Statement by Dr. M. Gandhi, Counsellor & Legal Adviser on Agenda Item 152: Report of the International Law Commission on the work of its fifty-fifth session (Responsibility of International Organisations, Diplomatic Protection and International Liability) at the Sixth Committee of the 58th Session of the UN General Assembly on October 29, 2003

Mr. Chairman,

At the outset, my delegation would like to congratulate Mr. Enrique Candioti, Chairman of the International Law Commission, for his introduction of the report on the work of the International Law Commission at its 55th Session. Let me also express our appreciation to the Special Rapporteurs, Prof. Giorgio Gaja, Mr.John Dugard and Dr. P.S Rao, for the progress achieved in consideration of the subjects, namely Responsibility of international organizations, Diplomatic protection, and International liability in case of loss from transboundary harm arising out of hazardous activities.

Mr. Chairman,

I should like to offer my comments on the first report on the topic of responsibility of international organisations. This report proposed three draft articles which were considered by the Commission and referred to the drafting committee. The Commission adopted articles 1 to 3 as recommended by the drafting committee together with the commentaries. We thank Prof. Gaja for providing a very useful background for consideration of the topic, which clarifies the reasoning behind the propositions developed by him and reflected in the draft articles.

We agree with Prof. Gaja that this topic is a sequel to the draft articles on Responsibility of States for Internationally Wrongful Acts.

With regard to its scope, we agree with the understanding that the definitions in the 1975, 1978 and 1986 Vienna Conventions were specific to the scope of those Conventions and a more precise definition needs to be developed for the present subject. In our view, any definition of international organisation essentially includes inter-governmental organisations, although non-state entities like nongovernmental organisations could also become members of

international organizations in some cases. In this context, we consider appropriate the suggestion of the Rapporteur to exclude non-governmental organisations from the scope of the topic as they do not perform any governmental functions.

We agree that it is the function of an international organisation rather than the fact of existence of a constituent instrument by which it is established, that should form the basis for its identification. The Rapporteur has rightly pointed out that it is more important that the organisation should be exercising functions as a legal entity in its own right and under its own responsibility, independently and separately from its members, so that the obligations and the wrongfulness of any impugned conduct could be attributed to that organisation.

At this stage, we would also like to indicate our agreement to the recommendation made by the Rapporteur that the present study should only be concerned with responsibility under international law and it need not deal with issues concerning international liability of international organisations, in so far as they involve issues relating to civil liability.

As regards the texts of the adopted articles, Article 1 identifies all the three elements which are essential for an organisation to be considered within the scope of this topic like the mode of establishment, the legal personality of the organisation and the membership of the organisation. Article 2 indicates that such treaties or instruments should be governed by international law. We understand that this formulation comes from the Vienna Convention. Article 3 on general principles reproduces Articles 1and 2 on State Responsibility, with only one change: replacing the word "state" by "international organisation". The text as adopted by the Drafting Committee for Articles 1, 2 and 3 therefore, is acceptable to my delegation.

Mr. Chairman,

With regard to the topic of Diplomatic Protection, my delegation had offered detailed comments on various aspects of this question during the last session of the General Assembly. We are happy to note that the Special Rapporteur plans to submit his final report on Diplomatic Protection sometime next year. We will offer our further comments on this subject at an appropriate time.

On the issue of International Liability for injurious consequences arising out of acts not prohibited by international law, we commend the Special Rapporteur, Dr. P.S. Rao, for his detailed report, which provides an in-depth analysis of the various regional and sectoral regimes of liability, considering the inherent difficulties of the subject that has to accommodate different interests of States.

In our view, the scope of the topic and the triggering mechanism should be the same as that of 'prevention', as both prevention and liability for allocation of loss are related and are sub-topics of the larger subject "International liability for injurious consequences arising out of acts not prohibited under international law".

Mr. Chairman,

To address international liability for injurious consequences arising out of acts not prohibited by international law, States generally prefer civil liability regimes which are largely sectoral in nature, depending upon the nature of activity involved. However, the merit of having a strict liability regime for certain selected hazardous activities cannot be over-emphasised. The discussions in the Commission on a multi-tiered approach to liability, including payment of residual compensation by States, appear to be interesting. However, it must be remembered that not all States authorising lawful hazardous activities, have the means of paying residual compensation.

It should be borne in mind that the work of the Commission on allocation of loss suffered by innocent victims involves a fine balancing act between loss allocation to the victim of transboundary harm and the settled right of the State to claim reparation under rules of State responsibility. In this context, the recommendation of the Special Rapporteur in his first report that States should have the flexibility to develop schemes of liability to suit their particular needs is of great use. In our view, the model of loss allocation proposed by the Commission should be of a general and residual nature, not impinging upon the remedies available at the domestic level or under rules of private international law.

We also support the recommendation of the Rapporteur that primary liability should be that of the operator. Development of State liability of residual character in certain well defined cases may be of some use, more particularly where the operator's liability is limited on account of fulfilling insurance needs. We also believe that State liability is largely an exception to state responsibility reflected in very few Convention regimes, such as those governing space activities.

The establishment of a Working Group to fine-tune some of the ideas in the Special Rapporteur's first report is a welcome move and it is hoped that the inputs from the Working Group and the further work of the Special Rapporteur will contribute to the early completion of the work on this very important subject.

Thank you, Mr. Chairman.

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