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WORKING GROUP ON RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

Report of the Working Group

The responsibility of international organizations: scope and orientation of the study

I. INTRODUCTION

1. Following the Commission's decision to include the topic "Responsibility of international organizations" in its programme of work, the Commission, at its 2717th meeting, held on 8 May 2002, established a Working Group on Responsibility of International Organizations. At the same meeting, the Commission decided to appoint the Special Rapporteur, Mr. Giorgio Gaja, as Chairman of the Working Group. The Working Group was composed as follows: Mr. G. Gaja (Chairman), (Special Rapporteur); Mr. J.C. Baena-Soares, Mr. I. Brownlie, Mr. E. Candioti, Mr. R. Daoudi, Ms. P. Escarameia, Mr. S. Fomba, Mr. M. Kamto, Mr. J.L. Kateka, Mr. M. Koskenniemi, Mr. W. Mansfield, Mr. B.E. Simma, Mr. P. Tomka, Mr. C. Yamada and Mr. V. Kuznetsov (ex-officio).

2. The Working Group held three meetings, on 16 and 29 May and 5 June 2002, respectively.

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3. The present report is designed to facilitate deliberations that the Commission will be called to take in the plenary during the second part of the current session on the topic "Responsibility of international organizations". While in the course of the study of the topic the need may arise for choices to be reviewed, some preliminary indications on the scope of the topic and on the general orientation of the study will provide helpful guidance to the Special Rapporteur in the preparation of the reports to be discussed in future sessions.

II. THE SCOPE OF THE TOPIC: (A) THE CONCEPT OF RESPONSIBILITY

4. The Commission used the term "responsibility" in the articles on "Responsibility of States for Internationally Wrongful Acts" [hereinafter, State responsibility] with reference to the consequences under international law of internationally wrongful acts. It is to be assumed that the meaning of "responsibility" in the new topic at least comprises the same concept. Thus, the study should encompass responsibility which international organizations incur for their wrongful acts. The scope should reasonably cover also related matters which were left aside in the articles on State responsibility: for instance, as was said in paragraph (4) of the commentary on article 57, "cases where the international organization is the actor and the State is said to be responsible by virtue of its involvement in the conduct of the organization or by virtue of its membership of the organization".[1]

5. The articles on State responsibility purport to establish only rules of general international law and leave aside "conditions for the existence of an internationally wrongful act" and questions regarding "the content or implementation of the international responsibility of a State" that "are governed by special rules of international law" (art. 55). A similar approach appears to be justified with regard to international organizations. This choice would not exclude the possibility that some indications for establishing general rules may be taken from "special rules" and the respective implementing practice. Likewise, general rules of international law may be of relevance for construing "special rules" of the organization.

6. The responsibility of international organizations may arise vis-à-vis member and non-member States. In the case of non-universal international organizations, responsibility may be more likely to occur in relation to non-member States. With regard to member States, the great variety of relations existing between international organizations and their member States

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[1] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), p. 362.

and the applicability to this issue of many special rules - mostly pertaining to the relevant "rules of the organization" - in case of non-compliance of obligations by an international organization towards its member States or by the latter towards the organization will probably limit the significance of general rules in this respect. However, issues of responsibility for internationally wrongful acts should not be excluded from the study of the topic for the sole reason that they arise between an international organization and its member States.

7. Questions of responsibility of international organizations are often coupled with those concerning liability of the same organizations under international law, such as those concerning damage caused by space objects, for which international organizations may be liable according to article XXII (3) of the 1972 Convention on International Liability for Damage Caused by Space Objects and possibly also according to a parallel rule of general international law or by virtue of the operation of general principles of law. Issues of responsibility and liability are not infrequently intertwined, because damage may be caused in part by lawful activities and in part by the infringement of obligations of prevention or other obligations. However, since the Commission has made a separate topic of international liability, which is currently under examination, it seems preferable, for the time being, to defer consideration of questions of the liability of international organizations pending the outcome of the Commission's work in the context of that study, and not to consider such issues in the context of responsibility of international organizations.

III. (B) THE CONCEPT OF INTERNATIONAL ORGANIZATIONS

8. Conventions adopted under the auspices of the United Nations restrict the meaning of the term international organizations to intergovernmental organizations, implying by these organizations that States have established by means of a treaty or exceptionally, as in the case of OSCE, without a treaty. Thus, for instance, article 2 (1) (i) of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations says that "'international organization' means an intergovernmental organization". This concept undoubtedly covers most entities for which issues of responsibility under international law are likely to occur. It is to be assumed that international law endows these international organizations with legal personality because otherwise their conduct would be attributed to their members and no question of an organization's responsibility under international law would arise.

9. The definition of international organizations given above comprises entities of a quite different nature. Membership, functions, ways of deliberating and means at their disposal vary so much that with regard to responsibility it may be unreasonable to look for general rules applying for all intergovernmental organizations, especially with regard to the issue of responsibility into which States may incur for activities of the organization of which they are members. It may be necessary to devise specific rules for different categories of international organizations.

10. Some international organizations like the World Tourism Organization have as members besides States also non-State actors. The study could include questions of responsibility arising with regard also to this type of organization. The responsibility of non-State members does not need to be examined directly, but one could take it into account insofar as it affects the responsibility of member States.

11. The topic would be considerably widened if the study were to comprise also organizations that States establish under municipal laws, for example under the law of a particular State, and non-governmental organizations. Thus, it may seem preferable to leave questions of responsibility relating to this type of organization aside, at least provisionally.

IV. RELATIONS BETWEEN THE TOPIC OF RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS AND THE ARTICLES ON STATE RESPONSIBILITY

12. The draft articles on responsibility of international organizations will formally have to be an independent text from the articles on State responsibility. This would not necessarily exclude the option of making in the new text a general reference to rules adopted in the context of State responsibility and of writing specific provisions for the issues that could not adequately be dealt with by means of such a reference or also of leaving some of these issues unprejudiced. This option would have the advantage of giving the opportunity of writing a relatively short text which would highlight the specific issues. However, in so doing one would run the risk of underestimating the specific aspects of the topic, especially in those cases in which there is little practice relating to international organizations. Some matters for which the articles on State responsibility reflect rules of customary international law with regard to States may only be the object of progressive development in respect of international organizations. Whichever way of drafting is chosen, the specific aspects of the topic will have to be considered with great care.

13. The situation cannot be entirely likened to the one which occurred with regard to the law of treaties. In that context, well before the Commission completed its work with regard to international organizations a codification convention concerning treaties between States had been adopted and had entered into force; moreover, the 1986 Vienna Conference came to the conclusion that the rules governing treaties of international organizations had in most respects to be aligned with those of the 1969 Convention. The ensuing result was the textual reproduction of many provisions of this Convention by the 1986 Convention. This could not escape the criticism that the exercise had been unnecessary: it would have been generally sufficient to say that what applied to States was deemed to apply also to international organizations. In the field of responsibility a different picture emerges. The articles concerning States have been recommended to the attention of States by the General Assembly, but a decision on future action on them has been postponed. Arguably, the issues that are specific to the responsibility of international organizations are more numerous than with regard to treaties. Thus the drafting of a comprehensive text is more justified, at least for the time being, in the case of responsibility than in the case of the law of treaties.

14. Given the quality of the results of the lengthy work completed by the Commission in the year 2001 and also the need for keeping some coherence in the Commission's output, articles on State responsibility will have to be taken constantly into consideration. They should be regarded as a source of inspiration, whether or not analogous solutions are justified with regard to international organizations. The more precise identification of what is specific to international organizations as well as the developments concerning the articles on State responsibility will show whether a reference to rules applying to States could be adequately made with regard to part of the topic. If the initial work of the Commission on responsibility of international organizations addresses matters which are undoubtedly specific, the risk of having to redraft part of the text will anyway be minimized.

V. QUESTIONS OF ATTRIBUTION

15. One of the questions which have been mostly considered in practice with regard to the responsibility of international organizations concerns the attribution of wrongful conduct either to an organization or to its member States or to some of them; in certain cases attribution could conceivably be made both to an organization and to its member States. The commentary on article 57 of the articles on State responsibility noted that "[...] article 57 does not exclude from the scope of the articles any question of the responsibility of a State for its own conduct, i.e., for

conduct attributable to it under Chapter II of Part One, not being conduct performed by an organ of an international organization".[2] However, the quoted passage of the commentary does not imply that conduct taken by a State organ will be necessarily attributed to the State, as would appear from article 4. An exception is mentioned in the commentary for the case that "a State seconds officials to an international organization so that they act as organs or officials of the organization, their conduct will be attributed to the organization, not the sending State, and will fall outside the scope of the articles".[3]

16. The case in which a State organ is "lent" to an international organization is not the only one which raises the question of whether conduct of a State organ is to be attributed to the State or to the organization. One may have to consider also the cases in which the conduct of a State organ is mandated by an international organization or takes place in an area that falls within an organization's exclusive competence. For example, Annex IX of the United Nations Convention on the Law of the Sea states in article 5 (1) that an organization and its member States are required to make, when acceding to the Convention, "a declaration specifying the matters governed by this Convention in respect of which competence has been transferred to the organization by its member States which are Parties to this Convention"; according to article 6 (1), "Parties, which have competence under article 5 of this Annex shall have responsibility for failure to comply with obligations or any other violation of this Convention." There is clearly the need for a deeper study of these questions than was made at the time of writing the commentary on article 57 on State responsibility.

VI. QUESTIONS OF RESPONSIBILITY OF MEMBER STATES FOR CONDUCT THAT IS ATTRIBUTED TO AN INTERNATIONAL ORGANIZATION

17. The question whether States may be responsible for the activities of international organizations of which they are members is probably the most contentious issue of the topic under consideration. As it is partly linked to the question of attribution, it may be preferable to deal with it in immediate sequence. Some cases of member States' responsibility find a parallel in chapter IV of Part One of the articles on State responsibility. This chapter, which concerns relations between States, only considers instances in which one State aids or assists, directs and

[2] Ibid., p. 363.

[3] Ibid., p. 361.

controls, or coerces another State over the commission of an internationally wrongful act. Member States' responsibility may be engaged under further circumstances. As has already been noted, the different structure and functions of international organizations may lead to diversified solutions to the question now under consideration.

18. When States are responsible for an internationally wrongful act for which an international organization of which they are members is also responsible, it is necessary to inquire whether there is a joint or a joint and several responsibility or whether the member States' responsibility is only subsidiary.

19. One question that has given rise to practice, albeit limited, and which would probably have to be considered, concerns member States' responsibility in case of non-compliance with obligations that were undertaken by an international organization which was later dissolved. On the other hand, the question of succession between international organizations raises several issues that do not appear to fall within the topic of responsibility of international organizations and could be left aside.

VII. OTHER QUESTIONS CONCERNING THE ARISING OF RESPONSIBILITY FOR AN INTERNATIONAL ORGANIZATION

20. The articles on State responsibility provide a model for the structure of the remaining parts relating to the arising of responsibility for international organizations. One would thus successively have to consider questions relating to the breach of international obligations, to the responsibility of an organization in connection with the acts of another organization or a State and to circumstances precluding wrongfulness, including waivers as a form of consent.

21. Should one consider that the conduct of an organ of a State is attributed to the same State even when conduct is mandated by an international organization, the issue whether the organization is responsible in this case would have to be considered together with the instances of aid or assistance, direction and control, or coercion of a State by an organization over the commission of an internationally wrongful act.

VIII. QUESTIONS OF CONTENT AND IMPLEMENTATION OF INTERNATIONAL RESPONSIBILITY

22. Parts Two and Three of the articles on State responsibility only concern the content of a State's responsibility towards another State and the implementation of responsibility in the relations between States. Article 33 (2) says that Part Two "is without prejudice to any right, arising from international responsibility of a State, which may accrue directly to any person or

entity other than a State". Although the commentary on article 33 does not specifically refer to international organizations, it is clear that they may be considered entities other than States towards which a State is responsible.

23. It seems logical to extend the study to the legal consequences of internationally wrongful acts of an international organization. This is what is called "content of the international responsibility" in the articles on State responsibility. If the new draft articles follow a pattern similar to the one taken in Part Two of the articles on State responsibility, it would not be necessary to specify whether the rights corresponding to the responsible organization's obligations pertain to a State, another organization or a person or entity other than a State or organization.

24. As the new topic relates to the responsibility of international organizations, it does not include issues relating to claims that international organizations may put forward against States. However, insofar as it covers claims that international organizations may make against other organizations, some of the issues concerning claims against States would be covered if only by analogy. Implementation of an organization's responsibility would raise some specific problems if it covered also claims made by organizations. One may raise, for instance, the question whether an organization is entitled to invoke responsibility in case of infringements of obligations owed to the international community as a whole, or else whether organizations may resort to countermeasures. In the latter respect, one may also need to consider the respective roles of the organization and its member States in taking countermeasures. As has been previously noted, the solution of these questions would have implications with regard to claims that organizations may prefer against States. One would also have to consider who would be entitled to invoke responsibility on behalf of the organization. Given the complexity of some of these issues, it may be wise, at this stage, to leave open the question whether the study should include matters relating to implementation of responsibility of international organizations and, in the affirmative, whether it should consider only claims by States or also claims by international organizations.

IX. SETTLEMENT OF DISPUTES

25. The fact that the articles on State responsibility do not include provisions concerning the settlement of disputes would appear to indicate that a similar choice should be taken also with regard to the responsibility of international organizations. Should the General Assembly decide in the future to pursue the adoption of a convention for State responsibility, the issue would have

to be reviewed. However, as the draft articles on responsibility of international organizations will be formally independent, it is unlikely, but not inconceivable that the path towards the convention is taken only with regard to the latter topic. Moreover, one argument in favour of considering the settlement of disputes concerning the responsibility of international organizations derives from the widely perceived need to improve methods for settling those disputes. At this stage the question whether provisions on the settlement of disputes should be drafted is best left in abeyance, without prejudice to their inclusion or not.

X. PRACTICE TO BE TAKEN INTO CONSIDERATION

26. Some of the most well-known cases concerning the subsidiary responsibility of member States for conduct of an international organization relate to commercial contracts that the organization had concluded with private parties. The arising issues were mainly considered under municipal laws or general principles of law. This type of case raises issues that are of an entirely different nature from those pertaining to responsibility under international law: for instance, questions of the applicable law, of the existence of legislation implementing the constituent instrument of an international organization or of the organization's immunity. Thus, there would be little reason for extending the study of the responsibility of international organizations to issues of responsibility that do not arise under international law. However, the judicial or arbitral decisions in question do offer some elements of interest for the study of responsibility under international law. For instance, Lord Oliver's and Lord Templeman's opinions in the 1989 judgment by the House of Lords in *J.H. Rayner Ltd. v. Department of Trade* (81 *International Law Reports* 670) contain some incidental comments on issues pertaining to member States' responsibility under international law; moreover, arguments developed with regard to municipal laws may offer a few useful elements for an analogy. Judicial and arbitral decisions concerning commercial contracts should be considered under the latter perspective.

XI. RECOMMENDATION OF THE WORKING GROUP

27. Given the importance of having access to hitherto unpublished materials, the Working Group recommends that the Secretariat approaches international organizations with a view to collecting relevant materials, especially on questions of attribution and of responsibility of member States for conduct that is attributed to an international organization.

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