention of the State, to the detriment of the description of an objective situation in which an organization using a competence provided to it by a State would commit an act which would be wrongful if committed by that State. Furthermore, it was indicated that it

proved always difficult to demonstrate the existence of intent. It was also suggested in that regard that a distinction be drawn depending on the exclusive or concurrent nature of the competence provided to the organization; in case of concurrent competence, it would be necessary to reinforce the link between the exercise of that competence and the impulse given by the member State.

Other members in the Drafting Committee however favoured retaining a linkage between the advantage taken from the use of an organization's competence and the commission of a given act. According to one view, a State should be held responsible if it had sought to gain illicit advantage by the use of the organization's competence, whether or not that organization had eventually committed the act in question. While that opinion was perceived as too extensively relying on the element of intent, it was broadly felt that a link should be established between a given act by an organization and the member State's conduct, which had encouraged it. Several options were considered to express the appropriate degree a linkage, using such phrases as "because of", "as a result of", or referring to the organization being "induced" by the State. The Drafting Committee eventually agreed on the locution "thereby prompting", which fairly describes the process by which responsibility is entailed.

Two other issues need to be addressed regarding draft article 28, paragraph 1. The first one relates to the reference to the "subject-matter" of the obligation. The previous version of the provision as well as the redrafting proposed by the Special Rapporteur seemed to maintain some confusion as to the obligations respectively pertaining to the State and to the international organization; the drafting eventually retained intends to resolve this

difficulty by referring to the competence of the organization “in relation to the subject-matter” of the member State’s obligation. Secondly, and finally, the title of draft article 28 has been modified so as to reflect the changes made to paragraph 1; it now reads “Responsibility of a member State seeking to avoid compliance”.

Mr. Chairman,

Let me now turn to the four draft articles which, according to the restructuring of the text, are to make up the final Part Six of the draft, on “General Provisions”.

I will begin with **draft article 61, entitled “*Lex specialis*”**. The text of the provision introduced in the report before you is very similar to that proposed by the Special Rapporteur in its seventh report, with a slight modification to which I will revert in a moment. Beforehand, I should however mention that the various proposals made in relation to this draft article have given rise to an extensive discussion within the Drafting Committee, thereby reflecting the substance of the debate held in the Plenary.

As to draft article 61 itself, the only modification brought to the text proposed by the Special Rapporteur concerns the replacement, in the final part of the provision, of the phrase “such as the rules of the organization that are applicable” with the phrase “including rules of the organization applicable”. As explained by the Special Rapporteur, the rules of the organization provided an obvious example of those special rules envisaged by draft article 61; there could however be other kinds of “special” rules,

dealing, for instance, with particular situations relevant to an international organization. In addition, some members of the Drafting Committee considered that the initial drafting of the provision could give the impression that all the rules of the organization were covered, without paying regard to the actual specificity of those rules. The modification introduced in the last sentence with the use of the phrase “including rules of the organization” intends to address these concerns.

On the other hand, the purpose of this last part of the draft article is not to deal with the broader issue raised in the Plenary as to the need to take into account considerations resulting from the specific characteristics and variety of international organizations. You will recall that some drafting suggestions had been made in that regard, including through the addition of a new article addressing the issue. A revised proposal of such a provision had also been introduced in the Drafting Committee, stating in substance that, “in applying these draft articles, the specific characteristics of the particular organization shall be taken into account”.

In the opinion of its supporters, this proposal would put some welcome emphasis on the diversity of existing international organizations and the corresponding need to apply the draft articles in a flexible manner. It would merely serve as a signal to the importance of making appropriate differentiations among international organizations in applying the draft articles.

Without necessarily disputing the idea conveyed by such a proposal, several members in the Drafting Committee voiced some discomfort with the inclusion of a specific provision for that purpose. In their view, the

proposed additional article, with its rather ambiguous drafting, could either be interpreted as stating the obvious, namely, that the draft articles have to be applied in context, or could be used by some international organizations as a tool to try and escape their responsibility. In other words, there was some concern within the Committee that the inclusion of such a provision would put the draft articles in jeopardy, as an international organization could be tempted to rely on the invocation of its specific characteristics in order to avoid altogether the consequences of its wrongful conduct. The argument of the variety of international organizations should not be used against the whole exercise of codification in which the Commission was involved.

Closing this discussion, the Drafting Committee resolved not to include a provision along the lines suggested but to add to the commentary to the introductory articles of the draft a sentence clarifying in substance that, when applying the draft articles, particular factual or legal circumstances relating to the international organization or organizations concerned may have to be taken into account. This addition to the commentary should not be interpreted in a way allowing an organization to allege of its specific characteristics in order to exempt itself from its responsibility or to have double standards applied in the implementation of the draft articles.

Mr. Chairman,

Let me now turn to **draft article 62, relating to “Questions of international responsibility not regulated by these articles”**. Two issues were discussed in relation to this provision in the Drafting Committee. The

first one concerns the inclusion of the words “continue to”, which could be interpreted as freezing in time the regulation of questions of responsibility by applicable rules of international law. It was however considered that the use of this phrase in the present tense, common in a number of conventions of codification, would sufficiently make it clear that it should be at the time when the draft articles are applied that proper consideration should be given to rules covering issues not otherwise regulated in the draft.

The second issue relates to the proposed addition, at the end of draft article 62, of an illustrative sentence, which would have read: “such as the invocation by an international organization of the international responsibility of a State”. The merit of such an addition would be to draw attention to the gap existing between issues covered by the present draft articles and those expressly dealt with in the articles on State responsibility. The Drafting Committee was however of the view that the proposed addition would not fill the current lacuna, especially given that the draft articles are not intended to cover questions of State responsibility towards an international organization, which can arguably be considered as addressed by analogy in the 2001 articles. The commentary to article 1 of the present draft will refer to this lacuna and the possible application by analogy of the articles on State responsibility when it addresses the scope of the draft articles. The Drafting Committee has also considered it misleading to add the phrase “of an international organization” after “internationally wrongful act”, given that some issues of State responsibility related to the action of an international organization are covered in the text.

As a result, draft article 62 has been adopted unchanged. Such is also the case of **draft article 63, entitled “Individual responsibility”, and draft article 64, on the “Charter of the United Nations”**.

In relation to the latter provision, the Drafting Committee agreed to refer in the commentary to the effect that obligations under the Charter may have for international organizations, although they are not formally bound by it. The commentary will also make it clear that draft article 64 is not intended to affect the application of the draft articles to the United Nations.

Mr. Chairman,

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 adopt the draft articles presented.

Thank you Mr. Chairman.