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Responsibility of international organizations

Statement of the Chairman of the Drafting Committee

3 June 2011

Mr. Chairman,

It is my pleasure, today, to introduce the second report of the Drafting Committee for the sixty-third session of the Commission. This report, which deals with the topic "Responsibility of international organizations", is contained in document A/CN.4/L.778. The Committee had before it the entire set of draft articles on the responsibility of international organizations, as adopted on first reading, together with the recommendations of the Special Rapporteur contained in his eighth report, the suggestions made during the Plenary debate and the comments received from Governments and international organizations.

The Drafting Committee held 11 meetings from 29 April to 19 May on this topic. I am pleased to report that the Committee was able to complete the second reading of a set of 67 draft articles on the responsibility of international organizations, and decided to submit its report to the Plenary with the recommendation that the draft articles be adopted by the Commission, on second reading.

Mr. Chairman,

This is an historic moment for the International Law Commission. Today's report signifies the drawing to a close of the Commission's work on the subject of

international responsibility, which was among the original topics selected in 1949 for consideration by the Commission. This work has been the subject of the Commission's attention for nearly 60 years and is unquestionably one of its most important contributions to the codification and progressive development of international law. Following the successful conclusion in 2001 of the articles on State responsibility, the Commission turned its attention to the question of the responsibility of international organizations, which has kept it busy for the better part of the last decade.

The Commission was particularly fortunate to have had at its disposal the services of extremely well qualified and experienced Special Rapporteurs who have put much of their energy and intellectual talent into conceptualizing and developing the international regime of responsibility for States and now for international organizations. The present Special Rapporteur, Prof. Giorgio Gaja, is no exception and has joined a select list of Special Rapporteurs who have made their mark on the contemporary understanding of international law. On behalf of the Drafting Committee, I wish to express my deep appreciation to the Special Rapporteur for his full cooperation and the efficient manner in which he approached the second reading of the draft articles. His mastery of the subject greatly facilitated the task of the Drafting Committee. I also wish to express my appreciation to the members of the Committee for their cooperation and their constructive manner, as well as the good spirit in which they discussed the articles. Furthermore, I wish to thank the Secretariat for its valuable assistance.

Mr. Chairman,

Before turning to the article by article discussion, I might add that the Committee considered matters of translation into all the languages of the United Nations, in order to align the various linguistic texts with the English original. I will not dwell on such matters today. However, through you, Mr. Chairman, I will

request the members of the Commission who still notice some discrepancies in other language versions of the articles to inform the Secretariat.

Mr. Chairman,

The draft articles on the responsibility of international organizations, as adopted by the Drafting Committee, are structured into six parts.

Part One - Introduction

The Drafting Committee retained the title for Part One as “Introduction”. It is constituted of two draft articles.

Draft article 1

Mr. Chairman,

Draft article **1** pertains to the scope of the draft articles. Paragraph 1 was adopted as formulated on first reading, with the exception that the concluding phrase “act that is wrongful under international law” has been refined to “internationally wrongful act”.

The Drafting Committee refined paragraph 2 so as to more closely reflect the scope of the draft articles. In particular, it sought a formula which took into account the fact that the draft articles, in draft articles **60** [59] and **61** [60], also covered the scenario of State responsibility for acts committed by an international organization which were not wrongful acts of that organization. Various formulations were considered. At the same time, the formulation of the paragraph had to also cover the situation envisaged in draft article **62** [61] where a State is responsible not for its own wrongful acts, but for those of an international

organization. The Committee drew inspiration from the title of Part Five by reformulating the concluding phrase of the paragraph as "…for an internationally wrongful act in connection with the conduct of an international organization".

The Committee also considered including a specific mention to Part Five but decided against doing so since, although the provisions relating to State responsibility are grouped in Part Five, it is not only that Part which applies to State responsibility. Other Parts, such as Parts One and Six would also be relevant. The Committee considered linguistic options for trying to capture the manner in which the draft articles deal with the responsibility of States, including using terms such as "relates to", "refers to", "concerns", but without success. Accordingly, it decided to retain the more general reference to the drafting articles applying to State responsibility.

The Committee further resorted to the indefinite article "an" (instead of "the internationally wrongful act") so as to align the formulation with that adopted in paragraph 1.

The title of draft article **1** remains "Scope of the present draft articles".

Draft article 2

Mr. Chairman,

Draft article **2** pertains to the use of terms. The version being proposed for consideration at second reading contains the definitions of four phrases, as opposed to three in the first reading text.

Subparagraphs (a) and (b), defining "international organization" and "rules of the organization", respectively, have been retained in the version adopted on first reading, save for the insertion of the word "international" before the first reference to "organization" in subparagraph (b). This was done for the sake of

consistency in how the articles refer to international organizations. The same technical refinement has been made in a number of places throughout the draft articles. On subparagraph (b), the Drafting Committee also decided not to accept a suggestion to emphasize those rules which are part of international law, out of recognition that there also existed other rules of an organization which were not necessarily rules of international law, but which were nonetheless relevant to the draft articles, for example, in determining competence or the grant of consent. Nor did it consider it appropriate to include a hierarchy of rules, since such hierarchy could vary by international organization.

The main issues in this draft article, therefore, pertained to new subparagraph (c) and subparagraph (d). Subparagraph (c) was introduced in order to provide a definition of the phrase “organ of an international organization”. This was done on basis of the Special Rapporteur’s proposal which was inspired by article 4, paragraph 2, of the 2001 articles on the responsibility of States. The word “means” was resorted to, as opposed to “includes”, so as to align with the definition for “agents”. The Drafting Committee also considered a proposal which sought to establish a more substantive definition of an organ, as opposed to a *renvoi* to the rules of the organization. Under that proposal the definition would have been rendered as “…person or entity through whom the organization acts and who is charged by the organization with carrying out, or helping to carry out, one of its functions”. The Committee decided to retain the formulation in the more general terms proposed by the Special Rapporteur, out of recognition that the concept of “organ” has a different connotation for various international organizations. Individuals or entities which might not be captured by a definition of “organ” under the rules of an international organization, could nonetheless be considered an “agent” if the terms of subparagraph (d) are satisfied.

Subparagraph (d) defines the concept of “agent of an international organization”. Two changes were made to the first reading text. First, the words “of an international organization” were added after “agent”, so as align with the

formula adopted in new subparagraph (c). The second change involved bringing the provision more into line with the broader definition of the International Court of Justice in the *Reparation for Injuries* Advisory Opinion, by adding the reference to "who is charged by the organization with carrying out, or helping to carry out, one of its functions". The reference to "through whom the organization acts" was moved to the end of the subparagraph and rendered as "thus, through whom the organization acts". The word "thus" serves to indicate that this is not a cumulative requirement, but rather a further specification of the requirement of "carrying out, or helping to carry out, one of its functions", as the Court stated in its Opinion.

The reference to "person or entity" is included out of recognition of the practice of international organizations delegating their functions to other persons or entities, such as other organizations or companies.

The Committee also considered the related issue of whether to avoid an overlap between the category of "organ" and "agent", through the inclusion of the phrase "other than an organ". While the Committee recognized that there may be situations where persons or entities, under the rules of the organization, enjoy both the designation of organ and agent, it made sense to draw a distinction between the two in the draft articles since reference is made, for example in draft articles **6** [5] to **8** [7], to "organ or agent". The combined effect with subparagraph (c) then is that whatever the rules of the organization considers to be an organ is an "organ" for purpose of the draft articles. Everyone or everything else who is charged by the organization with carrying out, or helping to carry out, one of its functions, is an "agent" for purposes of the draft articles.

The title of draft article **2** remains "Use of terms".

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Part Two

Mr. Chairman,

I now draw your attention to Part Two of the draft articles, the title of which has been retained as “The internationally wrongful act of an international organization”. The Part is made up of five chapters.

Chapter I of Part Two continues to be entitled “General principles” and is constituted of three draft articles, including the only new draft article introduced during the second reading.

Draft articles 3 and 4

Mr. Chairman,

Other than a technical refinement to change the second reference to “the international organization”, in both draft articles **3** and **4**, to “that organization”, the texts and titles of those two draft articles were adopted without substantive change to the first reading versions. It might be mentioned that the Drafting Committee did take into account a suggestion that had been made by a State to include the requirement of the causation of damage in draft article **4**. However, the Committee decided against this since it was not clear how it could be justified that such element would be required for acts committed by international organizations, but not for those committed by States (since the 2001 articles made no such reference).

Draft article 5

As already mentioned, draft article **5** is new. It arose out of the discussion held in the context of draft article **64** [63] on the principle of *lex specialis*, and in particular whether that provision could be interpreted as implying that if an act is lawful under the rules of an international organization then it would necessarily be lawful under international law. As a matter of policy, the Drafting Committee felt that the draft articles should not allow for such an interpretation.

Accordingly, new draft article **5** deals with the characterization of an act of an international organization as internationally wrongful. It adopts, with the necessary modification, the formulation of the first sentence of article 3 of the 2001 articles on State responsibility, and establishes the principle that it is international law that decides whether an act of an international organization is wrongful or not.

The Drafting Committee did not, however, include the second sentence of the corresponding provision in the 2001 articles on State responsibility since it felt that it was not possible to make an analogous assertion along the lines that such characterization could not be affected by the rules of the organization, because the position taken in the draft articles was that the rules of the organization could include rules of international law which may be relevant to the characterization of an act as being internationally wrongful. While the Committee attempted to capture this nuance by modifying the language of the provision, including through a proposal to make reference to the "internal law" of the organization, it was unable to find a satisfactory reformulation. Accordingly, it settled for the text currently before you, with the understanding that the question of the interaction with the rules of the organization was best left for further explanation in the commentary (which will include a cross-reference to the material covered in the commentary to draft article **10** [9]).

The Drafting Committee agreed to have the provision early in the draft articles, in a similar location to the equivalent article in the State responsibility articles. Initially, it considered the proposed new provision as a second paragraph

to draft article **4**, but decided to include it as a separate provision since it dealt with a different set of issues to those covered by draft article **4**.

The title of draft article **5** is "Characterization of an act of an international organization as internationally wrongful", which is based on that of article 3 of the 2001 articles on State responsibility.

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Chapter II

Mr. Chairman,

Chapter II continues to consist of four draft articles. The title adopted on first reading, namely "Attribution of conduct to an international organization" was retained.

Draft article 6 [5]

Mr. Chairman,

Draft article **6** [5] covers the issue of the conduct of organs or agents of an international organization. The provision has been retained largely in the form adopted on first reading, with some drafting suggestions. In paragraph 1, the word "as" in "as an act" of the first reading version, was deleted to align the text closer to the 2001 articles on State responsibility.

The Committee took into account a suggestion that it be specified that the conduct in question be undertaken under the instruction and control of the organization, or in an official capacity. However, it decided not to include such an

element out of concern not to create the impression of establishing an additional requirement. The issue has been resolved through an amendment to draft article **8** [7].

Paragraph 2 was also refined through an amendment of the opening phrase which now reads "[t]he rules of the organization apply in the determination". This was done to make it clearer that the rules of the organization are not the exclusive basis for determining the functions of the organ or agent, a point that is made in the commentary, but which was not clear in the first reading version of the draft articles. On the one hand, the international organization should not be allowed to rely on the fact that the attribution of functions to an agent went beyond its rules to deny the attribution of the conduct of the agent to it. On the other hand, it was recognized that the rules of the organization would normally apply in the determination of the functions of its organs and agents. The shift from "shall apply to" to "apply in" is intended to indicate this nuance in the meaning of the provision.

The title of draft article **6** [5] has been changed to "Conduct of organs or agents of an international organization" which was considered clearer, and corresponds to the 2001 articles on State responsibility.

Draft article 7 [6]

Mr. Chairman,

The Drafting Committee noted that many of the comments on draft article **7** [6] were addressed to the commentaries. The Committee considered a proposal made by a State to introduce a qualification that the organs placed at the disposal of the international organization were being used to carry out its functions. The

Committee did not consider it necessary to specify this in the draft article The draft article was, accordingly, adopted in the version adopted on first reading.

The title of draft article **7** [6] was amended to read "Conduct of organs of a State or organs or agents of an international organization placed at the disposal of another international organization", in order to align it closer with the text.

Draft article 8 [7]

Mr. Chairman,

Draft article **8** [7] has been amended through the deletion of the indefinite article "an" before "agent of an international organization" so as to harmonize it with the formula adopted throughout the draft articles. The Committee further decided to replace the first reading reference to "in that capacity" with "in an official capacity and within the overall functions of that organization". The word "and" was included so as to make it clear that these are two distinct issues. This new qualifier was introduced in order to align the text with the practice of international organizations, even though there existed the concern in the Drafting Committee that this would unnecessarily limit the ability of victims to seek recourse against international organizations. On this latter point, the view of the Committee was that the question of the wrongful conduct of an international organization, if any, for failure to control its organs or agents, was a matter for draft article **6** [5].

In the concluding clause, the phrase "even though" has been changed to "even if", which is the formulation used in the corresponding article of the 2001 articles on State responsibility.

The title of draft article **8** [7] remains “Excess of authority or contravention of instructions”.

Draft article 9 [8]

Mr. Chairman,

Draft article **9** [8] concerns the question of conduct acknowledged and adopted by an international organization as its own. The provision elicited no changes other than the technical refinement of replacing the phrase “the preceding draft articles” with “draft articles 6 to 8” and deleting the second reference to “international” before “organization”, for reasons mentioned earlier.

The title of draft article **9** [8] remains “Conduct acknowledged and adopted by an international organization as its own”.

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Chapter III

Mr. Chairman,

Chapter III also continues to consist of four draft articles. The title adopted on first reading, namely “Breach of an international obligation” was retained.

Draft article 10 [9]

Mr. Chairman,

Draft article **10** [9] deals with the existence of a breach of an international obligation. As regards paragraph 1, the Drafting Committee took note of a suggestion made by an international organization that it make it clearer in the draft article that breaches of the rules of an organization are not as such breaches of international law. The Committee considered making this nuance clearer by replacing "international obligation" with "obligation under international law", but decided against it as it would have meant introducing such a change in other draft articles which could have led to unnecessary *a contrario* interpretations arising from the difference between the present draft articles and those on State responsibility. The commentary will clarify that what is meant by "international obligation" are obligations arising under international law. The Committee further focused on amending the concluding clause which in the first reading version read "regardless of its origin and character". In particular, the Committee considered the use of the pronoun "its" to be confusing, and decided to reformulate the phrase as "regardless of the origin or character of the obligation concerned". The earlier version "origin and character" has been rendered as "origin or character", so as to align with the formulation in the 2001 articles on State responsibility.

The matter was also considered in paragraph 2, where the Drafting Committee changed the phrase "breach of an international obligation" to "breach of any international obligation" so as to suggest that by no means all obligations that may arise under the rules of the organization would be international obligations. The Committee further discussed alternative formulations for the words "that may arise", including "on the basis of", "under", and "arising out of". However, it decided to retain the first reading formulation as an indication that, while the rules of the organization might not *per se* be rules of international law, they nonetheless may serve as the basis of obligations which arise under international law.

The Drafting Committee also introduced the phrase "for an international organization towards its members", after "international obligation that may arise"

as a reminder that the rules of the organization constrain the organization primarily in it relations with its members. Obligations in relation to non-members arising out of the rules of the organization are not likely to be obligations under international law. In short, the phrase serves to confirm what is also said in draft article **32** [31] (and what is implied in draft article **5**), namely that the rules of the organization cannot be relied upon as a way of justifying the non-application or modification of rules of international law which would otherwise be applicable to the organization.

The title of draft article **10** [9] remains "Existence of a breach of an international obligation".

Draft articles 11 [10], 12 [11] and 13 [12]

Mr. Chairman,

The texts and titles of draft articles **11** [10], **12** [11] and **13** [12] were adopted in the same versions as on first reading, with minor technical adjustments. In draft article **11** [10], the second "international" before "organization" was deleted, in line with the practice already described. Similarly, in draft article **12** [11], paragraph 2, the concluding reference to "the international obligation" has been replaced by "that obligation". There is also no longer a comma between the words "wrongful" and "occurs" in paragraph 1 of draft article **13** [12].

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Chapter IV

Mr. Chairman,

Chapter IV of Part One is entitled “Responsibility of an international organization in connection with the act of a State or another international organization” and is constituted of six draft articles. The Drafting Committee decided to make no changes to the texts and titles of draft articles **14** [13], **15** [14], **16** [15], **18** [17] and **19** [18] as adopted on first reading, other than a technical refinement in subparagraphs (a) of draft articles **14** [13] and **15** [14], replacing the words “that organization” with “the former organization”. Accordingly, draft article **17** [16] was the only draft article in this Chapter that was the subject of modification.

Before proceeding to draft article **17** [16], allow me to state for the record that the Drafting Committee did consider, under draft article **14** [13], the question of whether the element of intention should be added to that of “knowledge of the circumstances of the act”. The commentary to the corresponding article in the State responsibility articles makes reference to the element of intention, and the issue was whether the same thing should be done in the commentary to draft article **14** [13]. The Special Rapporteur, in the commentary to the first reading text, had declined to reproduce the reference to the criterion of intention out of concern that this would give rise to a discrepancy with the draft article, which does not include such element. While there was support in the Drafting Committee for the inclusion of the criterion of intention in the draft article, the Committee decided against doing this as it would imply a reorientation of the concept of responsibility being employed, which could also have implications for the 2001 articles on State responsibility.

Draft article 17 [16]

Mr. Chairman,

I now draw your attention to draft article **17** [16], which was the subject of some discussion in the Drafting Committee. As you can see, the provision has been significantly restructured. Before describing the draft article paragraph by paragraph, allow me to dispose of one matter. The Special Rapporteur had proposed making the provision subject to what is now draft articles **14** [13] to **16** [15] by including a phrase to that effect at the beginning of what was paragraph 1. This would serve to remove any overlap between those provisions and draft article **17** [16] (which had been pointed out in some of the comments received) and would make it clear that draft article **17** [16] was an additional basis for establishing responsibility. The Drafting Committee decided that such precision was strictly not necessary, and that it could be explained in the commentary.

The central issue for the Drafting Committee, as in the Plenary debate, was whether the provision should, in principle, extend to cover circumvention through recommendations. If you recall, the Special Rapporteur had proposed to delete paragraph 2 of the first reading text entirely, so as to limit the draft article to responsibility for binding decisions. The Committee also had before it an intermediate proposal which retained the first reading text, including paragraph 2, but deleted references to the organization incurring responsibility for the recommendations it adopts, leaving the concept of responsibility for authorizations. The Committee also had before it a proposal that included the element of a recommendation causing members to commit such an act. It, however, decided not to pursue such approach, preferring instead to base itself on the proposal to limit responsibility for non-binding acts to authorizations granted by an organization. The view of the Committee was that different organizations ascribed different meanings (and legal consequences) to the notion of "recommendations". Regardless of such variety in approaches, what mattered was whether by making a recommendation the organization was, in effect, authorizing its members to act in a particular manner. In other words, the concept of

"authorization" included within it those types of recommendations which constrained members of the organization to act in a certain manner. This will be explained further in the commentary.

Working on that understanding, the Drafting Committee adopted a provision similar to that adopted on first reading, with the key difference being that the concept of "circumvention" is given greater prominence by being located at the beginning of the formulation adopted for both paragraphs 1 and 2.

Paragraph 1, therefore, maintains the thrust of that adopted on first reading establishing international responsibility for an international organization arising from the adoption of a decision binding on its members. Paragraph 2 extends this to circumvention of an international obligation of an international organization by authorizing its members to commit the act which would be wrongful for the organization if it had committed the act. The additional concept, previously in subparagraph (b) in former paragraph 2, of the act actually having been performed, has been retained and strengthened by linking it to the authorization in the new words "and the act in question is committed because of that authorization". The idea is of abuse by the international organization of its separate legal personality.

Paragraph 3 is retained substantially in the form adopted on first reading. The only changes introduced were to reflect the members being referred to in the plural, and to delete the reference to recommendations. The Drafting Committee also decided to replace the word "directed" with "addressed", which is used in the title, so that the final clause now reads "to which the decision or authorization is addressed".

The title of draft article **17** [16] has been amended to read "Circumvention of international obligations through decisions and authorizations addressed to members", so as to more closely reflect the content of the provision. The new formula has the additional benefit of being similar to the titles for draft articles **14** [13], **15** [14] and **16** [15].

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Chapter V

Mr. Chairman,

Chapter V is the final chapter of Part One. Its title remains "Circumstances precluding wrongfulness". Of the eight draft articles in the chapter, the Drafting Committee made changes only to two. Accordingly, it adopted the texts and titles of draft articles **20** [19], **23** [22], **24** [23], **26** [25] and **27** [26] without change to the first reading version. The Drafting Committee discussed draft article **21** [20], without making changes, and modifications were introduced in draft articles **22** [21] and **25** [24].

Draft article 21 [20]

Draft article **21** [20] on self-defense was discussed at some length in the Drafting Committee, with a view to providing the Special Rapporteur with guidance for the preparation of the commentary. After considering some tentative proposals for refining the text including by replacing "constitutes" with "may be regarded as", "may amount to" and "is", the Committee decided to retain the provision as proposed on first reading, while recognizing that the situation it provided for was, to some extent, theoretical, and not analogous to that raised in the context of States. This is admitted through the inclusion in the first reading text, and retained at second reading, of the words "and to the extent that" which do not appear in the corresponding provision in the 2001 articles on State responsibility.

The title of draft article **21** [20] remains "Self-defence".

Draft article 22 [21]

Draft article **22** [21] deals with the characterization of the resort to countermeasures as a circumstance precluding wrongfulness. As in the Plenary debate, this provision was the subject of some debate in the Drafting Committee. As will be described shortly, the Committee decided to retain, in large part, the version adopted on first reading in a more elaborate manner. The main problem, which the Committee confronted, related to former paragraph 2, and in particular the possibility of the taking of countermeasures by an international organization against one of its members. The Drafting Committee accepted the working hypothesis suggested during the Plenary debate that it was possible to distinguish between countermeasures taken against a member for breaches of obligations unrelated to membership, and those against a member for obligations binding on it because of its membership, even if such distinction was not always easy to draw in practice. The focus of the Committee's consideration thus was on seeking to qualify the possibility of countermeasures taken by an international organization against its members. One of the options considered was to convert paragraph 2 into a without prejudice clause, but such proposal did not garner sufficient support within the Committee. Instead the Committee decided to structure the provision in line with the hypothesis just referred to.

Paragraph 1 establishes the general scenario of countermeasures taken against non-member States. The Drafting Committee retained the text in the version adopted on first reading.. Paragraph 1 applies subject to the exceptional rules in paragraph 2 and new paragraph 3.

Paragraph 2 covers the situation where countermeasures are taken against a member State or international organizations for the breach of an obligation unrelated to the State's or organization's membership. As a policy matter, the Drafting Committee was of the view that, even if a dispute concerned an

obligation unrelated to membership, there were institutional reasons for limiting the possibility of countermeasures, so as to preserve the relationship between the organization and its member. Paragraph 2, therefore, presents several criteria, which have been retained from the first reading text, with some drafting refinements. The criterion now found in subparagraph (a) was in the chapeau of the first reading text, and has been moved down into the list, to make the text clearer.

Paragraph 3, in turn, deals with the final scenario of countermeasures being taken against a member in response to a breach of an obligation arising as a consequence of membership. Given the legal complexity that such scenario implies, the Drafting Committee felt it necessary to limit the possibility of the taking of countermeasures in such context to only where they are expressly permitted by the rules of the organization. The Committee decided to further restrict the provision by making it clear that what is being referred to is an obligation arising for the wrongdoing member State or international organization under the rules of the organization. In such cases, whether countermeasures are possible would be a matter for the rules of the organization. If the obligation on the member arises from other rules of international law, then paragraph 2 would apply. This relationship between the two paragraphs is signified by the qualifying phrase inserted at the beginning of paragraph 2, “subject to paragraph 3”.

The title of draft article **22** [21] remains “Countermeasures”.

Draft article 25 [24]

Mr. Chairman,

Draft article **25** [24] concerns the invocation of necessity as a circumstance precluding wrongfulness. The Drafting Committee retained the first reading

formulation with refinements in subparagraphs (a) and (b) of paragraph 1. In particular, the Committee amended the scope of subparagraph (a) so as to add to the list of essential interests being safeguarded by the international organization the "interest of its member States". If you recall, the first reading version was limited to the safeguarding against a grave an imminent peril an essential interest of the international community as a whole. The Committee was of the view that the first reading version potentially excluded many international organizations whose functions did not involve protecting the interest of the international community as a whole. In addition, a comma was inserted after "international community as a whole" and the final clause of subparagraph (a) was changed from "the function to protect that interest" to "the function to protect the interest in question", by way of making the provision clearer.

A change was introduced in subparagraph (b) through the addition of the word "international" before "obligation". There was a concern in the Committee that the introduction of a reference to the interests of the members of the international organization in subparagraph (a) meant that subparagraph (b) was no longer in balance with (a). The Drafting Committee felt that making reference to an "international obligation" helped clarify that that part of the subparagraph was referring to the interests of the State or States, including non-member States, against which the circumstance precluding wrongfulness was being invoked.

The Committee further considered but rejected a proposal to also refer to the interests of the international organization itself, in subparagraph (b), on the grounds that such interests were not provided for in subparagraph (a). The rationale is that international organizations do not have "essential interests" on which they can base an invocation of necessity as a circumstance precluding wrongfulness, or on which they can rely to prevent another entity from invoking necessity against them. The Committee decided to retain this policy, which was agreed to during the first reading, since changing it would have meant broadening the concept of "essential interest".

The title of draft article **25** [24] remains “Necessity”.

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Part Three

Mr. Chairman,

I wish to now turn to Part Three of the draft articles, the title of which has been retained as “Content of the international responsibility of an international organization”. The Part is made up of three chapters.

Chapter I

Chapter I of Part Three continues to be entitled “General principles” and is constituted of six draft articles, of which the texts and titles of the first four, namely draft articles **28** [27] to **31** [30] were adopted without any change to the first reading formulation.

Draft article 31 [30]

Mr. Chairman,

As regards draft article **31** [30], the Drafting Committee considered the possibility of replacing the reference “caused by the internationally wrongful act”, with “caused by its internationally wrongful act” but decided against it for fear of inadvertently changing the concept. The Committee further agreed to reflect in the commentary the point that international organizations can negotiate bilateral

agreements to regulate the form and extent of reparation as a means of mitigating the possible impact of the requirement of full reparation.

As already mentioned, draft article **31** [30], which remains entitled "Reparation", was adopted without change.

Draft article 32 [31]

Draft article **32** [31] has its roots in the corresponding provision in the 2001 articles on State responsibility. Paragraph 1 corresponds to article 32 of the 2001 articles, and establishes the position that the responsible international organization cannot, as a general proposition, rely on its rules as a justification for failure to comply with its obligations under Part Two. The rules of the organization are not opposable to non-member States or organizations unless those third States or organizations have accepted them as governing their relations with the international organization or they apply as a matter of customary international law. Unless the latter conditions exist, the rules of the international organization cannot be relied upon to justify the breach of an international obligation owed to those entities.

The Commission had, during the first reading, accepted the view that this did not fully reflect the prevailing position and that, in the relations between the international organization and its members, the organization's rules may indeed derogate from what is provided in paragraph 1. This flows from draft article **10** [9] where it is recognized that some rules of the organization may give rise to obligations under international law. Paragraph 2, accordingly, is addressed only to the situation of the relations between the international organization and its members, and recognizes that the rules of the organization may play a role in the operation of Part Three.

During its consideration of draft article **32** [31], the Drafting Committee considered a proposal to include a general statement of principle as to the applicability of the rules of the organization corresponding to that in article 3 of the 2001 articles, but decided to consider this at a later stage. As I have already mentioned, the Committee subsequently did insert a new provision as draft article **5**, which replicated the first part of article 3 of the 2001 articles. It, however, refrained from saying anything about the characterization by the rules of the organization of an act as wrongful or not, out of recognition that international law and the rules of the international organization are to some extent intertwined in the relations between members and the organization, and that the rules of the organization could apply as part of international law.

The Drafting Committee decided to keep draft article **32** [31] as being applicable to the specific situation of the content of international responsibility as provided for in Part Three.

The Drafting Committee made no change to paragraph 1. The Committee considered a proposal to insert “as such” after “may not rely on its rules” as an indication of the nuanced role that the rules of the organization play. However, the Committee decided against doing so since it could suggest that there may be situations where the rules of the organization could apply to non-members, which is not the case.

As regards paragraph 2, the Drafting Committee decided to replace the concluding clause, which read in the first reading text “of the responsibility of the organization towards its member States and organizations”, with “to the relations between the organization and its member States and organizations”. This was done to make the provision clearer, and to convey the idea that paragraph 2 is only carving out an exception to paragraph 1 for purposes of the present Part of the draft articles.

The earlier version of the title of draft article **32** [31] was "Irrelevance of the rules of the organization". After considering various options for amending the title, the Committee settled on inverting the title so as to read "relevance" since paragraph 2 was less about the "irrelevance" of the rules and more about their "relevance" in relation to Part Three. The title of draft article **32** [31] was thus amended to read "Relevance of the rules of the organization". In doing so, it should be noted, for the record, that the Committee was not reversing the position of the State responsibility articles, but was rather reflecting the operation, in the context of the responsibility of international organizations, of the exception in paragraph 2 in relation to the general proposition in paragraph 1.

Draft article 33 [32]

Draft article **33** [32] deals with the question of the scope of international obligations set out in Part Three. The only change introduced was in paragraph 1, in the manner in which the possible groupings of States and international organizations is described. One suggestion was to render the phrase in the first reading text "to one or more other organizations, to one or more States, or to the international community as a whole" as "to a State or another international organization, to several States or international organizations, or to the international community as a whole", which is closer to the formulation in draft article **47** [46] as well as that employed in the 2001 articles on State responsibility. The Drafting Committee felt that the proposal added an unnecessary element of imprecision and preferred to work on the basis of the first reading formulation. Other ideas were to add "or combination thereof" or "singularly or jointly" to suggest that there are multiple possible combinations of groupings that are envisaged, but neither proposal garnered sufficient support in the Committee.The Committee settled for "to one or more States, to one or more other organizations, or to the international

community as a whole", which is the first reading text with the reference to States and international organizations reversed as it is the practice to refer to States first..

The title of draft article **33** [32] remains "Scope of international obligations set out in this Part".

Chapter II

Mr. Chairman,

Chapter II of Part Three, which continues to be entitled "Reparation for injury", is constituted of seven draft articles. The Drafting Committee adopted text and titles of draft articles **34** [33] to **39** [38] without change to the first reading formulation. Therefore, in this Chapter, I will only discuss draft article **40** [39], which has been modified.

Draft article 40 [39]

Draft article **40** [39] concerns the question of the fulfillment of the obligation to make reparation. If you recall, the Special Rapporteur presented a revised text in his eighth report which combined that adopted on first reading, slightly revised and presented as a new paragraph 1, together with a further text proposed during the debate on the first reading text in 2009 but which had not been adopted by the Drafting Committee. That provision was included as a new paragraph 2 in the Special Rapporteur's proposal.

The Drafting Committee noted that this course of action had been supported in the Plenary, and, therefore, agreed to work on that basis. The Committee accepted a suggestion to reverse the order of the paragraphs in order to present the obligation on the international organization first, and then draft article

39 as adopted on first reading, which deals with the obligations of members of the organization, appears now as paragraph 2.

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The title of draft article **40** [39] is “Ensuring the fulfillment of the obligation to make reparation”. This is an amended version of the first reading title. The earlier reference to “effective performance” has been replaced by “fulfillment” so as to align the title with the text of the draft article. Furthermore, the first reading phrase “obligation of reparation” has now been refined to “obligation to make reparation”.

Chapter III

Mr. Chairman,

The last chapter of Part Three is Chapter III, which continues to be entitled “Serious breaches of obligations under peremptory norms of general international law”. The texts and titles of draft articles **41** [40] and **42** [41] were adopted by the Drafting Committee without change.

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Part Four

Mr. Chairman,

I propose now to turn to Part Four of the draft articles, which remains entitled “The implementation of the international responsibility of an international organization”. The Part continues to be divided into two chapters.

Chapter I

Chapter I, which continues to be entitled “Invocation of the responsibility of an international obligation”, is constituted of 8 draft articles. The text and titles of draft articles **43** [42], **44** [43], **46** [45] and **47** [46] were adopted without change to the first reading formulations. Modifications were introduced in draft articles **45** [44], **48** [47] to **50** [49].

Draft article 45 [44]

Draft article **45** [44] deals with the admissibility of claims. The text adopted is substantially that agreed to on first reading. The only modifications made are the inclusion of the definite article “the” before “nationality of claims” at the end of the first paragraph. In the second paragraph, the reference in the first line to “[w]hen a rule requiring” has been replaced by “[w]hen the rule of”. Furthermore, the clause “provided by that organization” towards the end of paragraph 2 was deleted. The Drafting Committee considered refining that phrase to “provided by the rules of that organization”, but felt that that would be too restrictive since it is possible, for example, for an international organization to simply not assert its immunities. It is not clear that such possibility would necessarily be undertaken in accordance with the rules of the organization. At the same time, there was a concern that the reference to “provided by the rules of that organization” could be read as being discretionary which is not what is intended. The solution was to delete the reference, which also had the benefit of aligning the text with the State responsibility articles.

It should be noted that, in the case of the invocation of responsibility by a State or international organization other than an injured State or organization, under draft article **49** [48], paragraph 5, only paragraph 2 of draft article **45** [44] is

applicable. In other words, in such cases, there would be no nationality of claims requirement.

The title of draft article **45** [44] remains "Admissibility of claims".

Draft article 47 [46]

Turning to draft article **47** [46], the Committee considered proposals for refining the text by way of finding a better formula for expressing the possible combinations of States and international organizations which may be injured by the same internationally wrongful act. This included using the word "plurality" which is in the title. As already mentioned, the Committee decided not to make any changes to the text or title, noting that the question of the potential constellations of arrangements was covered by the phrase "each injured State or international organization may separately".

Draft article 48 [47]

Draft article **48** [47] deals with the situation where there exists a plurality of responsible States or international organizations. In paragraph 1, the Drafting Committee once again considered the manner in which the collectivity of entities was expressed. In this case, it recognized that the formula used in some of the previous draft articles was not appropriate here since this draft article dealt with the situation where one international organization is responsible together with one or more States or international organizations. Accordingly, it retained the formulation as adopted on first reading with the minor refinement of adding the word "international" before "organizations" in the first line, and deleting "international" before "organization" in the last line.

Regarding paragraph 2, the Committee took note of the Special Rapporteur's intention to clarify in the commentary the question of the sequencing of the invocation of subsidiary responsibility in relation to that of primary responsibility. It will be made clear that having a temporal sequence is not a rigid requirement. The Committee considered a proposal to try say as much in the text itself by replacing "has not led to reparation" with "does not lead to reparation" or "has not resulted in reparation", but decided to retain the first reading formulation.

The first reading version included a reference to what is now draft article **62** [61]. The Committee considered different formulations for that cross-reference, including "as in the case provided for in", but eventually decided to delete it since it implied that subsidiary responsibility was provided for in other draft articles. It was also not strictly necessary to provide an example in the text of the draft article, and as a general policy, the Drafting Committee preferred to avoid forward cross-references.

The title of draft article **48** [47] has been revised to now read "Responsibility of an international organization and one or more States or international organizations". This was done to more clearly align the title with the text of paragraph 1.

Draft article 49 [48]

Draft article **49** [48] concerns the question of the invocation of responsibility by a State or an international organization other than an injured State or international organization. The Drafting Committee focused its consideration on paragraph 3. It added the words "as a whole" after "international community", so as to align the text with the standard phrase "international community as a whole". The Drafting Committee further considered a proposal to word the final clause of the paragraph 3 as "and such invocation is within the

powers and functions of the international organization invoking responsibility". However, there was opposition in the Committee to introduce the concept of "powers" in the draft articles, and the Committee settled for replacing "is included among the functions" with "is within the functions", which it felt was clearer. The present formulation therefore allows an international organization which has the task to promote a certain interest to invoke the responsibility for breaches of obligations in the area covered by that interest.

As already discussed in the context of my introduction to draft article **45** [44], paragraph 5 of draft article **49** [48] limits the requirements for the invocation of responsibility by interested non-injured States or international organizations by excluding the applicability of the nationality of claims rule for such types of claims. The Drafting Committee recalled that there had been a suggestion in the Plenary to make this clearer, but considered the first reading formulation to be satisfactory, and, therefore, decided to retain paragraph 5 as adopted on first reading.

The title of draft article **49** [48] remains "Invocation of responsibility by a State or an international organization other than an injured State or international organization".

Draft article 50 [49]

Draft article **50** [49] concerns the scope of Chapter I. If you recall, the first reading version presented the provision as describing the scope of the entire Part Three. The Drafting Committee focused on whether this saving clause applied also to Chapter II of the Part, dealing with "countermeasures". The sense was that it did not, since draft article **50** [49] dealt with the entitlement to invoke the responsibility. Making it applicable to the entire Part implied a recognition of the

right of persons or entities other than a State or international organization to take countermeasures, which was not what was intended by the provision. This will be made clear in the commentary. Accordingly, the Committee decided to limit the provision by replacing "Part" with "Chapter".

The title of draft article **50** [49] was similarly modified to read "Scope of this Chapter".

Chapter II

Mr. Chairman,

Chapter II continues to be entitled "Countermeasures". It is constituted of 7 draft articles. The text and titles of draft articles **51** [50], **54** [53], **55** [54] and **56** [55] were adopted without change to the first reading formulations, except for the addition of the words "of countermeasures" in the title of draft article **54** [53], so that it now reads "Proportionality of countermeasures". Modifications were introduced in draft articles **52** [51], **53** [52] and **57** [56], which I will now discuss.

Draft article 52 [51]

Draft article **52** [51] pertains to the conditions for the taking of countermeasures by members of an international organization. The Drafting Committee modified the provision in order to align it with what was decided in connection with draft article **22** [21]. In particular, it introduced the same distinction drawn there, namely between obligations which arise generally for members of an international organization independently of the rules of the organization and those which are based on the rules of the organization. This necessitated the inclusion of an additional paragraph, with the former scenario

captured in paragraph 1, and the latter in new paragraph 2. This two-tiered arrangement is established by making paragraph 1 subject to new paragraph 2.

As regards the chapeau in paragraph 1, in addition to the introduction of the qualifying clause at the beginning already referred to, the Drafting Committee moved the reference, in the first reading version, to "under the conditions set out in the present chapter" down as new subparagraph (a) and redrafted it as "the conditions referred to in draft article 51 are met". This was done to align the text with what was adopted in draft article **22** [21].

Subparagraph (b) retains the text of former subparagraph (a).

Subparagraph (c) is based on the first reading version of subparagraph (b), but has been rewritten in order to follow the formulation adopted in paragraph 2(c) of draft article **22** [21].

As already mentioned, paragraph 2 is new. The formulation that you have before you is based on that adopted for paragraph 3 of draft article **22** [21], with some necessary adjustments.

The Drafting Committee considered different options for the title of draft article **52** [51], including "countermeasures by members of an international organization". The Committee settled for "Conditions for taking countermeasures by members of an international organization".

Draft article 53 [52]

Draft article **53** [52] concerns the types of obligations which are not affected by countermeasures. The provision was adopted substantially with the same formulation as adopted on first reading with the following modifications.

Concerning, paragraph 1, subparagraph (b), the Drafting Committee took into account the comment made by Governments and in the Plenary that the reference to "fundamental human rights" was not in line with the contemporary

practice of referring to human rights. After some discussion, the Committee decided to delete the word “fundamental”, so as to now render the phrase as “protection of human rights” on the understanding that it will be explained in the commentary that, in doing so, the Committee did not intend to widen the scope of draft article **53** [52], thereby commensurately limiting the possibility of the taking of countermeasures. Instead, it was introducing the change merely by way of resorting to the more contemporary way of referring to human rights, including in the Commission’s own work elsewhere.

Concerning paragraph 2, subparagraph (a), the Drafting Committee decided to simplify the text by replacing the phrase in the first reading text, “the injured State or international organization” with the pronoun “it”.

The Drafting Committee further considered a suggestion received from an international organization to redraft paragraph 2, subparagraph (b), so as to reflect the privileges and immunities of international organizations. It, however, declined to do so because it did not feel that it was the function of subparagraph (b) to list the types of privileges and immunities which international organizations enjoy. Rather the concern was to exclude from the ambit of countermeasures the issues for which international organizations might be most vulnerable through the taking of countermeasures. The proposed change could also not be accepted because not all international organizations falling within the scope of the draft articles enjoy privileges and immunities to the same degree. The Committee considered changing the word “any” to “the”, but decided against it since it suggested that there is a general rule that all the organs and agents enjoy immunities and privileges, which is not the case. Some organizations have no immunities at all. It will be explained in the commentary that the word “any” means wherever such privileges and immunities exist.

The only change made to subparagraph (b) was to change “agents” to “organs or agents”, as a consequence of the introduction of the new definition of “organs of an international organization” in draft article **2**.

The title of draft article **53** [52] remains "Obligations not affected by countermeasures".

Draft article 57 [56]

Draft article **57** [56] is a without prejudice clause dealing with measures taken by a State or international organization other than an injured State or organization. It finds its origin in the corresponding provision of the 2001 articles on State responsibility. The Drafting Committee focused on improving the formulation of the text without making changes in substance.

The reference in the first reading text to "is without prejudice to the right" has been refined to "does not prejudice the right". Furthermore, the words "responsibility of an international organization" now appears as "responsibility of another international organization". Similarly, the phrase "measures against the latter international organizations" has been refined to "measures against that organization". Finally, the words "injured party" are now presented as "injured State or organization". Such changes were also introduced to bring the draft article closer into line with the formulation of the corresponding provision in the 2001 articles on State responsibility.

The title of draft article **57** [56] has been amended to now read "Measures taken by States or international organizations other than an injured State or organization" to more closely track the content of the draft article.

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Part Five

Mr. Chairman,

I turn now to Part Five of the draft articles, the title of which was changed to "Responsibility of a State in connection with the conduct of an international organization". The Part contains six draft articles. The text and title of draft article **60** [59] was adopted without change. Modifications were introduced in draft articles **58** [57], **59** [58], **61** [60], **62** [61] and **63** [62], which I will now introduce.

Draft article 58 [57]

Draft article **58** [57] provides for State responsibility when the State aids or assists an international organization in the commission of an internationally wrongful act. Other than a drafting refinement to subparagraph (a) modifying "that State" to "the State", the Drafting Committee retained the text of the first reading provision as new paragraph 1 of draft article **58** [57].

The focus of the discussion in the Drafting Committee was what is now presented as a new paragraph 2. The Committee took note of the fact that several Governments had called upon the Commission to draw a clearer distinction between participation in the decision-making process within an international organization, as distinct from aiding or assisting the organization in the commission of an internationally wrongful act. While this issue was raised in the Special Rapporteur's eighth report in the context of a possible clarification in the commentary, the Committee nonetheless decided to include an indication in the text of the draft article itself.

As was done in the context of countermeasures, the Drafting Committee drew a basic conceptual distinction between member States acting *qua* members and member States acting in a capacity other than a member. It felt that the possibility of responsibility for aid or assistance in the commission of an internationally wrongful act by an international organization should be restricted to the latter scenario.

One possibility considered by the Drafting Committee was to include a general saving clause, possibly in draft articles **62** [61] or **63** [62], stating that nothing in the Part implied that the responsibility of a State arose simply because of a State's membership in the organization. However, this proposal did not find favour in the Committee since its effect on draft articles **61** [60] and **62** [61] was not clear. As a matter of presentation, the Committee preferred to deal with the issue early in Part Five so as to give an accurate presentation of the scope of draft articles **58** [57] and **59** [58], by including a second paragraph in both those draft articles.

The new paragraph 2 accordingly seeks to limit the possibility of a member State being held responsible for the aid or assistance granted to an international organization in the commission of an internationally wrongful act. Such responsibility would not arise in situations where the State is acting as a member in accordance with the rules of the organization, for example, when voting or otherwise participating in the affairs of the organization.

The commentary will make it clear that, while such restriction applies to responsibility derived from the commission of a wrongful act by the organization (i.e. in the context of aid or assistance to that organization or direction and control exercised over it), it does not affect the State's responsibility for its own actions. In other words, the provision does not mean that a State member of an Organization no longer incurs responsibility for the breach of its own international obligations arising from its participation in the activities of the organization. For example, a State voting within an organization in favour of the commission of an act which amounts to a genocide continues to be responsible under international law on its own accord. To the extent that such vote was taken in accordance with the rules of the organization, that State would not in addition be considered responsible for aiding or assisting the organization in the commission of the act in question.

Such concern about preserving the obligations of the member State under international law is captured by the formula "[a]n act of a member State…does not as such engage the international responsibility of that State" which suggests that it may do so in another capacity.

The title of draft article **58** [57] remains "Aid or assistance by a State in the commission of an internationally wrongful act by an international organization".

Draft article 59 [58]

Draft article **59** [58] concerns the question of State responsibility for direction and control exercised by a State over the commission of an internationally wrongful act. As with draft article **58** [57], the Drafting Committee retained the provision as adopted on first reading as paragraph 1, also with the technical refinement in subparagraph (a), replacing "that State" with "the State". The Committee also decided to repeat paragraph 2 from draft article **58** [57] as new paragraph 2 for draft article **59** [58], as the same considerations apply.

The title of draft article **59** [58] remains "Direction and control exercised by a State over the commission of an internationally wrongful act by an international organization".

Draft article 60 [59]

As regards draft article **60** [59], I wish to record the fact that the Drafting Committee expressly decided not to include a second paragraph along the lines of what was done in draft articles **58** [57] and **59** [58]. The Committee felt that the possibility of recognizing that coercion may be taken in accordance with the rules of an international organization was unacceptable as a matter of policy. The

provision, therefore, makes no distinction between acts of coercion undertaken qua member and those by member States acting in a different capacity.

As already indicated, the text and title of draft article **60** [59] was adopted in the same form as that adopted on first reading, with the exception of drafting refinements in subparagraph (a) to replace "that international organization" with "the coerced international organization" and in subparagraph (b) to replace "that State" with "the coercing State".

Draft article 61 [60]

Draft article **61** [60] concerns the question of the responsibility of a member State for circumvention of one of its international obligations. As you can see, the Drafting Committee adopted a reformulated version of paragraph 1.

First, the Special Rapporteur had proposed the inclusion at the beginning of a qualifying clause subjecting draft article **61** [60] to what are now draft articles **58** [57] to **60** [59], so as to limit any overlap between the provisions. However, the proposal was subsequently withdrawn as it had not garnered enough support in the Plenary. The Drafting Committee proceeded to reformulate paragraph 1 on the basis of the version adopted on first reading. In particular, the Committee decided on a formula that would move the phrase "by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations" earlier in the text.

Further changes included resorting to the word "circumvents" to replace "seeking to avoid complying with" so as to align the provision with the formulation adopted in draft article **17** [16]; and replacing the reference to "prompting" with "causing", which was considered clearer.

The Drafting Committee further considered the question of the criterion of intention. It considered a proposal to include the words "seeks to" before

"circumvent" so as to highlight the necessary intention that would be required. However, the Committee decided not to adopt such language since it was ambiguous and could be interpreted as allowing for inchoate responsibility for merely seeking to circumvent, without actually succeeding. The Committee further considered proposals for making this clearer by including the terms "intentionally", "deliberately", "purposefully" or "is able to" before "circumvents", but decided against doing so. Instead, the Committee did not include any such qualifiers so as not to be perceived as changing the concept of responsibility being employed in the draft articles. Nonetheless, it understood the requirement of intention as being implicit in the words "circumvents" and "caused". Not including one of those qualifiers further had the benefit of having a text which emphasized the commission of the act of circumvention by taking advantage of the fact that the organization has competence. This will be explained in the commentary.

No change was made to paragraph 2.

The Drafting Committee also considered a proposal to include a further paragraph along the lines of new paragraph 2, which was included in draft articles **58** [57] and **59** [58], but decided against doing so as it would limit the practical impact of draft article **61** [60].

The title of draft article **61** [60] was amended several times and now reads "Circumvention of international obligations of a State member of an international organization". This was done in order to align the title closer to the content of the draft article.

Draft article 62 [61]

Draft article 62 [61] concerns the question of the responsibility of a State member of an international organization for the internationally wrongful act of the

organization. The Drafting Committee based itself on the first reading formulation and made some amendments by way of taking into account some of the comments received.

As regards the chapeau of paragraph 1, the Drafting Committee decided, in line with what it did in previous draft articles, to delete the qualifying clause "[w]ithout prejudice to articles [58 to 61]". It recognized that this would leave a measure of overlap with those draft articles, but found this to be generally tolerable.

In subparagraph (a), the Drafting Committee took into account a recommendation that it be made clear in the text that acceptance needs to operate *vís-a-vís* the State or international organization invoking responsibility, since acceptance could be a matter internal to the organization. The Committee decided to add the phrase "towards the injured party" at the end of subparagraph (a) to clarify the point.

The Committee considered several proposals to clarify subparagraph (b). First, it considered the possibility of emphasizing the element of conduct as the basis for the reliance by saying "[i]t has by its conduct led", but decided to cover the point in the commentary. Another proposal was to replace the word "led" by "induced" or "caused", however, none of these suggestions were carried by the Committee.

With regard to paragraph 2, the Drafting Committee took note of suggestions that it be emphasized that the responsibility which was contemplated therein, namely subsidiary responsibility, was exceptional in nature. It decided to emphasize this in the text by changing the opening clause "[t]he international responsibility" to "[a]ny international responsibility". The commentary will also cover this point. The Committee further refined the text of paragraph 2 by replacing the phrase, in the English text, "which is entailed in accordance with" with "under" so as to align the English with the French text. The Drafting Committee further understood paragraph 2 as implying that the responsibility of a

member State arose in a residual manner, so as to be subsidiary to that of the international organization itself. The invocation of such responsibility takes place in accordance with draft article **48** [47], paragraph 2. That the responsibility of the international organization remains unaffected is clarified in draft article **63** [62].

The title of draft article **62** [61] has been slightly amended to read "Responsibility of a State member of an international organization for an internationally wrongful act of that organization".

Draft article 63 [62]

Draft article **63** [62] is the final draft article in Part Five, and deals with the effect of the Part.

The Drafting Committee introduced three drafting refinements to the first reading version, namely introducing the definite article "the" before "international responsibility, and the inclusion of "State or" before "other international organization" at the end, so as to align the provision with draft article **19** [18]. As a consequence of the latter inclusion of the reference to the responsibility of a State,the Committee further decided to suppress the phrase "under other provisions of these draft articles" so as to avoid the implication that State responsibility was dealt with by provisions other than those in Part Five.

The title of draft article **63** [62] remains "Effect of this Part".

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Part Six

Mr. Chairman,

I turn now to the last Part of the draft articles, namely Part Six, which continues to be entitled “General provisions”. The Drafting Committee considered a proposal to adopt the title “Miscellaneous provisions”, but decided against it. The text and titles of draft articles **65** [64] to **67** [66] were adopted without change to the first reading formulations. Modifications were introduced only in draft article **64** [63]. I will, however, also make some comments for the record on some of the issues raised in the context of draft article **67** [66].

Draft article 64 [63]

Draft article **64** [63] deals with the *lex specialis* principle. The Drafting Committee did not accept a proposal to include language to the effect that, regardless of the application of the *lex specialis* provision, there should always be a responsible subject, as it felt that such a general proposition could not be sustained. The Committee also did not accept a proposal to add a provision recognizing the principle of speciality, by requiring that the special characteristics of an organization be taken into account.

The Drafting Committee accordingly limited itself to refining the first reading text. Two modifications were introduced. The phrase “or a State for an internationally wrongful act of an international organization” is now rendered as “or of a State in connection with the conduct of an international organization”, so as to align the text with the title of Part Five. The second change was to break what was a single lengthy sentence into two sentences after the words “are governed by special rules of international law”. The second sentence deals with the rules of the organization.

The Committee considered a proposal to expand the scope of the new second sentence to indicate that it was not just the rules applicable in the relations between the organization and its members that were being considered, although it would primarily be those rules that were relevant. This would leave it open for

some rules of the organization to also apply in the relations between the organization and third States or organizations. This proposal was not, however, accepted out of concern that it would allow room for an interpretation that the rules of the international organization would always trump general rules of international law. The Committee was of the view that, to the extent that the rules of the organization were relevant in the relations with third States or organizations, this would be not *qua* special rules, but would arise either in the context of the application of general rules (for example, in the determination of the validity of consent) or where the third State or organization had accepted the rules of the organization as binding on it. In the latter case, the basis for applicability would be the acceptance by the State and not the *lex specialis* rule.

The focus then was on breaking the provision into two sentences for ease of reading, but without necessarily making any substantive changes. The formula that was agreed upon, and which is before you, uses the phrase "special rules of international law" to make it explicit that it is that quality, namely that they are rules of international law, that is significant. Furthermore the phrase "may be contained in" serves to indicate that not all such rules of the organization operate as special rules. It was further decided to refine the words "between the international organization and its members" as "between an international organization and its members".

As a consequence of this discussion, the Drafting Committee considered the possibility of including a statement of principle that an organization cannot rely upon its internal rules to avoid its international responsibility, following a similar statement contained in article 3 of the 2001 articles on State responsibility and further to its discussion in the context of draft article **32** [31]. This idea was subsequently implemented, in a revised form, as new draft article **5**, which I introduced earlier in my statement.

The title of draft article **64** [63] remains "*Lex specialis*".

Draft article 67 [66]

Draft article **67** [66] is a saving clause preserving the Charter of the United Nations. As already alluded to, the Drafting Committee decided to retain the formulation of the draft article, and its title, as adopted on first reading. It understood that the provision should not be interpreted as meaning that the United Nations, as an international organization, was exempt from the draft articles.

Furthermore, the Committee considered a proposal to include a reference to the draft articles having to be interpreted in conformity with the Charter, as can be found in the commentary to the equivalent provision in the 2001 articles on State responsibility. It, however, decided against recommending such clarification in either the provision itself or the commentary because it felt that it was easier to sustain such an assertion in the context of State responsibility than in that of the responsibility of international organizations. Contrary to States, international organizations are not capable of becoming parties to the Charter of the United Nations, and as such cannot become members of the Organization. Nor are they necessarily bound by the provisions of the Charter or even the decisions of the organs of the United Nations. The preference, therefore, was for a provision that merely preserved the Charter of the United Nations without taking a position on whether or not it is binding on international organizations generally. A proposal to make this clearer by adding the words “to any obligations arising under” before “the Charter of the United Nations”, did not succeed in the Committee, out of concern that modifying the formulation as had been adopted in the 2001 articles on State responsibility could have unintended consequences.

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Mr. Chairman,

This concludes my introduction of the second report of the Drafting Committee this year. It is my sincere hope that the Plenary will be in a position to adopt the draft articles on the responsibility of international organizations, on second reading, as presented.

Thank you.