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Summary record of the 2840th meeting

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2840th MEETING

Wednesday, 18 May 2005, at 10 a.m.

Chairperson: Mr. Djamchid MOMTAZ

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Yamada.

Effects of armed conflicts on treaties (*concluded*) (A/CN.4/552 and A/CN.4/550 and Corr.1–2)

[Agenda item 8]

First report of the Special Rapporteur (*concluded*)

1. Mr. BROWNLIE (Special Rapporteur), summing up the discussion on the item, began by reiterating that the overall goals of his first report (A/CN.4/552) had been, first, to clarify the legal position on armed conflict and its effect on treaties; second, to promote the security of legal relations between States; and, third, to increase access to and utilization of State practice.

2. The method used had been to provide a complete package of formulations, without prejudice to the final form, on the working assumption that a set of draft articles was the best way forward, given the nature of the subject matter. The use of draft articles should not, however, lead to the assumption that he had been rushing to judgment. It had simply seemed to be a useful vehicle for presenting a comprehensive scheme. It had not been intended to produce a definitive and dogmatic set of solutions. The normative form was accompanied by elements of open-mindedness and left issues open for the formation of collective opinion. Some of the articles were expository in character, and that in itself was a strong reason for not yet resorting to the Drafting Committee. The draft articles clearly had a provisional character and a practical purpose, namely, to elicit information and opinions from Governments. The need for evidence of State practice was clear enough, but practice and opinion could be collected more effectively if Governments were presented with a relatively comprehensive package of draft articles.

3. On sources, he acknowledged that more reference to doctrine was called for. Because he had been writing a report, rather than a learned article, he had not recorded all the work done, for example his consultation of Spanish-language sources. He would welcome assistance from members with the literatures with whose language he was not familiar. Mr. Economides had drawn attention to the work of the famous Greek scholar of international law, Professor Constantin Eustathiades, and Mr. Kolodkin had referred to items from the Russian literature, but the German and Polish classics—for instance, the work of Ludwik Ehrlich—remained unplumbed.

4. Turning to the subject of municipal court decisions, he noted that the laconic style he had adopted for the report had apparently led to a misunderstanding. He had taken the view, not that municipal cases were of no value, but that they tended to be contradictory. In seeking evidence of international law, one had to distinguish between those municipal decisions in which the court actually adverted to public international law as applicable law and those in which the court was approaching legal problems from the standpoint of domestic law exclusively. The Codification Division had now produced a collection of municipal decisions as a background document for the exclusive use of the Commission.

5. More examples of State practice, especially recent practice, were clearly needed. Such material called for careful evaluation, however, to see whether the specific point of law of interest to the Commission was actually addressed. The decisions of international tribunals also required careful assessment. Often, when analysed carefully, they proved not to be very helpful. For example, in the legal relations between the Islamic Republic of Iran and the United States, whether before the Iran–United States Claims Tribunal or the ICJ, it was generally agreed that the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran was still in force,[1] and that the real issue hinged on its interpretation and application. While the way the two States behaved before international tribunals was of interest, the decisions in the relevant cases, such as the *Oil Platforms* case, were not very helpful. As to the *Military and Paramilitary Activities in and against Nicaragua* case, astonishing as it might seem, the fact of the matter was that Nicaragua and the United States had never been at war and had maintained diplomatic relations throughout the period, so that the precise point of law that the Commission was looking for had never arisen.

6. On the question of scope, a number of members had adverted to the need to include treaties with organizations. His own assumption had been that there were enough problems to solve already; he was not certain that the question fell within the Commission's mandate; and he was also concerned about possible overlaps with the work of other Special Rapporteurs. Despite those doubts, he would not seek to oppose the general opinion. No doubt the issue would be included in any questionnaire that might be addressed to Governments.

7. The question of the relation of the draft articles to other areas of international law needed to be seen as a general question. The specific problem in each case was the need to avoid grafting other subjects onto the draft without good cause. One specific instance was the legality of the use of force. Unnecessary excursions into the legal position on that point, to which he would revert in due course, had to be avoided. A second case was the proviso in article 13 that the draft was without prejudice to

[1] Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran (Tehran, 15 August 1955), United Nations, *Treaty Series*, vol. 284, No. 4132, p. 93.

the termination or suspension of treaties as a consequence of the four events or situations enumerated. He continued to believe that that proviso was sufficient. Admittedly, there was some overlap, but he did not see that this mattered. There were many situations in both municipal and international law in which a single subject lent itself to multiple classifications. In addition, if the Commission began trying to encroach upon certain areas of the ordinary law of treaties, serious problems of compatibility with the 1969 Vienna Convention would arise.

8. A third case was that of *jus cogens*. He wondered if it was desirable to embark upon the codification of *jus cogens* as a by-product of the work on the topic. While a proviso might be included on that point, he did not think that would be a very advisable or elegant solution. In addition, one would have to identify which principles of *jus cogens* were involved.

9. A fourth question concerned the relevance of principles of State responsibility. They certainly stood in the background to the law of treaties, but they were not really part of the present project. In the general context of relations to other areas of the law, the policy aims should be the avoidance of confusion and unjustifiable distraction from the Commission's main purposes.

10. A number of members had suggested that the separability of treaty provisions should be given a clearer profile. Article 44 of the 1969 Vienna Convention was expressly concerned with that subject, which at present was merely alluded to in draft article 8. It might ultimately be made part of a provision on the consequences of the incidence of armed conflict.

11. On the central question of intention, which related primarily to draft articles 4, 7 and 9, members had indicated major concerns and referred to the familiar problems of proof. It was his own intention to produce a much fuller examination of those problems in a second report. There was a clear need for fuller treatment of intention, but a sense of proportion was also needed. No member had proposed replacing intention by some other criterion. Mr. Pellet had stated that he was not hostile to the principle of intention as such, and Mr. Koskenniemi had described intention as an elusive or vague criterion, but had then relented somewhat and declared himself less critical of intent, because it left room for contextual elements and flexibility. Mr. Pellet and others had seen the object and purpose of the treaty as a better guide than the criterion of intention *per se*. Mr. Dugard had suggested that articles 4 and 9 should include a reference to the nature of the treaty. He would take all those views carefully into account in any future draft. There was, however, no simple answer to the problem of proving intention. In the first place, the concept of intention would not go away: for better or worse, it was the basis of international agreements, the law of contract, the law of trusts and the interpretation and application of legislation. It was often a construct, but it provided the necessary force field within which decision makers could design solutions, as in the *Gabčíkovo-Nagymaros Project* case.

12. Secondly, as Mr. Pambou-Tchivounda had pointed out, the elements of intention relating to draft article 4 were complex. Obviously, the nature and extent of the conflict in question were necessary criteria, because the application of the criterion of intention was not an abstract process, but contextual. Everyone seemed to agree on that, and it was difficult to go along with those members who insisted that the nature of the armed conflict had nothing to do with intention.

13. The function of article 7 had elicited a variety of views. Some had considered that the use of a presumption was very problematic. Others, including Mr. Fomba and Mr. Comissário Afonso, considered the criterion of object and purpose, as deployed in article 7, to be a useful tool.

14. Turning to individual articles, he said that draft article 1, on scope, had attracted two types of comments: first, that it should refer to treaties with organizations, and secondly, that it should include treaties that had not yet entered into force. He had no problem with the latter suggestion and had already addressed the former point.

15. In the commentary to draft article 2 (paragraphs 17 and 18 of his report), he had suggested that the Commission should decide whether to include non-international armed conflicts, and the great majority of members had favoured such inclusion. Draft article 2 as presently worded did not refer to that distinction, as Mr. Pellet had pointed out. Mr. Matheson had expressed the opinion that the Commission should not attempt to redefine the concept of armed conflict and favoured a simpler statement to the effect that the articles applied to armed conflict, whether or not there was a declaration of war.

16. He himself was not a very warm supporter of draft article 3, as could be seen from paragraph 28 of his report. In any event, it was proposed that the locution "*ipso facto*" be replaced by "necessarily". Ultimately, draft article 3, with improved wording, should probably be retained. A number of members considered it to be the point of departure of the whole draft. Mr. Kateka had supported it but thought it should be shortened, and Mr. Candioti had pointed out that it stated the basic principle of continuity.

17. On draft article 4, two points should be stressed. First, the relation between draft articles 3 and 4 required more explanation: there might be a good case for amalgamating the two. Secondly, draft article 4 needed to be developed further, with particular reference to the effects of termination or suspension, a point made by Mr. Pambou-Tchivounda.

18. Draft article 5, on express provisions on the operation of treaties, had been uncontroversial. It was complementary to draft article 3. Mr. Matheson had pointed out that it should be included for the sake of clarity. Ms. Xue had questioned the use of the word "lawful" in relation to agreements between States that were already in a situation of armed conflict. There were, however, interesting situations when States were at war yet made special agreements that purported to modify the application of the law of war. He had included the term "lawful" in an attempt to cover such situations, but he now felt that that attempt had not been very successful. In a future draft he would

elaborate the commentary to draft article 5 to explain the nature of the problem addressed.

19. Draft article 6 concerned treaties relating to the occasion for resort to armed conflict. In principle, it was complementary to the principle of continuity formulated in draft article 3. It had, however, proved to be problematic. Its history was quite simple: in the course of his research he had learned that certain authorities, including Hall and, more recently, Briggs, held that in all cases in which war was caused by differences as to the meaning of a treaty, the treaty must be taken to be annulled. He himself found it unreasonable that a treaty which stood in the background to an armed conflict and which was later the subject of some legal process should be assumed to be annulled. In retrospect, however, he felt that draft article 6 was redundant in view of the earlier provisions in the draft. He had included it as a way of removing detritus from the past, but as Mr. Matheson and Ms. Xue had pointed out, it was not needed. Mr. Sreenivasa Rao had said that draft article 6 was confusing: the effects of the armed conflict could occur at several levels. He acknowledged that further research was needed on the subject in general and that the commentary should be replaced with more apposite material. Neither of the two decisions referred to in paragraph 61 of the report truly illustrated the principle with which he was concerned. More relevant was a decision not cited, namely, the decision of *the Eritrea–Ethiopia Boundary Commission* regarding the delimitation of the border, dated 13 April 2002.[2]

20. In principle, draft article 7, which had attracted a great deal of comment, was a corollary of draft article 4, but that connection was not properly spelled out in the commentary. The content was intended to be tentative and expository. Moreover, taking a strict view, the draft article was superfluous as the principle of intention had already been put in place in draft article 4. However, as was pointed out in paragraph 62 of his report, a major aspect of the treatment in the literature was the indication of categories of treaty in order to identify types of treaty which were in principle not susceptible to suspension or termination in case of armed conflict. Draft article 7 was thus not an invention: many of the categories therein were a familiar feature of the existing literature.

21. The response to draft article 7 had been very varied: some members had accorded it some sceptical acceptance, others wanted new categories of treaties to be included—for example, Mr. Addo had suggested the inclusion of treaties governing intergovernmental debt. Some, like Mr. Pellet, thought the draft article was not based on intention. Mr. Koskenniemi had thought the list worthwhile but had made the logical point that if one knew what the intention was, no list was needed at all. Mr. Matheson had thought that identifying whole categories of treaties was problematic, and Ms. Escarameia had emphasized the contextual aspect of the operation of draft article 7 but had not been hostile to the article. On a rough count, there seemed to be about 11 supporters and 3 critics of draft article 7.

[2] The text of the decision is annexed to the "Letter dated 15 April 2002 from the Secretary-General to the President of the Security Council" (S/2002/423).

22. In conclusion, on draft article 7: it was, in the first place, expository in character and thus provisional; secondly, it was intended only to create a rebuttable presumption; and lastly, several categories of treaties were to be distinguished, as they had a firm base in State practice—treaties creating a permanent regime (paras. 68–71); treaties of friendship, commerce and navigation (paras. 77–79); and multilateral law-making treaties (paras. 101–104). Mr. Matheson had pointed out that it was difficult to define the latter category, but a number of decision makers, including in municipal decisions, took the view that such treaties were not automatically affected by armed conflict.

23. Draft article 8 was unproblematic, and draft article 9 was ancillary to the purposes of article 4. Draft article 10, which dealt with the legality of the conduct of the parties, was probably the most provocative provision of all. The provision had attracted justified criticism, and stood in need of amendment. In his view, it should take the form of a proviso in general terms, referring to the right of individual or collective self-defence. He was still a little uneasy about that proposal, however, because if States reserved the right of individual or collective self-defence, it did not automatically follow that the States concerned could use that reservation as a basis for suspending or terminating treaties, unless there was some sort of legal causal connection which necessitated suspension or termination. The Commission had not yet taken such problems into account.

24. The proviso contained in draft article 11 was necessary, although it might be combined with the proviso in article 10 concerning the Charter of the United Nations. Draft article 12 had not attracted any criticism. Draft article 13 seemed to enjoy general support; he had suggested that the Commission should await the response of States to that provision. Draft article 14 was included for the sake of clarity and to complete the picture.

25. A few further issues of principle and policy remained. The first concerned what might be called the applicable *lex specialis*. Mr. Matheson had drawn attention to the need clearly to state, preferably in the articles themselves, the principle enunciated by the ICJ in its advisory opinion in the *Legality of the Threat or Use of Nuclear Weapons* case, in which it had found that certain human rights and environmental principles did not cease in time of armed conflict, but that their application was determined by "the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities" (para. 25 of the advisory opinion).

26. The second general issue of principle was the role of third parties, and especially the relations of third parties *inter se*. Article 3 raised the question whether the same concept should apply to the operation of treaties between one third party and another, a problem adverted to by Mr. Matheson. Mr. Gaja, too, had indicated that the issue called for further examination. The distinction between third party relations and relations between the parties to the conflict was significant, but only in the framework of the criterion of intention, which would govern relations between belligerents and neutrals. That point applied both to article 3 and to article 4, but, as Mr. Gaja had proposed,

the practice should be reviewed to see whether different solutions were possible. Mr. Pellet had also pressed for more emphasis on the question.

27. The last issue concerned the distinction between bilateral and multilateral treaties, which was discussed in paragraphs 51 and 52 of the report. That question had not elicited much comment or discussion. The principle of intention appeared to provide the general criterion, and there seemed to be no good case for seeking to design special criteria for the two categories. As might be expected, it was the particular context that mattered.

28. In sum, there seemed to be considerable interest in the subject and a general feeling of optimism in the Commission. The discussions had attracted contributions from 24 speakers and the Chairperson, and he was very grateful to members for their helpful comments.

29. As to the way forward, his own preference would be to prepare a second report in January 2006 in the light of the debate during the current session and, he hoped, the comments of Governments. A working group would be of limited utility at the present early stage.

30. Mr. PELLET pointed out that he, along with Mr. Koskenniemi and a number of other members, had not expressed a view on individual articles, because he believed that it was first necessary to explore questions of principle in greater depth. That did not imply that he endorsed the articles. There was only one article which he could support; all the others posed problems for him. He hoped that the second report would dissect the problems and not simply rehash the contents of the first, and that it would not again include a complete set of draft articles. The time had come to proceed slowly, step by step and problem by problem.

31. Ms. ESCARAMEIA asked whether the Special Rapporteur intended to draft the questionnaire for States without assistance, or whether a working group should be established for that purpose.

32. Mr. ECONOMIDES said that the Commission's task was one of codification and progressive development. Codification required it to focus on existing customary rules and possibly on other elements, such as doctrine and, in particular, practice. In the current case, however, the Special Rapporteur had not attempted to undertake a codification on the basis of existing customary law governing the effects of armed conflicts on treaties. Everyone agreed that the Charter of the United Nations was customary law and constituted *jus cogens*. The Charter pointed to three conclusions not reflected in the Special Rapporteur's report: first, that international armed conflicts were *ipso facto* illegal; secondly, that aggression was prohibited; and thirdly, that the State which exercised its right of self-defence had the sympathy of the international community as a whole and must be assisted in every way possible, *inter alia*, by the Security Council. Draft article 10 referred instead to the general law on legality; but that legality did not exist, and the Commission must bring out the obligations which stemmed from the Charter. The Special Rapporteur's plan to deal with the problem by including a proviso or a reference to the right of collective security would not suit the purpose. Instead, the Commission must proceed as it had in article 41 of the draft articles on responsibility of States for internationally wrongful acts, which contained specific obligations in the form of substantive rules, and the sole relevant rule in the current case was that a distinction must be drawn between the aggressor State and the State that exercised its right of self-defence.[3] The Commission must adopt the distinction made by the Institute of International Law in its resolution II/1985,[4] attempting to improve upon it as much as possible. Otherwise, it would give the impression that it was out of step with the times.

33. Mr. PAMBOU-TCHIVOUNDA supported Ms. Escarameia's suggestion that a working group should be established to draft a questionnaire. He would be pleased to take part in the work of such a group. He welcomed the comments by Mr. Economides, especially with regard to the need to have recourse to the resolution of the Institute of International Law. However, it must be borne in mind that the Institute had been engaged in what might be termed "doctrinal codification", whereas the Commission dealt with positive law. It must therefore not appear to be merely repeating the Institute's ideas, but must put the resolution of the Institute of International Law to good use.

34. Mr. BROWNLIE (Special Rapporteur) said he had been working on the assumption that at some point a questionnaire would be prepared to elicit the views of Governments in an organized way, rather than waiting for their more spontaneous reactions, if any. While he was open-minded on how that was to be done, the idea of having a working group for that sole purpose seemed to him to be top-heavy. Obviously, some sensible mechanism was needed. Perhaps the task of preparing a questionnaire could be carried out in the second part of the current session.

35. On the comment by Mr. Pambou-Tchivounda, for the Commission to seek to codify the law relating to the use of force would be the worst possible approach, because that was not part of the Commission's mandate, and it would also cause serious confusion by giving the impression that the Commission thought that those principles were not well settled. That was why a proviso relating to Article 51 of the Charter was the obvious way of dealing with the problem. Some other issues were involved, such as the relationship between the exercise of the right of self-defence and the treaty relations in question, which was a problem of causation.

36. Mr. ECONOMIDES said that he had never called for a codification of the law on the use of force or even for an attempt to analyse or reproduce it. The point he had made was that the Commission was under an obligation to identify the consequences of the illegal character of an international armed conflict for the suspension or termination of treaties. Did the aggressor State have the right, having unleashed a war of aggression, to suspend

[3] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 113–114.

[4] See 2834th meeting, footnote 7.

or terminate any international treaty which was not to its liking? In his view, the answer was a categorical "no", and the Institute of International Law thought so too. Did the State that exercised its right of self-defence have the right to suspend or terminate certain treaties which were incompatible with the exercise of the right of self-defence? The answer was a categorical "yes". That was the difference.

37. Mr. PAMBOU-TCHIVOUNDA said he had simply wanted to stress the difference between doctrinal codification, which was a task for academics, and the codification of positive law, which was a task for the Commission. In some areas, the two exercises could borrow from each other. The Special Rapporteur had quite misunderstood the point he was making, which was that the Commission should build on the resolution II/1985 of the Institute of International Law.

38. Mr. DUGARD said he tended to agree with the Special Rapporteur on the relationship between the draft articles and the use of force. However, there were clearly differences of opinion on the subject. Mr. Economides had forcefully drawn attention to another perspective, one which required consideration at an early stage of the Commission's work. It might be helpful to establish a working group to discuss the issue; otherwise, there was a danger that the Special Rapporteur might prepare a second set of draft articles in which he simply repeated the position he had adopted in his first report. As the Commission's agenda for its current session was not as full as it was likely to be in 2006, it might be useful to resolve the issue at the current session in a working group.

39. Mr. CHEE said that there were differences between the provisions of the Charter and State practice with regard to the exercise of the use of force. Pursuant to Article 51 of the Charter, force could be used, pending a Security Council decision. Thus the question whether an action was legal or illegal was currently decided by the Security Council. In using the wording "all measures as appropriate", Security Council resolutions seemed to go beyond what the Charter prescribed. The whole concept of the use of force should be examined.

40. Mr. BROWNLIE (Special Rapporteur) said he was somewhat surprised at Mr. Dugard's assumption that his second report would simply repeat the drafting of article 10. He had made it clear on a number of occasions that article 10 had been meant to elicit comments, as indeed it had. It was highly unlikely that he would leave the provision unchanged. Indeed, he had recently stated that he would amend it. Moreover, he had made a point of including in his report the three relevant articles of resolution II/1985 of the Institute of International Law (para. 123). Having been a member of that body for nearly 30 years, he was well aware of its activities, and he was entirely happy to use its material.

41. The CHAIRPERSON pointed out that the Special Rapporteur had full latitude to prepare the questionnaire to be addressed to States, and that the Secretariat was at his disposal to assist him in that task.

Responsibility of international organizations (*continued*) (A/CN.4/549 and Add.1, sect. A, A/CN.4/547, A/CN.4/553, A/CN.4/556, A/CN.4/L.666/Rev.1)

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

42. Mr. PELLET said the Special Rapporteur had once again submitted a dense and comprehensive report which, although at times somewhat allusive, was both thought-provoking and, overall, persuasive. Nevertheless, he wished to raise one important point on which he disagreed with the Special Rapporteur before entering into a discussion of the draft articles themselves and the reasoning which underlay them.

43. He did not agree with the Special Rapporteur's wording of draft article 8, paragraph 2. Paragraph 1 stated that "[t]here [was] a breach of an international obligation by an international organization when an act of that international organization [was] not in conformity with what was required of it by that obligation, regardless of its origin and character". Paragraph 2 stated that paragraph 1 also applied "in principle" to the breach of an obligation set by a rule of the organization. He did not understand why the Special Rapporteur had chosen to include the words "in principle". In the first place, he did not find it satisfactory from a functional point of view. The draft articles should enlighten States and international organizations concerning ways in which international responsibility might arise for them. The words "in principle" alerted them to the existence of a problem, but provided no explanation of what the problem was or of how they should deal with it.

44. That problem had been illustrated by the Special Rapporteur in the first sentence of paragraph 22 of his comments: if an organization failed to apply its own rules, on which States could count, then its responsibility was incurred, unless there were special rules which were unique to the organization, in which case member States, though not third States, would not be able to rely on a wrongful act. But that exception was covered by paragraph 23 of the report, in which the Special Rapporteur announced his intention of submitting a draft covering the case of special rules concerning specific treatment of breaches of obligations, including with regard to the question of the existence of a breach. He did not know if any concrete cases of such a circumstance had yet arisen, but he felt it was certainly a wise precaution on the part of the Special Rapporteur to provide for such a possibility. It should be mentioned somewhere that, like the draft articles on the responsibility of States for internationally wrongful acts, the present draft articles were residual in character.

45. If that was in fact the situation referred to by the words "in principle", they were superfluous, since the matter could be dealt with in the future general clause to be drafted; otherwise, every draft article would have to state that the rules would apply "in principle" unless there were special rules which took precedence over the general rules.

46. However, that was not the only meaning that the Special Rapporteur seemed to attribute to the words "in principle", to judge from the last sentence of paragraph 22 of his report, according to which "the wording of the paragraph should be flexible enough to allow exceptions with regard to those organizations whose rules [could] no longer be regarded as part of international law". He feared that was a reference to international integration organizations, in particular the European Union. That was confirmed by the Special Rapporteur's reference in paragraph 21 to the *Costa* v. *E.N.E.L.* case, in which the Court of Justice of the European Communities had stated that "the EEC Treaty has created its own legal system" (p. 593), overlooking the fact that in an earlier judgment it had found that the European Community legal system was a new legal system of international law, grounded in a treaty, which formed the basis for its existence (*Van Gend and Loos*, p. 12). That would continue to be the case if the European Constitution, which was also a treaty, entered into force. Theoretical discussions on such systems, although important, would not help settle the problem that concerned him.

47. For the purposes of article 8, a distinction must be made between the existence of a breach of an international obligation *vis-à-vis* the member States of an organization and *vis-à-vis* third States. Regardless of the nature of the rules of the organization or of the organization itself, third States were obviously not bound by those rules; and if they were entitled to count on those rules being respected, it was on the basis of a commitment made by the organization to them, whether in a treaty, in a deliberate unilateral act, or by estoppel, but certainly not because the rules of the organization had any particular value *vis-à-vis* third States; they were *res inter alios acta*.

48. In the case of member States of the organization, the nature of the internal rules of the organization was again of little consequence, but for other reasons. Either the principle stated in draft article 8, paragraph 2, applied without exceptions, in which case the "in principle" was superfluous, or the internal rules in question did not apply because the relations between the organization and its member States were governed by special rules, a case which would be covered by the "without prejudice" clause envisaged by the Special Rapporteur for submission at a later date and which made the words "in principle" not only superfluous but also ambiguous.

49. It would be a mistake for the Commission to attempt to preserve the specificity of the internal rules of the European Union in its draft articles. Of course, Community law existed and constituted a legal system, as did those of all other international organizations; it obviously exhibited many original features as compared to general international law. It was, however, the latter that the Commission was mandated to progressively develop and codify. The relations between the European Union and non-member States, like those of other international organizations, were subject to the rules of general international law, which was flexible enough to allow such organizations to organize their relationship with their member States as they wished. The draft articles must treat the European Union and similar organizations like any other international organization, on the understanding that such organizations must be allowed to regulate questions involving responsibility in their internal law as they wished.

50. The problems posed by the inclusion of the words "in principle" in draft article 8, paragraph 2, had seemed important enough to dwell upon at some length. His remaining comments had less to do with the wording of the draft articles themselves than with the Special Rapporteur's reasoning, as explained in his comments. He hoped the Special Rapporteur would take his remarks into account when drafting his commentary to the articles.

51. He did not reproach the Special Rapporteur for his decision to use the 2001 articles on the responsibility of States for internationally wrongful acts as a starting point, departing from the text of those articles as necessary. That approach had its advantages, not least the fact that the Commission would not have to have to start again from square one in drafting the present articles. At times, however, the Special Rapporteur underestimated the differences between his own topic and the topic of the responsibility of States. For example, in paragraphs 8 and 9 of his report, the Special Rapporteur stated that, as in the case of States, difficulties with compliance by international organizations with their international obligations might be due to the political decision-making process. There was, however, a significant difference: in the case of international organizations, the persons or organs involved in the political decision-making process were themselves subjects of international law—in most cases, States—and not subjects of internal law. Although it might conceivably be possible to transpose the reasoning behind the articles on the responsibility of States, it was not enough simply to say that the problem was the same, even if the end result was the same.

52. Likewise, it was perhaps not necessary to specify in the draft articles that an international organization was responsible at the international level for compliance with the obligations it had assumed even where it met such obligations through the intermediary of its member States, as was pointed out by the Special Rapporteur in paragraph 15 of his report. There again, however, it must be borne in mind that the context was very different from that of the articles on the responsibility of States, because the actors responsible for compliance with the obligation were themselves subjects of international law.

53. The Special Rapporteur had a regrettable tendency to put off consideration of certain problems. In paragraph 14 of his report, for example, the Special Rapporteur cited the judgment of the Court of Justice of the European Communities in the *European Parliament* v. *Council of the European Union* case, which had found that the European Community and its member States were jointly liable to the ACP States for the fulfilment of every obligation arising from the commitments undertaken in the Fourth ACP–EEC Lomé Convention of 15 December 1989 (pp. I-661–I-662 of the judgement). In paragraph 15 of his report, the Special Rapporteur said that such cases did not need to be taken into account in the draft articles; no doubt because he felt that they could be addressed when dealing with the issue of implementation of responsibility. Although it was certainly at that level

that the principle of joint responsibility entered into play, in the case of joint responsibility the wrongful act could be jointly attributed to both categories of subjects of international law, namely, the European Community or other international organizations and States. It might have been preferable to deal with that issue at the level of the attribution of the act to both subjects of international law in order to draw the appropriate conclusions when discussing the issue of implementation of responsibility.

54. He agreed with the spirit of draft article 16, which enunciated two points of principle, namely, that an international organization incurred international responsibility if it obliged a member State or States to commit, by an action or omission, an internationally wrongful act, and that it might incur responsibility if it recommended or authorized the commission of such an act—although the draft article did not explain how it might incur responsibility in the latter case. He nevertheless had some reservations with regard to the text of the draft article, as well as a real concern with one aspect of the Special Rapporteur's reasoning.

55. With regard to paragraph 1, subparagraph (*b*), he wondered if it was really necessary for the act to have been committed for the responsibility of the international organization to be incurred. That seemed to be the opinion of the Special Rapporteur, although he provided no explanation of the matter in paragraph 36 of his report, but he himself felt that such a conclusion was far from obvious. In fact, he wondered whether the requirement that a wrongful act had to have been committed might prejudge the sensitive question whether a State would incur responsibility merely by adopting a law contrary to international law. The question whether the mere adoption of such a law constituted an internationally wrongful act or whether the law had to have been applied remained a moot point. In its commentary to article 4 of the articles on the responsibility of States,[5] the Commission had merely cited judgements of the PCIJ and the ICJ, which found that a State incurred responsibility on the basis of its laws. Those precedents, cited, *inter alia*, in footnote 108 to the report of the Commission on its fifty-third session,[6] seemed to show that the mere adoption of such a law sufficed for a State to incur responsibility. Likewise, in paragraph 2 of its commentary to article 12 of the articles on State responsibility, the Commission had expressly stated that the mere passage of a law could result in a breach of international law, thereby entailing the State's responsibility.[7]

56. He agreed that the mere enactment of a law allowing an internationally wrongful act, even if not implemented, was sufficient to entail a State's responsibility. Otherwise, a State would be able to use the existence of such a law as a deterrent, with formidable effect. The same should hold true for an international organization if it adopted a decision which would oblige its member States to commit an internationally wrongful act, if only because prevention was better than cure. For those reasons, draft article 16, paragraph 1 (*b*), should be closely examined by the Drafting Committee.

57. A different problem arose in paragraph 2 (*b*) of draft article 16, pursuant to which an international organization incurred international responsibility if it authorized or recommended a member State to commit an internationally wrongful act and the act in question was committed. In that case, a wrongful act did not ensue merely by virtue of the fact that the international organization authorized or recommended it. The State retained its freedom to choose whether to implement the resolution, and only if it did so would an internationally wrongful act be committed. That being said, if one accepted, like the Special Rapporteur, that the international organization nonetheless incurred responsibility, that posed at least two very thorny legal problems which were not resolved by the Special Rapporteur. The first was the question of the moment at which the international organization incurred responsibility. Was it at the date of adoption of the resolution or at the date of commission of the wrongful act by the member State? It was clearly an example of a composite act within the meaning of article 15 of the draft articles on State responsibility, but unfortunately the articles adopted by the Commission in 2001 were much less clear on that point than the "Ago draft" adopted on first reading in 1996.[8] The Special Rapporteur and the Drafting Committee should consider that problem with reference not only to the draft articles of 2001 but above all to the "Ago draft", which covered all contingencies.

58. The second problem posed by the solution adopted—rightly, in his view—by the Special Rapporteur in paragraph 2 (*b*) of article 16 was the question of how the responsibility of the organization and of the member State or States were combined. Would responsibility be joint, joint and several, shared, or parallel? He agreed with the Special Rapporteur's statement, in paragraph 41 of the report, that the responsibility of the organization would depend on the extent to which it was involved in the act. But how was that "extent" to be determined? That again raised the question of the difficulties involved in the decision-making process in international organizations, to which he had already alluded. The Special Rapporteur, in paragraph 43, recommended that the issue of the degree of responsibility should be examined at a later stage, perhaps when dealing with implementation of responsibility. He himself was of the opinion however, that it would be better for the Commission to tackle that problem forthwith.

59. Before returning to draft article 16, paragraph 1, he had a comment with regard to paragraph 2 (*a*) of that same article. That provision, which stated that an international organization incurred international responsibility if it authorized or recommended an internationally wrongful act only if the act fulfilled an interest of the same organization, was illustrated, in paragraph 40 of the report, by an example which he did not find persuasive. If an international organization recommended or authorized a member State to commit an act which was a breach of international general law, and the organization had no authority to release the State from its obligations under international law, then the organization was complicit in

[5] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 40–42.

[6] *Ibid.*, p. 40.

[7] *Ibid.*, pp. 54–55.

[8] *Yearbook ... 1996*, vol. II (Part Two), chap. II, sect. D, p. 58 *et seq.*

that wrongful act, although the extent of its complicity was difficult to determine. The example given by the Special Rapporteur in paragraph 40 of the report seemed to confirm that position.[9] The Sanctions Committee had the authority to release a Member State from its obligations under the Charter of the United Nations if it was acting in accordance with chapter VII of the Charter, but only on condition that such an act did not breach an obligation arising from a peremptory norm of international law (*jus cogens*). Even if the export of freon to Iraq had constituted an internationally wrongful act in spite of the authorization by the Sanctions Committee, the fact remained that the act had been committed thanks to, perhaps at the instigation of, the Organization, which bore some degree of responsibility for the act, even if the act did not directly fulfil its interests.

60. For those reasons he believed that the Drafting Committee should simply delete draft article 16, paragraph 2 (*b*), although it could be explained in the commentary that a situation might arise where an international organization which had authorized or recommended an internationally wrongful act might not incur responsibility, if any convincing examples of such a scenario could be found. However, he had not found any such examples and he did not find the Special Rapporteur's own example convincing. In any case, even if any such examples could be found, the rule enunciated in draft article 16, paragraph 2 (*b*) was too general and absolute to be included in the draft.

61. In paragraph 31 of his report, the Special Rapporteur stated that if the conduct mandated by a binding decision of the organization necessarily implied the commission of a wrongful act, the organization's responsibility would "*également*" ("also") be involved. Responsibility would thus be shared, to an extent that remained to be determined, between the organization and the State or States implementing such a decision, even though States might have no choice, under the rules of the organization, but to implement it. However, at the same time, States might have another international obligation that would be violated by the implementation of the decision. It was not clear that there was necessarily a sharing of responsibility as implied by the use of the word "*également*". However, what was clear was that if a State could choose to fulfil its obligations towards the international organization or to commit or not commit an internationally wrongful act, it was ultimately the State that decided. That the State alone was responsible for breaches of its international obligations could be inferred from draft article 16, paragraph 2, and from the decision of the *European Court of Human Rights in Matthews* v. *the United Kingdom*, in which the United Kingdom had been found to have fulfilled its obligations towards the European Community in a manner that violated the European Convention on Human Rights when it could have chosen to fulfil them in a manner that did not violate the Convention. However, when an international organization forced one of its members to breach international law, the organization alone should be held responsible, and that was the conclusion that should be drawn from the *Krohn & Co.* v. *Commission of the European Communities* and *Dorsch Consult* v. *Council and Commission* cases cited in paragraph 34 of the report, although the Special Rapporteur was right to point out that the decisions in those cases concerned matters of jurisdiction.

62. When a State had an obligation towards an international organization that conflicted with an obligation under international law, the State had to decide which obligation it would fulfil. Consequently, the State incurred responsibility through its decision not to fulfil the other obligation. In such a case, he did not think that the State and the international organization could be said to be "*également*" responsible; they were responsible separately for different reasons, as the international organization might have forced the State to act in a manner contrary to its obligations under general international law, while the State was responsible as a result of having complied with its obligations towards the organization.

63. Moreover, the idea of the State and the international organization sharing responsibility appeared to be incompatible with the current trend towards deeper regional integration, not only in Europe but also in Latin America and Africa. In the light of that trend, to confront States with the dilemma of choosing between their obligations towards an organization and their obligations under international law was to put them in an intolerable position. It would be better to encourage the organizations themselves to comply with general international law and oblige them to assume responsibility for their own actions.

64. Of course, such reasoning led to the usual objection: if organizations, not States, were held responsible, international courts might well find themselves unable to make a ruling. That was indeed a possibility, given that the international courts—wrongly in his opinion—did not currently have jurisdiction over violations committed by international organizations. For that reason, few such cases reached the courts. However, the substantive issues related to responsibility should not be confused with problems related to the jurisdiction of international courts.

65. In sum, he did not object to draft article 16, paragraph 1 (*a*), but felt that it did not go far enough. If the Special Rapporteur thought that the responsibility of international organizations did not exclude State responsibility, he should say so plainly, giving his reasoning, and the relationship between the two kinds of responsibility should be clarified. In his view, the Commission should decide, as a matter of principle, that in cases where an international organization forced States to act in breach of international law, the organization bore sole responsibility.

66. Mr. YAMADA said that, as a matter of form, it would be advisable to group the seven draft articles on the topic that had already been provisionally adopted by the Commission,[10] under chapter headings, as had been done in the case of the draft articles on responsibility of States for internationally wrongful acts. Similarly, draft articles 8 to 11 on the responsibility of international

[9] The provision of freon gas to Iraq was authorized by the Security Council Sanctions Committee under Security Council resolution 661 (1990) of 6 August 1990, as amended by resolution 687 (1991) of 3 April 1991. For the exporting State, this provision was a violation of the Montreal Protocol on Substances that Deplete the Ozone Layer. See also United Nations, *Juridical Yearbook 1994* (Sales No.: 00.V.8), pp. 500–501.

[10] See the 2839th meeting, footnote 16.

organizations should be grouped under the heading "Breach of an international obligation on the part of an international organization" and draft articles 12 to 16 under the heading "Responsibility of an international organization in connection with the act of a State or another organization". The use of chapter headings would not only help the reader but would also help emphasize that draft article 7 dealt with the attribution of conduct, not the attribution of responsibility. According to that article, which was based on article 11 of the draft articles on responsibility of States,[11] "[c]onduct which is not attributable to an international organization under the preceding draft articles shall nevertheless be considered an act of that international organization under international law if and to the extent that the organization acknowledges and adopts the conduct in question as its own". The problem with that provision was that, while it was possible for an international organization to shift attribution of conduct from the wrongdoing State or international organization, it was not possible to shift responsibility from the wrongdoer without the express consent of third States or international organizations adversely affected by the wrongful act: responsibility remained with the original wrongdoer. Unfortunately, that problem had not been resolved by the Special Rapporteur in his third report, though it could still be addressed by including a reference to draft article 7 in draft article 15.

67. On the question of the rules of the organization in connection with a breach of an international obligation, he agreed with the Special Rapporteur that some rules of international organizations constituted a part of international law and that breaches of such rules must be covered in the draft articles. However, he still had a problem with draft article 8, paragraph 2. He understood that the Special Rapporteur was trying to limit the scope of the rules of the organization by inserting the words "in principle", but more precise wording was required. Moreover, draft article 8, paragraph 2, as currently formulated, might imply that the breach of an obligation set by a rule of the organization was different from the breach of an international obligation mentioned in paragraph 1 of the same article. However, the Drafting Committee should be able to clarify that point.

68. He also had a problem with draft article 15, another of the articles modelled on the corresponding article of the articles on responsibility of States. According to draft article 15, articles 12 to 14 were without prejudice to the international responsibility of States or international organizations. That accorded with draft article 12, according to which an international organization which aided or assisted a State or another international organization in the commission of an internationally wrongful act was internationally responsible for the aid or assistance provided, while the original wrongdoer remained responsible for the act in question. However, draft articles 13 and 14 assumed that both the international organization and the original wrongdoer were responsible for the act in question. If that was the case, he wondered how responsibility was to be apportioned between them. That problem required further study.

[11] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 52.

69. The draft articles on the responsibility of international organizations also applied to the international responsibility of a State for the internationally wrongful act of an international organization, as stipulated in draft article 1, paragraph 2. The fact that the State's responsibility arose as a result of its membership of an organization was a crucial point, and he looked forward to receiving draft articles or a preliminary view dealing with that aspect of the topic.

70. Mr. KOLODKIN said he agreed with the Special Rapporteur that some of the draft articles already adopted should be reviewed before first reading, taking into account the comments received from Governments and international organizations, particularly with regard to the attribution of conduct to international organizations and the rules of such organizations. With regard to draft article 3, on general principles, the Special Rapporteur had raised the question whether a wrongful act of an international organization could consist not only of an action but also of an omission. In theory, the answer was in the affirmative, but that was not clear from the example given in paragraph 10 of the report of a wrongful act by omission—the failure by the United Nations to prevent the genocide in Rwanda. That example raised the question of whether the responsibility to provide protection was already established as an international obligation and whether a breach of any such obligation entailed the international responsibility of the United Nations, and, possibly, of its Member States. Moreover, it was not clear what the position was with regard to the international responsibility of members of the Security Council who vetoed a resolution that might have averted the genocide. It was one thing to carry out a political evaluation of the failure to prevent the genocide in Rwanda; it was quite another to attribute international responsibility to the United Nations for its failure to act.

71. With regard to the question of whether the draft articles should cover such organizations as the European Community, he believed that a special exception or protective reservation for such organizations should be included in the draft articles, especially since Community law was unlike the internal rules of international organizations in the traditional sense and since the Community resembled an international organization less and less as it became more integrated.

72. With regard to the rules of the organization, it was quite clear from article 4, paragraph 4, of the draft articles that many such rules belonged to the sphere of international law. There was no hard and fast distinction between the rules of the organization and international law. Moreover, he believed that the term "rules of the organization" did not refer to all the rules or individual decisions adopted by international organizations, but only to those relating to the internal functioning of the organization. He did not think that the example given in paragraph 20 of the report was a very useful one; the Security Council resolution considered by the ICJ in the *Lockerbie* case could not be seen as a rule of the organization.

73. With regard to draft articles 8 to 11, he agreed with the Special Rapporteur that they should, *mutatis mutandis*, replicate the corresponding draft articles on responsibility of States. It should be noted, however, that the

wording of draft article 8, paragraph 2, did not fully reflect the idea expressed in paragraph 22 of the report that the scope of the draft articles should include breaches of obligations under the rules of the organization to the extent that those rules had retained the character of rules of international law.

74. Turning to the chapter of the report on the responsibility of an international organization in connection with the act of a State or another organization, he said that draft article 12 on help or assistance in the commission of an internationally wrongful act could, like draft articles 8 to 11, be sent to the Drafting Committee. However, draft articles 13, 14 and 16, which touched on the fundamental distinction between States and international organizations, should not just reproduce the corresponding articles on responsibility of States. An international organization, in contrast to States, could oblige other international organizations to commit certain acts and coerce them into acting in a certain way by adopting decisions that were binding in relation to them. An international organization could therefore have normative control over the activities of other subjects of international law. States did not have that possibility, except within their own territory. The Commission faced the problem of defining the effects of the binding decisions of an international organization in the context of international responsibility, a problem that was compounded by the fact that international organizations had members who took part in the adoption of decisions within the organization. The adoption of the binding decisions mentioned in draft article 16, paragraph 1 (*a*), could in many cases be considered a form of coercion. If it was possible to talk about "normative control", it was also possible to talk about "normative coercion" (para. 35 of the report). In fact, he believed that the decisions adopted by the Security Council under Chapter VII of the Charter could be considered a coercive measure. If the coercive measures covered by draft article 14 referred to measures other than binding decisions adopted by international organizations, that point should be made clearly.

75. Another issue was whether the adoption by an international organization of a binding decision was conduct attributable to the organization itself, rather than to its members. If the answer was in the affirmative, the organization would bear responsibility not, or not only, for the conduct of its members but also for its own conduct, as expressed in the relevant decision. The example given in paragraph 34 of the report demonstrated that in the case of *Krohn & Co.* v. *Commission of the European Communities* the Court of Justice of the European Communities had found that the unlawful conduct was to be attributed to the Commission of the European Communities because such conduct could have taken place only as a result of the adoption of the relevant decision. He wondered if a binding decision by an organization could be considered as conduct giving rise to the attribution of responsibility to that organization.

76. Similarly, with regard to draft article 13, on the direction and control exercised over the commission of an internationally wrongful act, he wondered if the adoption of a binding decision by an international organization could be considered as a form of direction and control. In paragraph 35 of the report, the Special Rapporteur spoke of the concept of control being extended to encompass normative control if it directed and controlled the member State in the commission of a wrongful act. That seemed to suggest that draft articles 13 and 16 overlapped to some extent.

77. The chapter of the report on the responsibility of an international organization in connection with the act of a State or another organization raised questions about the responsibility of member States of international organizations, particularly with regard to the adoption of decisions contrary to international law, and the implementation of such decisions, whether or not the individual member had voted for them. It was not clear whether the responsibility of States for the decisions of organizations of which they were members belonged to the field of State responsibility or of the responsibility of international organizations.

78. Lastly, he agreed with the application of the criteria of the member State's liberty to act or use discretion in implementing the binding decisions of an international organization, as mentioned in paragraphs 30 and 32 of the report and discussed by the delegations of France and the Russian Federation in the Sixth Committee.[12]

Organization of work of the session (*continued*)*

[Agenda item 1]

79. The CHAIRPERSON announced that, following consultations, it had been agreed that the working group established to discuss the topic of shared natural resources would be composed of Mr. Candioti (Chairperson of the Working Group), Mr. Comissário Afonso, Mr. Daoudi, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Mansfield, Mr. Matheson, Mr. Opertti Badan, Mr. Sreenivaso Rao, Mr. Sepúlveda, Ms. Xue, Mr. Yamada (Special Rapporteur), and Mr. Niehaus (Rapporteur, *ex officio*).

The meeting rose at 12.55 p.m.

2841st MEETING

Thursday, 19 May 2005, at 10 a.m.

Chairperson: Mr. Djamchid MOMTAZ

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Yamada.

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* Resumed from the 2836th meeting.

[12] See *Official Records of the General Assembly, Fifty-ninth Session, Sixth Committee*, 22nd meeting (A/C.6/59/SR.22), para. 13; and 23rd meeting (A/C.6/59/SR.23), paras. 22–23, respectively.