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Summary record of the 2892nd meeting

Topic:
Responsibility of international organizations

Extract from the Yearbook of the International Law Commission:-
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many of the real problems did not fit neatly into a logical framework.

60. He endorsed the order in which concerns were discussed in this section of the report. Paragraph 62 dealt with an important criterion, namely that of whether the aid or assistance, direction and control, or coercion came from a State which was a legal entity separate from the organization. It was logical to take draft articles 16 to 18 on responsibility of States for internationally wrongful acts²¹⁸ as the basis for constructing articles on the responsibility of international organizations. In that light, articles 25, 26 and 27 of the present draft were well crafted.

61. A number of views had been expressed in the Sixth Committee with respect to the use by States as members of an international organization of the separate legal personality of that organization. The inclusion of a brief summary of those views in the report would have been useful. Turning to the reference in paragraph 67 of the report to the Treaty on the Non-Proliferation of Nuclear Weapons, he wondered how the provisions of that Treaty would affect the responsibility of non-nuclear States which were both parties to the Treaty and members of NATO, if those States availed themselves of the nuclear umbrella provided by other States which possessed atomic weapons. Would such States be infringing the Treaty on the Non-Proliferation of Nuclear Weapons?

62. In his opinion it would be wrongful for a State to transfer certain sovereign functions to an international organization if “the alternative means of legal process” of which mention was made in paragraph 69 were unavailable. Although the test of equivalence had been discussed in paragraph 70, it had not been included in draft article 28, nor had that article mentioned alternative means of legal process as a possible way of circumventing a potentially wrongful act. He supposed that the phrase “would have implied non-compliance”, in draft article 28, paragraph 1 (b), would also apply to the test of equivalence and alternative means of legal process. If that were so, it should be made clear in the commentary.

63. The last section of the chapter was thought-provoking, in that it contained a wealth of views and material and discussed two instances of practice in a very helpful manner. In his opinion, however, the references to the judgements concerning the International Tin Council were not entirely apposite (para. 79), since members’ responsibility had been incurred only because the Council itself had become bankrupt. The courts’ decisions did not provide any basis for concluding that member States should incur responsibility for a wrongful act of the organization to which they belonged.

64. In the Sixth Committee, the delegation of China had raised the very important question of the extent of member States’ responsibility when an organization adopted a wrongful decision.²¹⁹ The Special Rapporteur had rightly

concurred with a number of authoritative positions taken by bodies such as the International Institute of Law in its resolution II/1995 in contending that, because an international organization possessed independent legal personality and decision-making was open to all member States, and because once decisions had been taken, they were attributable only to the organization and not to the individual member States, the question of subsidiary, independent or several responsibility did not arise. The Special Rapporteur provided cogent policy reasons in support of that proposition in paragraph 94 of his report. Nevertheless the real policy reason why the Commission was debating that issue was that wrongful decisions were sometimes pushed through by a group of members of an organization despite fierce opposition from other members. Should the latter really be held responsible for decisions which were subsequently found to be wrongful? That was the crucial issue which had doubtless prompted China to state that only members that voted in favour of a decision should incur international responsibility for its consequences.²²⁰

65. While most of the propositions put forward in the report applied in the vast majority of cases, very careful thought would have to be given to the wording of draft article 29. Nevertheless, he was in favour of referring the text of the draft articles contained in the fourth report on responsibility of international organizations to the Drafting Committee.

66. Mr. GAJA (Special Rapporteur) explained that the comments by States in the Sixth Committee to which he had referred in paragraph 64 of his report had no bearing on the question currently being considered by the Commission. Those observations, which had been made in relation to draft article 15, had been listed in a footnote and would be examined at a later stage. The only comments directly relating to the question under examination had been quoted *in extenso* in paragraph 65 of the report.

The meeting rose at 1 p.m.

2892nd MEETING

Wednesday, 12 July 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Niehaus, Mr. Opertti Badan, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.

²¹⁸ See footnote 8 above.

²¹⁹ *Official Records of the General Assembly, Sixtieth Session, Sixth Committee*, 11th meeting (A/C.6/60/SR.11), pp. 9–10, paras. 51–53.

²²⁰ *Ibid.*, p. 10, para. 53.

Responsibility of international organizations (continued) (A/CN.4/560, sect. C, A/CN.4/564 and Add.1–2, A/CN.4/568 and Add.1, A/CN.4/L.687 and Add.1 and Corr.1)

[Agenda item 4]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. The CHAIRPERSON invited the Commission to continue its consideration of the final part of the fourth report of the Special Rapporteur on responsibility of international organizations (A/CN.4/564 and Add.1–2).

2. Ms. ESCARAMEIA said that draft articles 25, 26 and 27 proposed in paragraph 63 of the report gave rise to two problems. The first, which the Special Rapporteur had raised at the previous meeting, concerned the relationship that existed between the State and the international organization. In paragraph 62 of his report, the Special Rapporteur had written that the “State that aids or assists, or directs or controls, or coerces an international organization may or may not be a member State”. However, nothing to that effect was mentioned in draft articles 25 to 27. She wondered whether circumvention of the organization’s rules by a member State, particularly when coercion was involved, was also covered. The wording of draft articles 25 to 27 was unclear in that regard, and the text could be improved by inserting the words “whether or not it was a member of the international organization” after the words “a State” and the words “by whatever means” after “international organization” in the first sentence of all three draft articles. The second problem, which related mainly to draft article 27, was the possible overlap with draft article 29: specifically, she wished to know how the situations that fell under draft article 27 could be distinguished from those covered by draft article 29. She would come back to that problem when addressing draft article 29.

3. With regard to draft article 28, which contemplated a realistic scenario that was in fact the opposite of that provided for in draft article 15, she endorsed the explanation provided by the Special Rapporteur and said that the draft article should be approved.

4. As to the responsibility of members of an international organization when that organization was responsible (paras. 75–96 of the report), she drew attention to the case law cited by the Special Rapporteur and said it was interesting to note that in *Westland Helicopters Ltd. v. Arab Organization for Industrialization* the court rulings had been based on intent, equity and third-party perspective. In the case involving the International Tin Council (para. 79), the importance attached to the constituent act of the organization should be noted. Lastly, with regard to the incident mentioned in paragraph 83, the fact that there had been only two States in the organization in question (Egypt and Israel) and, possibly, the terms of the organization’s constituent act could explain the Canadian position reflected in the passage quoted in that paragraph.

5. From the comments which the Commission had requested from States and international organizations on the question as to whether there were cases in which

a State could be held responsible for an internationally wrongful act of an international organization of which it was a member,²²¹ it could be concluded that although there was no general responsibility, several different types of exceptions existed. For example, Belarus had raised the issue of limited resources and the small number of members of the organization as well as the high level of control exercised by some of those members, Austria had mentioned negligent supervision, Italy had mentioned exceptional circumstances and China had cited the fact that the member State in question had voted in favour of or had implemented the wrongful decision (see paragraph 85 of the report). The comments of INTERPOL regarding the organization’s constituent instrument were also interesting (A/CN.4/568, sect. F), and the fact that the instrument did or did not contemplate the responsibility of member States towards third parties was certainly relevant.

6. In drafting article 29, the Special Rapporteur seemed to have been inspired by resolution II/1995 adopted by the Institute of International Law at its Lisbon session. However, more precision was perhaps necessary: for example, subparagraph (a) might mention how the State had accepted responsibility by inserting the words “under its constituent instrument or by any other means”. Subparagraph (b) did not pose any problems. Furthermore, a new subparagraph (c) could be added, which would list criteria for the responsibility or non-responsibility of member States and make it possible to take into account such arguments as that it would be unfair for a member State that had done everything in its power to prevent the international organization from committing a wrongful act to risk incurring responsibility once such an act had been committed. Such criteria might include the number of members, the level of control exercised by some member States and the position of the State in question at the time the decision that had led to the wrongful act was taken.

7. Despite the explanations provided by the Special Rapporteur, she failed to see why the same rules would not apply to international organizations that were also members of the organization. She also felt that it would be useful to look into the nature of the responsibility of the States or international organizations that were members.

8. Mr. PELLET, referring to paragraphs 53 to 57 of the fourth report, said that he agreed with the arrangements proposed by the Special Rapporteur and, with regard to the problems implicitly raised in paragraph 57, said that he did not find it useful for the draft to address the question of the possible responsibility of entities other than States or international organizations for the wrongful act of an international organization of which those entities might be members. He acknowledged that the problem, albeit unlikely, could arise in practice; however, mentioning it in the commentary would suffice. On the other hand, like Ms. Escarameia, he did not see why the Special Rapporteur had omitted international organizations when drafting the articles, especially since he seemed to have had the opposite intention when writing paragraph 57 of the report. There were several possible solutions to that problem: for example, the draft articles in question could be amended using the words “a State or international

²²¹ See footnote 215 above.

organization which is a member”, or it could be indicated in a separate provision that articles *x* to *y* applied, *mutatis mutandis*, to international organizations that were members.

9. Turning to paragraphs 58 to 63, he noted that the Special Rapporteur had often been reproached for following the provisions of the draft articles on State responsibility for internationally wrongful acts²²² too closely. However, as long as the problem remained, which seemed to be the case in the situations covered by draft articles 25 to 27 proposed by the Special Rapporteur, he could only be commended for doing so. The only comment he wished to make with regard to those articles was that he was not completely sure that a provision equivalent to draft article 19 on State responsibility²²³ had to be omitted, as the Special Rapporteur stated in paragraph 63 of his fourth report, without, however, explaining why, even though the problem arose in the context of international organizations just as it did for States.

10. Things became serious with the section on use by a State that is a member of an international organization of the separate personality of that organization (paras. 64–74) and draft article 28 (para. 74), which dealt with an interesting scenario. The provision proposed, while convincing, could be read as a very general illustration of the prohibition of the abuse of rights, and he suggested that it should be clarified in the future commentary on that provision. Continuing with the notion of abuse of rights, he wondered whether the Special Rapporteur did not go a bit too far by writing, in paragraph 72 of his report, that in the cases he had mentioned involving *Waite and Kennedy v. Germany*, *Matthews* or *Senator Lines* functions had been transferred by States to an international organization in order to avoid compliance with their international obligations. In his view, such avoidance had been the result, not the aim, which was altogether different: the States in question had had no intention of avoiding their responsibility, and it was unfair to assert the contrary. However, that complicated the drafting of article 28: should the element of intent be included, as the Special Rapporteur seemed to favour doing? If so, the current wording was appropriate. However, if, as he believed, the problem did not lie in knowing whether the State had intended to evade its international obligation but simply in asserting that its participation in the organization had allowed it to circumvent its responsibility, then the wording of paragraph 1 (*a*) should be revised, because the words “by transferring” clearly implied the existence of such an intent, which was irrelevant. In fact, in most cases the transfer of functions was not designed to absolve the State of its responsibility, even if that was the result in practice.

11. Draft article 28 called for two comments of minor significance. First, he did not understand why the text related only to States. Whereas it seemed reasonable not to include non-State actors, it was nevertheless unclear why international organizations were not mentioned there in the same way as States. Secondly, he was not convinced

that the terminology used in draft article 28 should differ from that used in draft article 15, since the two referred to identical situations; likewise, he failed to see what was “not very clear”, as some Commission members had said, about the word “circumvent”, for even if that was the case, the text could always be amended in second reading. However, the coherence of the draft in first reading was more important than the considerations highlighted by the Special Rapporteur in paragraph 73 of the report.

12. Clearly, the most interesting and difficult problems were addressed in the section of the report on the question of the responsibility of members of an international organization when that organization is responsible, and had to do with draft article 29 which it contained (para. 96). The fact of the matter was that the “cut and paste” method no longer did the job. He would go even further and say that, if the problem addressed in that section did not arise, the topic of responsibility of international organizations would be of no particular interest, for all one needed to do was to apply the rules of State responsibility by analogy. The whole topic revolved around the question of the responsibility of members of an international organization when that organization was responsible. For that reason he believed that the Commission’s deliberations should focus on this section. He had read that document not only with great interest but also with relief: the Special Rapporteur’s previous reports had led him to fear that he believed in the “transparency” of international organizations and chose to ignore the fundamental and incontestable principle which dated back at least to 1949, when the ICJ had issued its advisory opinion in the *Reparation for Injuries* case, finding that international organizations were subjects of international law vested with legal personality and responsible for their own internationally wrongful acts. He had often worried about the Special Rapporteur’s doctrinal approach, which he believed to be erroneous, during the consideration of his previous reports and, in particular, his third report, submitted in 2005.²²⁴ In fact, the fourth report was entirely unambiguous in that regard, and he wholeheartedly endorsed the conclusions drawn in paragraphs 90 and 96 as well as the principle reflected in the chapeau to draft article 29, namely that “a State member”—rather than “a State that is a member”—of an international organization was “not responsible for an internationally wrongful act of that organization”. The reasoning based on logic, doctrine and jurisprudence that lay behind that principle, which the Special Rapporteur had set out clearly in this section, seemed fully convincing. On the other hand, it was once again unclear why that fundamental principle was limited only to member States since, as the Special Rapporteur openly acknowledged in paragraph 95, there was no reason why it should not apply to international organizations that were members.

13. The two exceptions to that principle, set forth in subparagraphs (*a*) and (*b*) of draft article 29, did not pose any problem, although he had some doubts concerning the use of the phrase “to rely on its responsibility” in subparagraph (*b*). However, it would be up to the Drafting Committee to decide whether that wording was justified. In any case, those were the only exceptions he could accept, and he was more convinced than ever that

²²² *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 26, para. 76.

²²³ *Ibid.*, p. 27.

²²⁴ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/553,

some of the wording used in the report was ambiguous. For example, the beginning of paragraph 93 of the report read “[t]he two exceptions mentioned in the preceding paragraphs”, which seemed to imply that there were more than two exceptions to the principle. At the same time, he concurred with Ms. Escarameia, who had rightly noted that international organizations could find it difficult to deal with the specific consequences of their responsibility. However, that remained a factual problem, and it was important from a legal standpoint for that principle to be firmly maintained. At the same time, if it was felt that the consequences of that principle must be mitigated, the Special Rapporteur could, in the context of the progressive development of law, suggest arrangements or modalities for the implementation of responsibility in the second part of his report. In any event, where responsibility *per se* or the immediate consequences of an internationally wrongful act were concerned, the principle set out in draft article 29 should have no exceptions other than the ones mentioned. He noted also that, according to paragraph 93, “[a] distinction between States which vote in favour and the other States would not always be warranted”. Yet such a distinction was never pertinent where responsibility was concerned; there was no call for it, and relying on it would be tantamount to denying that the organization existed. He was thus completely opposed to Ms. Escarameia’s suggestion to add a subparagraph (c) to draft article 29. The attitude of States to a particular question was of little importance, since by joining an international organization they had accepted its existence and were thus bound by its acts. He strongly objected to any consideration by the Drafting Committee of a solution that even slightly resembled that suggestion.

14. As to the highly sensitive question of the subsidiary, several or joint nature of State responsibility, which the Special Rapporteur had raised the previous day without actually addressing it, he recalled that member States and international organizations could not incur responsibility unless they had expressly or implicitly accepted such responsibility through their conduct. It was all a question of what States had actually agreed to; the nature of responsibility would differ depending on the content and the circumstances of what had been agreed, on the assumption that if the State had not clearly said or done anything, it could incur only subsidiary responsibility. That should be clearly indicated either in draft article 29 or, preferably, in the second part of the draft on the implementation of responsibility, but it would be up to the Special Rapporteur to decide on that. The problem of the nature of any responsibility incurred by a State in connection with an internationally wrongful act of an international organization arose also with regard to draft article 28 and even draft articles 25, 26, 27 and the missing draft article 27 *bis*, which was equivalent to article 19 of the draft articles on State responsibility. The Special Rapporteur ought to be able to find in practice some arguments in support of the principle of subsidiary responsibility unless the State itself admitted joint or several responsibility.

15. Mr. GAJA (Special Rapporteur) drew the attention of those Commission members using the French version of his report to two translation problems. The first related

to paragraph 72, in which the penultimate sentence did not entirely conform to the English original. In particular, the use of the expression “*dans le but*” placed too much emphasis on the element of intent. In addition, the beginning of the first sentence of paragraph 93 should be amended to read: “*Les deux exceptions mentionnées*”.

16. Mr. BROWNLIE said that he was not in a position to endorse draft article 29 and did not share the arguments advanced by Mr. Pellet to justify the principle set out in that article, namely the general principle of the non-responsibility of States members of an international organization in connection with an internationally wrongful act of that organization. Furthermore, the two exceptions provided for in subparagraphs (a) and (b) of that draft article were not genuine exceptions because they could actually be applied in all situations. He therefore believed that the principle set out in that article was not only imprecise, but also contrary to existing general international law and to all the principles of the law of treaties and the law of State responsibility, because its application could allow States to circumvent their obligations by concluding a multilateral treaty establishing an international organization.

17. Mr. PELLET said that, first of all, it seemed that Mr. Brownlie was confusing responsibility for an internationally wrongful act with absolute liability. Yet even in cases of absolute liability States expressly provided that their responsibility should replace or supplement the responsibility of international organizations, which in fact showed that in the absence of provisions to the opposite effect the international organization would be responsible *a priori*. Secondly, Mr. Brownlie cited the law of treaties in order to claim that the State could not invoke the conclusion of a treaty to circumvent its responsibility. Under draft article 28, however, if States circumvented their existing obligations, they were responsible. Draft article 29 must not be read separately, and combining it with draft article 28 would make it possible to address Mr. Brownlie’s concern. Lastly, the main argument in support of draft article 29 proposed by the Special Rapporteur was one of legal logic. International organizations existed and had their own legal personality; they could not shift their responsibility on to their member States.

18. The CHAIRPERSON, speaking as a member of the Commission, said that the Drafting Committee should focus on draft article 29 with a view to ensuring that its title was consistent with the content of its provisions. The Drafting Committee should also look at the wording of paragraph 1 (a) of draft article 28 with a view to specifying the types of conduct implied by the phrase “avoids compliance with an international obligation”. He wondered whether the words “certain functions” in the same paragraph referred to particular functions of the member State or the functions of the international organization, and he sought clarification on the matter. He fully endorsed Mr. Pellet’s comments regarding draft articles 25, 26 and 27, and urged the Special Rapporteur and the Drafting Committee to ensure that both the States that assisted an international organization in committing an internationally wrongful act and the international organizations that did the same were treated fairly.

19. Mr. CANDIOTI asked the Special Rapporteur whether it might not be advisable to mention the rules of the organization in the context of exceptions to the principle set out in draft article 29 because it was possible that those rules might establish the responsibility of a State for an act committed by the international organization.

20. Mr. ECONOMIDES said that Mr. Candiotti's question was an important one, especially since that principle had been enshrined in resolution II/1995 of the Institute of International Law.²²⁵ It could be applied through *lex specialis*. The constituent instruments of organizations could provide for various systems of joint, subsidiary or residual responsibility. The question at hand was the residual responsibility of a member State, but if the Special Rapporteur had a different view of the matter, then the exception proposed by Mr. Candiotti should be included in the text of draft article 29 as soon as possible.

21. Mr. GAJA said that some of the questions posed by Commission members merited further consideration, and he therefore preferred to wait before answering them. However, on the question of *lex specialis*, he recalled that the Commission had to state a general rule. He was aware that there could be different points of view as far as its content was concerned. The proposal to include a reference to the rules of the international organization in draft article 29 would be relevant, if those rules provided for acceptance of responsibility with regard to third States. Lastly, the place of articles 28 and 29 in the draft articles on responsibility of international organizations had yet to be determined. The Commission could choose from several solutions, but, as he had noted in his report, he believed that the Drafting Committee could deal with that issue.

22. Mr. BROWNLIE reiterated that since subparagraphs (a) and (b) of draft article 29 did not list genuine exceptions, but set out elements of law that would be applicable in any case, the draft article was both redundant and jarring. On the other hand, draft article 27, which illustrated perfectly the application of general principles of international law relating to responsibility in specific situations, supported his view that an international organization could not be exempt from the application of general principles of international law. He wondered whether the Special Rapporteur would also extend that idea of non-responsibility to international crimes. In treaty law, a third State could not be bound against its will. A State could not be requested to bear the damage caused by an organization without having any possibility of recourse against member States of the organization if the necessary measures had not been taken.

23. Mr. Sreenivasa RAO said that it was clear from draft article 29 that international organizations were responsible for all their decisions and that member States did not incur responsibility unless they had explicitly accepted such responsibility or had led the injured third party to rely on it. However, it could happen that an international organization was unable to fulfil its own responsibilities, for example because it did not have the means to do so or because its payments had been suspended. In that case, responsibility inevitably fell on member States.

24. The general principle of the draft articles was that an organization was responsible for its own actions as long as the decisions had been taken legitimately and in accordance with the applicable rules. The draft articles were clear on that point and did not give rise to any controversy. However, some members were concerned that nothing had been said about specific situations. For example, large international organizations, such as the United Nations, were often called upon to take decisions that had serious repercussions, and with regard to which member States could have very different opinions. Such decisions could be taken even if member States questioned their lawfulness. In such cases, it was open to question who would be responsible if harm was caused as a result of the decision. In a small organization, a State that disapproved of the decision could leave, but a State could not leave an organization like the United Nations. In large organizations, States had no choice but to stay and bear responsibility for everything that happened.

25. He concluded by noting that the Commission must realize that the draft articles did not envisage all possible situations and that some issues had not been addressed.

26. Mr. GAJA (Special Rapporteur), replying to the question of whether the responsibility of a State member of an international organization was residual in nature or otherwise, said that he would have spelled that out in draft article 29 had he been drafting from the perspective of Mr. Brownlie, who seemed to think that States were always responsible. The draft article said nothing on that point because that was not the case: everything depended on the circumstances. As to Mr. Sreenivasa Rao's concern regarding the consequences of a decision taken by a majority of an organization's member States for a State that had voted against the decision, the question was relevant only if seen from Mr. Brownlie's perspective. In his own view, there was no cause for concern, since States were not responsible.

27. Mr. BROWNLIE pointed out that he had not said that States were always responsible. What disturbed him was the fact that draft article 29 spoke of the absence of State responsibility as if it was a general principle.

28. The CHAIRPERSON observed that Mr. Brownlie and Mr. Gaja seemed to be saying the same thing in different ways.

29. Mr. PELLET said that he did not believe that they were saying the same thing. Mr. Brownlie tended to view the international organization as transparent, whereas Mr. Gaja, like he himself, favoured non-transparency and attached importance to the protection afforded by the organization's legal personality.

30. He endorsed the Special Rapporteur's last comments. Responding to Mr. Brownlie, he emphasized that the point was absolutely not that international organizations were exempt from the principles of general international law, but that in some cases their responsibility could be combined with that of States. He was not sure that he understood Mr. Sreenivasa Rao's concern correctly, but it was unthinkable that a State member of an international organization could be exempted from any sharing of the

²²⁵ See footnote 216 above.

organization's responsibility by saying that it disagreed with the decision in question. Mr. Sreenivasa Rao was mistaken not only as to principles, but also as to practice. However, there was no cause for concern, since what draft article 29 was saying was that States were not responsible.

31. He thought that the problem underlying the discussion between Mr. Candioti and Mr. Economides had already been resolved by the two exceptions provided for in draft article 29. The State could have accepted responsibility with regard to the injured third party under the constituent instrument, a situation covered by subparagraph (a), or under the rules of the organization, a situation covered by subparagraph (b). That being said, constituent instruments could in fact set out special rules, and that would be covered by the principle of *lex specialis*, which the Commission would no doubt ultimately adopt.

32. Mr. DUGARD commended the Special Rapporteur for the quality of his work and said that he, too, thought that the draft articles under consideration would make a necessary addition to chapter IV (Responsibility of an international organization in connection with the act of a State or another international organization). Some States, in particular powerful ones, did in fact try to manipulate international organizations, and the Commission must take that into account. As far as he understood, the term "internationally wrongful act" referred to acts that were wrongful under general international law and that constituted a serious violation of the organization's constituent instrument. With regard to draft articles 25 to 27, paragraph 62 of the fourth report set out the guiding principle, which was that influence that could be considered as aid or assistance, direction and control or coercion must be exercised by the member State as a legal entity separate from the organization, and the member State could not be held responsible simply for having participated in the decision-making process of the organization. He supported draft articles 25, 26 and 27; however, subparagraph (b) of draft articles 25 and 26, which stipulated that a State was not internationally responsible unless the act was internationally wrongful if committed by that State, posed a problem. There might be circumstances in which the act committed by the international organization with the aid or assistance or under the direction or control of a State was an internationally wrongful act, even though the State itself did not commit an internationally wrongful act. For example, if a State called Utopia helped the United Nations to use force, knowing full well that the use of force was wrongful, then Utopia would be internationally responsible because the act would be internationally wrongful if committed by Utopia itself. In that case, subparagraphs (a) and (b) would apply. However, if Utopia helped the United Nations exert economic pressure on another State and the United Nations did so in an unlawful manner, by failing to respect the relevant provisions of the Charter of the United Nations for example, then the United Nations would have committed an internationally wrongful act, but Utopia would not have. He therefore suggested that the Special Rapporteur should consider deleting subparagraph (b) from draft articles 25 and 26.

33. With regard to draft article 29, it was widely known that, as article 34 of its Statute clearly stated, the ICJ did not have competence in respect of international organizations

where contentious proceedings were concerned. On the other hand, if an international organization wished to take action against a State for failure to respect a decision of that organization, it could designate a State to initiate proceedings before the Court. For example, in 1960 in the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* case, Ethiopia and Liberia had submitted an application to the Court against South Africa regarding Namibia. That attempt had failed because the Court had decided that the two States had not demonstrated that they had any legal interest in the object of their application (para. 99 of the opinion). However, it was clear that the decision had not been well-founded, and draft article 48 of the articles on responsibility of States for internationally wrongful acts had not been formulated along the lines of that decision.²²⁶ Moreover, developments in the law with regard to *erga omnes* obligations meant that at present States would be considered to have the right to initiate such proceedings. In other words, an international organization could designate a member State to bring a case before the ICJ. However, it was important to know whether the opposite was also true, i.e. whether an injured State could initiate proceedings against an international organization before the Court. Clearly, it could not. In that case, perhaps it could bring an action against a State member of the organization in order to express its dissatisfaction with an action of the organization: for example, because the organization had imposed economic sanctions on the State in an unlawful manner and the State wished to request compensation. It seemed that draft article 29 did not authorize such a step, since it made the conduct of the member State and not its membership of the organization a condition of responsibility. It was very difficult to link responsibility to membership in such cases, but if the international organization had committed an internationally wrongful act with regard to a State, the latter must have a possibility of recourse against the organization or its member States. The problem lay in identifying which States were responsible. China had suggested considering the way in which a given State had voted within the organization, but he did not consider that solution to be satisfactory. One could try to determine which State had been behind the organization's wrongful act or had consistently supported it. He thought that the Special Rapporteur had been unduly influenced by resolution II/1995 adopted by the Institute of International Law at its Lisbon session and mentioned in paragraph 89 of his report. However, the Institute had been guided by the decision of the House of Lords in the case of the International Tin Council and had not considered the question from the broader perspective of manipulation of an international organization by States. In any event, the Institute's resolution went even further than the Special Rapporteur's proposal because it stipulated, in article 5, subparagraph (b), that in particular circumstances, members of an international organization might be liable for its obligations in accordance with a relevant general principle of international law, such as acquiescence or abuse of rights. He suggested that a provision similar to the one contained in article 5, subparagraph (b), of the Institute's resolution should be added to draft article 29, or even that draft article 29 should say that a State that

²²⁶ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 29–30; see also paragraphs 11–12 of the commentary, *ibid.*, pp. 127–128.

was at the origin of, and had consistently supported the wrongful act of, the organization, even though it was aware of the consequences, could incur responsibility for it. Other Commission members had already suggested that the Special Rapporteur should broaden the scope of draft article 29 to cover more situations.

34. Mr. PELLET said that the problem raised by Mr. Dugard was important but not relevant to the case at hand. The fact that international organizations did not have *jus standi* before the ICJ had absolutely no bearing on their responsibility. If anything was to be changed, it was the Statute of the Court that should be amended, for it was by and large outdated in the light of the increased importance of international organizations. Yet it was hard to see why that should lead the Commission to change its position on the responsibility of international organizations. Procedural problems and matters related to remedies should not be confused with issues of substance and responsibility.

35. Mr. MATHESON said that there was no need to comment on draft articles 25 to 27 because they had been directly adapted from the equivalent provisions of the draft articles on State responsibility for internationally wrongful acts; in fact, a single clause applying those provisions *mutatis mutandis* to international organizations would be sufficient, although the Special Rapporteur's decision to deal with the question in more detail was equally acceptable. However, it was important to emphasize clearly, in the commentary for example, that the State, as noted in paragraph 62 of the report, did not incur responsibility simply by participating in the decision-making process of the international organization, but only if it acted as a legal entity separate from that organization. Otherwise, the internal decision-making process of international organizations could be seriously undermined and States might be reluctant to settle international problems through them.

36. On the other hand, draft article 28 had no equivalents among the draft articles on State responsibility. It was useful because a State would certainly incur responsibility if it deliberately attempted to circumvent its international obligations by acting through the intermediary of the organization it controlled. However, as currently worded, the draft article could be interpreted as holding States responsible for actions that were not wrongful or could be attributed to the organization *a fortiori*. If a State transferred certain functions to an organization, it was not necessarily responsible for the way in which the organization carried out those functions. That would be incompatible with the separate legal personality of the organization. Furthermore, a State could easily transfer to an international organization functions which, in some circumstances, would be wrongful if carried out by the State. The States Members of the United Nations did so when they requested the Security Council to resort to force, and the States members of a regional organization did so when they requested the organization to impose on one of the members sanctions that they could not impose individually. It would be inappropriate to suggest that such arrangements "implied non-respect" of the individual international obligations of those States. Thus if draft article 28 was to be kept, it should be modified to prevent

it from applying only to cases in which one or more States used an international organization as a front for circumventing their own obligations. In that connection, he thought that the verb "circumvent", although much debated, was still appropriate—if properly explained—for drawing a distinction between an ordinary transfer of powers and the deliberate circumvention of obligations. In any case, that was a problem for the Drafting Committee.

37. Draft article 29 judiciously stated that a State member of an organization was responsible for an internationally wrongful act of that organization only in very specific circumstances, namely when it had accepted responsibility with regard to the injured party and when it had led the injured party to rely on its responsibility. In the latter case, he believed that it should be clearly indicated that in any circumstances the third party could rely on the responsibility of the State only within reasonable limits.

38. Mr. MANSFIELD said that he agreed with the Special Rapporteur's decision to incorporate the provisions of the draft articles on State responsibility relating to cases of States helping another State to commit an internationally wrongful act rather than simply to refer to them.²²⁷ It was self-evident that if a State could aid or assist another State in committing an internationally wrongful act or direct or control it in the commission of that act, it could do the same with regard to an international organization, and it would be inappropriate not to address that issue in a chapter dealing with the responsibility of States in connection with the act of an international organization. Accordingly, draft articles 25 to 27 were satisfactory and could be sent to the Drafting Committee. The Drafting Committee could, as Mr. Dugard had suggested, consider whether subparagraph (b) of draft articles 25 and 26 was really necessary, but he believed that the question required further consideration.

39. The use by a State that was member of an international organization of the organization's separate personality was a more complicated question that nevertheless led to a clear conclusion. If an international organization should not be able to evade an international obligation by using the separate legal personality of its members and by making the members commit an act that would be wrongful if the organization committed the act itself, the opposite was also true. The example of States that bought or developed nuclear weapons through the intermediary of an organization in order to circumvent their obligations under the Treaty on the Non-Proliferation of Nuclear Weapons was particularly convincing, even though under the terms of the Treaty it was likely that those actions would actually constitute a direct violation of their own obligations.

40. Draft article 28 constituted a good basis for work and could thus also be transmitted to the Drafting Committee, which should nevertheless consider, as the Special Rapporteur had suggested, whether the draft articles ought to indicate that the international organization was not bound by the obligation in question. The Drafting Committee should also consider whether it was possible, without applying any subjective criteria, to emphasize

²²⁷ *Ibid.*, p. 27, articles 16–19.

that it was unacceptable for a State to use an international organization as a device for circumventing its own international obligations.

41. The issue covered by draft article 29 undeniably gave rise to controversy, but it seemed inevitably to lead to the conclusion that States were usually not responsible for the wrongful acts of an international organization of which they were members. Otherwise the established principle according to which an international organization had a legal personality separate from that of its members would not be respected, and that in turn would have serious consequences for the organization's management and decision-making and, above all, for its capacity to account for its actions in a transparent manner, which was essential. At the same time, there were obviously circumstances in which the State should be held responsible: the circumstances covered by subparagraphs (a) and (b). Draft article 29 was very clear in setting out the main points raised, which were largely in keeping with practice. He therefore recommended that draft article 29 should be forwarded to the Drafting Committee.

The meeting rose at 12.30 p.m.

2893rd MEETING

Thursday, 13 July 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candiotti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Operti Badan, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.

Responsibility of international organizations (continued) (A/CN.4/560, sect. C, A/CN.4/564 and Add.1–2, A/CN.4/568 and Add.1, A/CN.4/L.687 and Add.1 and Corr.1)

[Agenda item 4]

FOURTH REPORT OF THE SPECIAL RAPporteur (continued)

1. Mr. KOSKENNIEMI thanked the Special Rapporteur for his carefully nuanced but clear analysis of the key problems posed by the relationship between international organizations and their member States. Draft articles 25 to 29 raised the question of the image of international organizations on the world stage, and the earlier exchange of views between Mr. Brownlie and Mr. Pellet had illustrated how widely perceptions could differ. Mr. Brownlie had conjured up an image of international organizations as transparent bodies, and had denied the existence of any analogy with domestic limited liability companies. On that view, States that were in a powerful position *vis-à-vis*

the international organizations of which they were members would be unable to shelter themselves behind a corporate veil. Mr. Pellet had taken the contrasting view that attempts had been made over a number of decades to develop a law of international organizations that would enable States to combine forces in organizations possessing a separate legal personality, and that that law would give those organizations the status of legal subjects and allow them to assume obligations and the concomitant responsibility. Which of those images of international organizations the Commission chose to retain would determine its attitude towards draft articles 25 to 29.

2. Draft articles 25 to 28 formed a continuum. When a State aided or assisted, directed and controlled or coerced an international organization, or when it tried to use that organization as a facade in order to achieve its own ends and, in so doing, violated its obligations, that matched the image suggested by Mr. Brownlie, in that the main actors were States which were manipulating the organization in some way. In that case, notwithstanding the fact that, formally speaking, the means and procedures of an international organization had been brought into play, responsibility should be attributed to the States in question and not to the organization. Although he agreed with that view, he felt that, in paragraphs 62 and 67 of the report, inordinate stress had been placed on the assumption that it was relatively easy to differentiate between a situation in which a State participated in the normal decision-making process in good faith as a member of the organization in accordance with the latter's rules, and other cases in which a State directed and controlled or coerced the organization. In point of fact, however, it was hard to draw such a distinction, for while a State might pretend to be acting in good faith as a member of the organization and to be following its rules of procedure, it might be obvious to any outside observer that the State concerned was actually directing and controlling or coercing the organization.

3. The Commission was therefore faced with a pair of contrasting concepts: those put forward by the Special Rapporteur in draft articles 25 to 28, which described conduct for which member States, rather than the organization, should incur responsibility and, on the other hand, the situation in which a State acted in good faith as a member of an organization in accordance with its decision-making process. Yet very often a State suspected of having directed and controlled or coerced the organization would deny that it had done so and plead that it had merely followed the rules of procedure. There was no general rule for determining which of the two situations really obtained. Nevertheless he would have liked to see the Special Rapporteur examine more closely the criteria for assessing when a State was no longer acting in good faith as a member of an organization and was instead using its exceptional position of strength and bending the rules of procedure so as to direct, control or coerce the organization.

4. He had no specific objection to draft article 29. Draft articles 25 to 28 corresponded to Mr. Brownlie's realistic conception of a world where States actually controlled international organizations, whereas draft article 29 mirrored Mr. Pellet's image of an international organization capable of independent action, which could