

Document:-  
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**Summary record of the 2753rd meeting**

Topic:  
**<multiple topics>**

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acter. There were always going to be difficult cases, and that was why it was important to emphasize both criteria.

7. Mr. BROWNLIE said that it was not a good idea to try to define what governmental functions were. Governments did all sorts of things. They could create railways and even private enterprises. From a purely pragmatic viewpoint, he wondered why the criterion was useful as a factor of differentiation.

8. Mr. GAJA (Special Rapporteur) said he agreed that there was indeed a translation problem, the reverse of the one that had come up during the drafting of the draft articles on State responsibility for internationally wrongful acts. The term “governmental functions” could be understood in many ways. The concept could be widened to comprise that of *service public*, as mentioned by Mr. Pellet. The basic reason for having a criterion of that sort was that the Commission should be developing rules which followed the framework of the ones on State responsibility. It was reasonable to take into consideration those entities that, even if it was only a small part of their activity, could be assimilated to the activity of States, because some of the functions of the international organization were of the kind that a State would normally be expected to undertake. That did not mean that there might not be obligations under international law that were incumbent on other types of organizations. Similarly, individuals had not only rights under international law, but also obligations. The fact that one did not deal with the responsibility of individuals, or of non-governmental organizations composed of individuals, did not mean one denied that problems involving the responsibility of such entities existed.

9. Mr. ROSENSTOCK pointed out that a significant element of article 2 that facilitated the kind of language and approach used by the Commission was that it spoke of exercising certain functions, meaning that the institutions functioned, at some point, in some way, at a governmental level or like a government. That did not mean that they were governments, but rather that they did some things that governments did. The fact that it was not necessary for their activities to be specifically those of governments in order for the particular actions under consideration to give rise to responsibility seemed to support the general approach in article 2. It might be argued that the wording was not ideal, but, until something better was found, it could be seen as a reasonably sensible definition of what ought to be involved if the laws of State responsibility were to be applied.

10. Mr. BROWNLIE said that, in fact, the concept that worked best was that of “activity analogous to that of Governments”—a beautiful phrase that was completely useless, but was exactly what was needed. The article referred not to governmental functions but to the functions of international organizations, which were analogous to governmental activity.

*The meeting rose at 10.30 a.m.*

## 2753rd MEETING

*Wednesday, 7 May 2003, at 10.05 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Yamada.

### Statement by the Director-General of the United Nations Office at Geneva

1. Mr. ORDZHONIKIDZE (Director-General, United Nations Office at Geneva), welcoming the members of the Commission to Geneva, said that since its inception the Commission had held almost all its sessions in that city. Tasked with the progressive development and codification of international law, it had made impressive achievements over the 55 years of its existence: the law of treaties, the law of the sea, State responsibility, diplomatic relations, humanitarian law and an international criminal court were just a few of the areas that owed their codification to the Commission. Never before had so many different fields of international law been clarified and regulated. The fact that the last half-century had seen the universal codification of international law at an unprecedented pace was attributable in no small measure to the work of the Commission.

2. International law laid the foundations for just, humane and rational conduct among States. It set the basic rules on which any civilized society must rely. At the dawn of the twenty-first century, which was witnessing the emergence of a global community confronted with unprecedented challenges and risks, well-ordered State behaviour had become more crucial than ever before.

3. It was sometimes averred that the rule of law was too often ignored or flouted. He profoundly disagreed with that assertion: those whose short-sighted motives drove them to show contempt for international law usually found themselves obliged to circumvent it.

4. The scope of the Commission’s agenda for its fifty-fifth session testified to the extensive areas of law that still required international regulation. The fact that the Commission studied topics such as diplomatic protection, reservations to treaties, unilateral acts of States and the responsibility of international organizations was proof that many fundamental elements remained to be defined before universally accepted norms were established. He was confident that the Commission would continue to fulfil

its pivotal role of contributing to the establishment of the rule of law in international relations, a notion that lay at the heart of the Charter of the United Nations. The United Nations Office at Geneva stood ready to provide any facilities that could contribute to creating an environment conducive to the smooth functioning of the Commission.

**The responsibility of international organizations**  
(*continued*) (A/CN.4/529, sect. E, A/CN.4/532,<sup>1</sup>  
A/CN.4/L.632)

[Agenda item 7]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

5. Mr. RODRÍGUEZ CEDEÑO said that article 1 of the draft articles on the responsibility of international organizations, as proposed by the Special Rapporteur in his first report (A/CN.4/532), restricted the scope of the draft to two separate areas which must, however, be considered as a whole: the international responsibility of an international organization for acts wrongful under international law; and the international responsibility of a State for the conduct of an international organization. Article 1 thus excluded civil liability, for justifiable reasons set out in paragraphs 29 and 30 of the report: questions of civil liability had not been dealt with in the Commission's previous work on State responsibility for internationally wrongful acts; furthermore, exclusion of that issue reflected the preference of most States. The first sentence of article 1 was thus satisfactory as currently drafted. The draft also covered responsibility for acts of another international organization, and the responsibility that might arise from the internationally wrongful act of an international organization of which that organization was a member. Thus, the wrongful act might arise from an act not performed by the organization itself, as was reflected in the second part of the draft article, the wording of which was broadly acceptable. The form of the article might perhaps be improved by dealing with the two situations it envisaged in two separate paragraphs. That, however, was a question for the Drafting Committee.

6. Article 2, defining the term "international organization", would need to be expanded in due course to cover other terms to be introduced elsewhere in the draft articles. The term must be defined in the broader context of the organization's international responsibility for wrongful acts. The definition of an "international organization" as an "intergovernmental organization" used, *inter alia*, in the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character and the Vienna Convention on Succession of States in Respect of Treaties (hereinafter "the 1978 Vienna Convention"), was thus too general for the purposes of the present draft articles and should be retained as just one element of a new definition covering a wider range of organizations.

7. It was important to distinguish clearly between, on the one hand, the legal capacity of the organization *vis-à-vis* the internal law of the State and, on the other, the inter-

national legal personality of the organization as a subject of international law. In practice, those terms tended to be confused. Accordingly, the Rome Statute of the International Criminal Court had included a provision expressly defining the Court as an international organization as well as a criminal jurisdictional body. Those were two different and not necessarily complementary questions, as the Special Rapporteur pointed out in paragraph 18 of his report.

8. Two fundamental criteria should govern a definition appropriate to the draft articles under consideration. First, the organization must be one established by States, whether through a formal instrument such as a treaty or agreement, or by some other means reflecting a conventional basis for its establishment. Second, it must be an intergovernmental organization, not in terms of its composition but in terms of its creation. In other words, the organization must be established by States, though it could also include entities other than the State—a criterion that automatically excluded non-governmental organizations, which did not fall within the scope of the draft.

9. The Special Rapporteur also put forward another, more complicated criterion: the vexed question of governmental functions. Leaving aside any potential problems of translation, such functions were analogous to governmental functions, as Mr. Brownlie had pointed out, but related to the competences—including implicit competences—and powers conferred on the organization by States. They were not "governmental functions" in the strict sense of the term, but functions that the organizations could perform in the context of the competences established by their constitutions, by their internal rules, regulations and decisions, and by practice.

10. In short, the definition, or the commentaries thereto, should thus specify that an organization, regardless of its composition, must be established by States; must have international legal personality; and must exercise its functions pursuant to its own relevant rules and practice.

11. Mr. PELLET, welcoming Mr. Gaja to the "special rapporteurs' club", said that the Special Rapporteur's first report was both stimulating and debatable. The task of a special rapporteur was often a thankless one, calling for an ability to give as good as one got and, above all, to turn colleagues' suggestions and criticisms to one's advantage while continuing to steer a steady course. The Special Rapporteur seemed abundantly endowed with all those qualities, save, perhaps, the ability to respond to ferocious criticism with a like ferocity. That quality, however, might too lurk undetected.

12. While, generally speaking, he endorsed the Special Rapporteur's approach, he nonetheless had some serious grounds for disagreement. In that regard he recalled how, when newly elected to the Commission, he had been surprised at the manner in which members would praise special rapporteurs' reports at length, only to subject them to very severe strictures thereafter. Responding to his surprise, a more experienced member had explained to him that the role of members *vis-à-vis* a special rapporteur was analogous to that of a surgeon, namely, to anaesthetize the patient before proceeding to painful surgery.

<sup>1</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

13. First, the anaesthetic. The report was dense, concise, intelligent, interesting and broadly acceptable. In particular, the Special Rapporteur was right to define his topic in relation to the topic of State responsibility, and to propose to treat problems relating to the responsibility of international organizations that—rightly or wrongly—had been left aside by the Commission in its consideration of State responsibility. For instance, as the Special Rapporteur himself pointed out somewhat allusively in paragraphs 8 and 9 of the report, and more explicitly in paragraph 33, it might have been more logical to deal with State responsibility for the conduct of an international organization in the draft articles on State responsibility for internationally wrongful acts,<sup>2</sup> rather than in the current set of draft articles. That course, however, had not been taken. Nonetheless, if such a responsibility existed, it must certainly be dealt with somewhere, and the new topic was the natural—though not the most logical—place to do so.

14. However, there were two “buts”. First, the title of the topic was somewhat misleading. A better title would be “Responsibility arising by reason of the conduct of international organizations”; for one might otherwise infer that the conduct of international organizations could trigger the responsibility of the State. While a formal amendment of the title was not indispensable, that ambiguity, to which the Special Rapporteur had drawn attention, should be borne constantly in mind.

15. The same could not be said of his second reservation. The Special Rapporteur showed undue boldness, in his drafting of article 1, in seeming to propose that States could be held responsible for the conduct of an international organization—a point to which he would revert when, having, as it were, administered the anaesthetic, he came to perform the operation itself.

16. That being said, he nevertheless unreservedly endorsed the decision, referred to in paragraph 30 of the report, to exclude the responsibility of international organizations for activities not prohibited by international law. He agreed with the Special Rapporteur that those questions had their place within the topic of liability, and that they should be taken up forthwith in that context. He had no doubt that, in principle, the problem of liability was posed in the same terms for international organizations as for States, even if the formers’ lack of any resources could give rise to serious problems calling for imaginative yet practical solutions.

17. A third point on which he agreed with the Special Rapporteur concerned the method adopted. The Special Rapporteur was right to stress that the Commission was not starting from square one, having already postulated certain approaches, if only *a contrario*, as was clearly if somewhat succinctly indicated in paragraphs 3 to 11 of the report. He also endorsed the idea, again adumbrated somewhat allusively, notably in paragraph 11, that the draft articles on State responsibility for internationally wrongful acts should constitute a reference tool but that there should be no prior assumption of similarity, or even of comparability. There could be considerable variations between one problem and another, and even between one organization and another. In some cases international or-

ganizations “behaved” like States and there was no reason to treat them differently. That was particularly true of integration organizations, which tended to replace States in the exercise of their traditional functions and prerogatives. In other respects, however, international organizations posed specific problems which should be highlighted, and the solutions to them should not be calqued on the rules applicable to States. That, at any rate, was how he interpreted the Special Rapporteur’s intentions, couched as they sometimes were in somewhat sibylline terms.

18. Finally, he unhesitatingly endorsed the format adopted by the Special Rapporteur for draft articles 1 to 3, regarding the scope, definition—perhaps “definitions” would prove more appropriate—and general principles.

19. Now that the patient was—it was to be hoped—sufficiently anaesthetized, he would turn to some more critical remarks, stressing, however, that the problems tackled by the Special Rapporteur in his first report were so fundamental and central to international law that they must inevitably generate heated and impassioned debate.

20. Article 1 was conspicuous both for what it said and for what it omitted to say. As to the first sentence, he agreed that the scope should be limited to responsibility for internationally wrongful acts, and that it was thus imperative to align it with the draft articles on State responsibility for internationally wrongful acts. His only objection concerned the phrase “for acts that are wrongful under international law”. There seemed no reason to discard the terminology established in the draft articles on State responsibility, which had remained unchanged since the 1970s and was now firmly established in doctrine, and even in the jurisprudence of ICJ. The wording “for internationally wrongful acts” should be used.

21. He was more critical of the second sentence, to which he had already alluded. As drafted, it implied that the State could be responsible for the conduct of an international organization. That was possible, but not certain; and to incorporate it into a set of draft articles without first proving or even debating it seemed somewhat rash.

22. There were two possible solutions. The first, inelegant but simple, would be to place the sentence in square brackets pending further consideration. The second solution, one which he himself favoured, would be to delete the second sentence and to redraft the first sentence so as not to rule out that possibility, adopting some such wording as “This draft article applies to the question of [international] responsibility incurred by an international organization or arising by reason of internationally wrongful acts of an international organization.” The precise wording could be left to the Drafting Committee. The important point was to make it clear that the article concerned the responsibility for internationally wrongful acts of an international organization, while not prejudging questions of attribution or of the consequences or content of responsibility, which would also need to be considered in due course.

23. Admittedly, the first part of his proposal might raise objections, since responsibility incurred by an international organization did not necessarily exclude liability for acts not prohibited by international law, which the Spe-

<sup>2</sup> See 2751st meeting, footnote 3.

cial Rapporteur wanted to leave aside. However, wording could doubtless be found that would satisfy both himself and the Special Rapporteur. Besides, none of the draft articles on State responsibility for internationally wrongful acts formally excluded acts not prohibited by international law, and he wondered whether it was absolutely necessary to do so in the present draft, despite the somewhat sibylline explanations given by the Special Rapporteur in his report. It would become sufficiently clear from subsequent articles that such acts were excluded, and the title could even be changed, as had happened *in extremis* with the draft articles on State responsibility. Paragraph 31 of the report seemed to suggest that the Special Rapporteur would be open to making changes.

24. As to what the first sentence of draft article 1 omitted to say, he noted that the Special Rapporteur discussed one of the most important elements of the report, namely, civil liability, in paragraph 29 but made no mention of it in article 1. He disagreed with the Special Rapporteur's proposition that issues of civil liability, which the Special Rapporteur contrasted with responsibility under international law, should be left aside. He had two problems with that proposition. First, he was not convinced that civil liability and international responsibility could be contrasted in that way. International responsibility was neither civil nor criminal, it was simply international; the opposite of civil liability was not international responsibility but criminal liability. Second, and more importantly, unlike Mr. Rodríguez Cedeño he did not think that civil liability should be excluded. The Special Rapporteur gave as reasons for such exclusion the fact that the draft articles on State responsibility for internationally wrongful acts did not deal with questions of civil liability and his view that to state rules on civil liability would be an exercise in progressive development, rather than codification, of international law, and that the Commission was not the most appropriate body for studying those questions.

25. He disagreed with the Special Rapporteur for a number of reasons. First of all, under its Statute, the Commission was responsible for both the progressive development and the codification of international law. Second, he was not entirely sure that the Special Rapporteur's position on civil liability was based on premises that were factually correct. It did seem evident that what the Special Rapporteur termed "responsibility under international law" was based on far sounder practice than what he termed "civil liability". Third, the issue of civil liability raised real problems that were as essential to solve, if not more so, as those related to the traditional notion of international responsibility. The examples given in a footnote in paragraph 29 of the report made that quite clear. Fourth, he was far from convinced that the two concepts were as different and as easy to separate as the Special Rapporteur suggested. If international organizations incurred international responsibility in the restricted sense used by the Special Rapporteur, the question arose who would assume the resulting obligations, namely, reparation. That inevitably posed problems of the precise kind that the Special Rapporteur was proposing to leave aside by saying that they were issues of civil liability. Finally, he did not see why the Commission should not be the appropriate body to study those questions. He therefore disagreed with the exclusion of issues of civil liability from the wording in

paragraph 39, believing that the Commission could and must deal with those issues. Moreover, the Special Rapporteur was entirely capable of guiding the Commission in that task.

26. If, as he very much hoped, the Commission agreed that it should consider issues of civil liability and the Special Rapporteur resigned himself to doing so, that might mean article 1 would have to be redrafted. If the Commission subscribed to the Special Rapporteur's restrictive interpretation of the concept of international responsibility, "international" would have to be deleted before "responsibility" in the first sentence. Personally, he did not interpret the concept so narrowly and took the view that civil liability was in fact indissociable from international responsibility. If the Commission took the same view, the sensible solution would then be to retain "international". It was important not to ignore problems such as those that had arisen in the International Tin Council case (*Maclaine Watson and Co., Ltd. v. Council and Commission of the European Communities*). In that case, the English courts had been able to resolve some issues, but they had acted, or should have acted, only as bodies for the implementation of international law.

27. Draft article 2 posed a number of difficulties that had already been discussed following Ms. Escarameia's statement at the previous meeting and by Mr. Rodríguez Cedeño. It was not the first time that a special rapporteur had attempted to define the concept of "international organization". At the Commission's eighth session, in 1956, Sir Gerald Fitzmaurice, in his first report on the law of treaties, had defined an international organization as "a collectivity of States established by treaty, with a constitution and common organs, having a personality distinct from that of its member States...".<sup>3</sup> Parts of that definition could be said to have become obsolete. For instance, not all international organizations were necessarily established by treaty, OSCE being the most notable exception. Moreover, international organizations did not necessarily consist only of member States, although the term "collectivity of States" did not expressly exclude non-State members. The only real objection that could be made to the 1956 definition, in his view, was that it did not envisage the possibility of international organizations consisting purely of organizations. The only such organization with which he was familiar was the Joint Vienna Institute, set up in 1994 by agreement of IMF, BIS, EBRD, OECD and WTO, but there might be others. Generally speaking, however, the 1956 definition was a good starting point, and a reference to organizations of organizations, although not really crucial, could be discussed at some future point.

28. Fitzmaurice's definition had been produced in the context of the law of treaties, whereas the Commission was currently dealing with international responsibility. However, that did not warrant a fundamental difference of definition. Whether the issue was the organization's capacity to conclude treaties or its capacity to engage its international responsibility, neither was conceivable unless the organization had international legal personality. On that point, he had considerable problems with the Special Rapporteur's approach, as discussed at some length in paragraphs 15 to 19 of the report. He did not entirely agree

<sup>3</sup> *Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 108.

with those paragraphs, firmly believing as he did that all international organizations had an objective international personality—not for the negative reasons invoked by ICJ in its advisory opinion in the *Reparation for Injuries* case, referred to in a footnote in paragraph 19 of the report, but for those invoked by Judge Krylov in his dissenting opinion in the same case. It was surprising that the Special Rapporteur attached such importance to the Court's advisory opinion, which seemed to be of marginal relevance to the issue at hand, and also that the Special Rapporteur drew no conclusions from his reasoning. It was essential to make the point that international organizations had international responsibility not because they existed but because they had international personality—a chair or a dog existed, but that did not give it responsibility. He could not understand why, in attempting to define international organizations for the purposes of international responsibility, the Special Rapporteur had not made that point. The Court's advisory opinion stated that international organizations had a measure of international personality and that that was sufficient for them to incur responsibility. Since, judging by paragraph 15, the Special Rapporteur agreed with that position, he wondered why such a vital element was omitted from the definition in article 2 and suggested that it should be reinstated.

29. The Special Rapporteur took the view that the definition should not include a reference to establishment by treaty. He, personally, would prefer to retain such a reference—while explaining in a commentary that there might be exceptions—since the vast majority of international organizations were established by treaty. More to the point, he wished to correct a slight error in paragraph 14. As Legal Adviser to the World Tourism Organization, he wished to point out that, contrary to the assertion in the 1971 article in the *Netherlands International Law Review*,<sup>4</sup> the organization had been established not by a non-binding instrument of international law but by a binding international instrument (Statutes of the World Tourism Organization), signed in Mexico City on 27 September 1970, which had entered into force on 2 January 1975 and which was registered with the United Nations Secretariat. It would, in fact, probably become the sixteenth specialized agency of the United Nations system in the course of 2003. In article 1 of its statutes, the Organization expressly defined itself as “intergovernmental”, even though its membership consisted of member States (full members), non-self-governing territories (associate members) and private companies, individuals, universities, non-governmental organizations, and others (affiliate members).

30. Accordingly, article 2 could simply state, as was mentioned in paragraphs 12, 13 and 23 of the report, that the definition referred to “intergovernmental” organizations, or else, as suggested by the Special Rapporteur, that it referred to organizations which included States among their members or, as suggested by Mr. Rodríguez Cedeño in an attempt to avoid mention of a treaty, to organizations established by States, in which case the commentary could explain that such organizations could be established either by treaty or by non-binding instrument. All those options were acceptable, but the first was the simplest. He

disagreed that to use the word “intergovernmental” would be to wrongly equate Governments with States. Whichever of the three options was chosen, the commentary would have to recall that organizations of organizations could also exist.

31. In his opinion, organizations of organizations raised different problems, if only because they lacked the safety net of having States behind them. Such problems would have to be discussed when dealing with the issue of the possible responsibility of members of international organizations for the conduct of an international organization whose membership included States and other international organizations. That issue could not be left out of the draft articles, and the Special Rapporteur certainly had not suggested doing so.

32. The definition should therefore include the following elements: intergovernmental, possibly established by treaty, and possessing legal personality. The Special Rapporteur had, however, omitted any reference to establishment by treaty or to international legal personality. Instead, he had polarized the definition around the organization's exercise of certain governmental functions in its own capacity. As he had said at the previous meeting, using the English term “governmental functions” to render *prérogatives de puissance publique* might be acceptable for the draft articles on State responsibility for internationally wrongful acts, but not for those on responsibility of international organizations. Even though, as Mr. Rosenstock had said, it might be a generally reasonable translation, in the present case it was highly problematic. In that connection, he agreed with Mr. Brownlie that the organization must exercise functions analogous to those of a government, but he did not share his misgivings about including the management and promotion of tourism among such functions. The rendering “governmental functions” was a problem only for the English version, but in any case he seriously doubted whether the criterion used by the Special Rapporteur for the purposes of the draft was valid. In the systems of internal administrative law with which he was to some small extent familiar and which invoked the concept of *prérogatives de puissance publique*, the concept always seemed to refer to “inordinate” prerogatives of ordinary law, reflecting the idea that States and their organs did not behave like private individuals. If all activities that were not strictly governmental were excluded from the draft articles, however, that would leave little more than responsibility for the use of force, the conclusion of treaties and the adoption of binding legislation. That approach was unsatisfactory for many of the same reasons that he had invoked with regard to civil liability.

33. Moreover, the notion of *service public* was used in French administrative law to differentiate between activities under administrative law and those under private law—in other words, activities in the general interest as opposed to activities that served private interests. If he had to choose between the two terms, he would prefer to use *service public*. Article 2 would then read in French “...dans la mesure où elle assume une activité de service public”. However, he would rather use neither term, for a number of reasons. First, it was ill advised to refer, even implicitly, to concepts of internal law in an international legal instrument. That was clear from the translation problems to which he had alluded. International law was

<sup>4</sup> D. R. Gilmour, “The World Tourism Organization: international constitutional law with a difference”, *Netherlands International Law Review*, vol. 18 (1971), p. 275.

neither civil, criminal, Romano-Germanic nor common law, and he saw no reason to refer to concepts of internal law in the draft articles. The important point in article 2 was not that the international organization exercised certain governmental functions but that it did so “in its own capacity”. As soon as the organization acted in its own capacity rather than on behalf of its member States, it became internationally responsible. In fact, even the mention “in its own capacity” might be redundant, since an organization with legal capacity automatically acted in its own capacity.

34. To sum up, in article 2 his preference would be simply to say that the term “international organization” referred to an intergovernmental organization with international legal personality. However, he did not want the patient to emerge from the operation without anaesthesia and with no limbs left, so he would be prepared to retain the term “in its own capacity”, if the Special Rapporteur was attached to it, by inserting at the end “insofar as it acts in its own capacity”. For the time being, he could also agree to retain the wording “which includes States among its members” or to add a reference to the organization’s establishment by States or by treaty, although that did not really add anything. His proposal was a blend of the wording used by Fitzmaurice and by the Special Rapporteur, but it seemed appropriate.

35. He wished to thank the Special Rapporteur for initiating what promised to be a fascinating debate.

36. Mr. GAJA (Special Rapporteur) said that he would respond later to Mr. Pellet’s constructive comments. However, to dispel any confusion, he wished to clarify one point immediately. It had never been his intention to deny that international legal personality was an indispensable element. However, since many international organizations had such personality, he had not deemed it necessary to deal with the issue at length in the report or to include it expressly in draft article 2. The term “capacity” in article 2 implied that the organization had legal personality. While the wording might be improved, there was no need to discuss the issue of legal personality; such personality was an essential element and he did not think that Mr. Pellet’s otherwise constructive criticism was entirely justified on that score.

37. Mr. DUGARD said that, as he recalled, the International Tin Council would have fallen within the definition in article 2, since the Council had had member States and had exercised certain governmental functions. That point would prove important at a later stage. Of more immediate importance was the fact that the Special Rapporteur seemed to suggest in his report that the International Tin Council case (*Maclaine Watson and Co., Ltd. v. Council and Commission of the European Communities*) had involved an internationally wrongful act, but that the plaintiffs had chosen to take the case to the municipal courts rather than to international litigation. If that was so, it was difficult to invoke that case to justify making a distinction between international responsibility and civil liability. He shared Mr. Pellet’s concern that the two concepts should not be separated, but he would be grateful if someone could clarify the history of the International Tin Council litigation for him.

38. He agreed with the Special Rapporteur that there was no need for a reference to international legal personality. Indeed, to include such a reference might be risky, given that an intense debate was currently under way on the legal personality of non-governmental organizations. The purpose of article 2 was to exclude non-governmental organizations from the scope of the draft by placing the emphasis on States and the exercise of governmental functions, and he supported the approach taken by the Special Rapporteur in that regard.

39. Mr. GAJA (Special Rapporteur) said the litigation concerning the International Tin Council did undoubtedly yield interesting material, and the judgements handed down by national courts, particularly the English courts, were of special interest. The problem was that, while some questions before national courts had pertained to international law, there had chiefly been issues of municipal law, indeed of civil liability. It was such issues that he thought were dissimilar to the ones dealt with in the draft articles on State responsibility for internationally wrongful acts, and he proposed to deal only with those that came under international law.

40. Mr. KAMTO, referring to Mr. Pellet’s statement that a chair or a dog could not be a subject of international law or bear international responsibility—in other words, that it was not because something existed that it had objective international personality—said the question should rather be viewed from the standpoint of legal personality. The status of subject of international law was conferred on an international organization by the fact that States were members. By their membership, States brought to the organization a number of prerogatives and constituent elements of international legal personality. The advisory opinion of ICJ in the *Reparation for Injuries* case was insufficiently clear in that regard, but he had problems with Mr. Pellet’s assertion that Judge Krylov’s dissenting opinion was correct.

41. Mr. Rodríguez Cedeño had raised the interesting point that it was the element of creation, and not merely of control, that counted. IUCN was a non-governmental organization and had not been created by treaty; did the presence of States within it mean it could be considered an international organization? He did not think so. For that purpose, the State presence must be large enough so that States could be deemed to have control over the organization. It was being contended in legal writings in France that enterprises which signed contracts with individuals became subjects of international law. He thought not: they lacked the element that transformed the State into a subject of international law, the element of sovereignty.

42. Mr. BROWNLIE said that he had at one point advised a number of the member States of the International Tin Council on what to do, and that in the end they had engaged in extensive diplomatic activity, for lack of any other recourse. Some had gone to municipal courts, which had made for terrific fun for the lawyers but had immensely complicated the situation and delayed the diplomatic resolution of the problem. The Special Rapporteur was quite right that the judgement of the English court, while interesting, was not about international law; rather, it was about recognition in English courts of international organizations. In that and other contexts referred to by

Mr. Pellet, the Commission might advert to the question of what was the applicable law, which often provided the answer.

43. Mr. PELLET, responding to Mr. Kamto's remarks, said Mr. Kamto was reasoning the wrong way around: one should start from the proposition that international organizations had legal personality, which was precisely what ICJ had done in its advisory opinion in the *Reparation for Injuries* case. It had then looked into whether that legal personality was objective. Judge Krylov's argument pertained solely to the second issue. A chair could never have objective personality, as it had no personality whatsoever. An organization did have personality, and personality which, it seemed to him, must necessarily be objective. On the other hand, like Mr. Kamto, he thought that consideration should be given to Mr. Rodríguez Cedeño's proposal to incorporate in the definition of international organizations a reference to the fact that they were created by States.

44. He strongly disagreed with Mr. Dugard's final point: not including in the draft any reference to international legal personality would not signify that non-governmental organizations were excluded. Both non-governmental and intergovernmental organizations had international legal personality to some degree, that of the latter being much better established than that of the former. The main difference was that intergovernmental organizations were created by States, *inter alia*. In the absence of legal personality, however, there was no responsibility, and the draft was supposed to be about responsibility.

45. The International Tin Council had been a purely intergovernmental organization comprising no private individuals, but only States and the European Community. Had it exercised governmental functions? Yes and no: it had bought and sold tin, and, under the Special Rapporteur's very broad conception of governmental functions, that could constitute the exercise of such functions—but so could engaging in tourism.

46. Finally, he agreed with what had just been said by Mr. Brownlie: the question was not which municipal courts had handed down judgements, but what types of issues had been involved. The English courts, like the French ones, were not terribly concerned about international law, even though it was part of domestic law, and they had applied English law. That did not mean, however, that the issues involved did not raise problems of international responsibility with which the Commission should be concerned.

47. The CHAIR, speaking as a member of the Commission, noted that little had been said about an essential feature that should be part of the definition of international organizations: their capacity to assume rights and obligations under international law. Responsibility was triggered when an obligation under international law was breached. Irrespective of how it was created or of its composition, the important point was that an international organization was one that assumed obligations under international law.

48. Mr. RODRÍGUEZ CEDEÑO said there were two entirely unconnected criteria within the definition of an

international organization: first, the organization must be created by a State, and second, the organization must have international legal personality. Such personality was usually explicitly set out in the constituent instrument or was conferred on the basis of the organization's activities. As the Chair had suggested, that meant that the organization had the capacity to assume rights and obligations at the international level. Not all organizations or entities created by States were necessarily international organizations with international legal personality: even though they were public entities, States could set up private enterprises.

49. Mr. FOMBA, congratulating the Special Rapporteur on the excellent quality of his report, said the Commission had already done work on the responsibility of international organizations, even if only incidentally. The Special Rapporteur's review of that work was useful, and the conclusion had been drawn that the responsibility of international organizations must be handled in a manner analogous to the approach taken to the responsibility of States. Personally, he would add that that must be done *mutatis mutandis*, and he noted in that connection Mr. Pellet's remark about similarity and comparability.

50. The Special Rapporteur had rightly drawn attention to the fact that the topic raised complex and controversial issues of doctrine. The Commission must accordingly move forward with imagination yet also circumspection, particularly in making comparisons between States and international organizations and drawing the appropriate conclusions.

51. Draft article 1, which covered the scope both *ratione materiae* and *ratione personae* of the study, seemed to present no difficulties, especially since he agreed with the Special Rapporteur's view that the scope of the study did not include international liability for activities not prohibited by international law. He had some questions about whether civil liability should be included and endorsed the objections raised by Mr. Pellet, but he agreed with the Special Rapporteur that questions such as the responsibility of an international organization for conduct performed by a State or another international organization and the responsibility of an international organization for the unlawful conduct of another organization of which the first organization was a member should come within the scope of the study. Those issues, and the related remarks by Mr. Pellet, deserved further consideration and should be reflected in some way, but he had no firm ideas as yet about whether it should be in the wording of the draft article itself or in the commentary. Mr. Pellet's proposal for revising the title of the article to take account of those issues likewise deserved consideration. He agreed that matters that concerned the responsibility of States and were related to the wrongful conduct of an international organization must also be included in the scope of the study.

52. In draft article 2, the Special Rapporteur proposed two criteria for the definition of an international organization. First, its membership must comprise States, reflecting the desire to concord with the Vienna definition but also to take account of recent developments in the lives of international organizations, some of which now included entities other than States. The second criterion was that of autonomy in the exercise of "certain governmental functions". The present wording in French, *certaines préro-*

*gatives de puissance publique*, had already given rise to extensive discussion: apparently, under French law, few organizations had the capacity to exercise such functions. Alternative formulations such as those proposed by Mr. Brownlie and Mr. Pellet would thus be preferable. While the criterion of international legal personality had been amply shown to be relevant, perhaps that of the exercise of certain governmental functions would prove to be a dead end. It was a delicate question, and the Commission should examine it further.

53. Mr. PAMBOU-TCHIVOUNDA said that the first report on the responsibility of international organizations was fittingly sober, even though certain subjects were emphasized while others were left undeveloped. The approach, which was outlined in paragraph 11 and which he endorsed, was to align the treatment of the topic upon the work done on the responsibility of States for internationally wrongful acts. The limitations inherent in basing the treatment of one subject upon that used for another should be kept in mind, however, as they had become apparent in the work on unilateral acts of States. The Special Rapporteur on the responsibility of international organizations should therefore take account of the particularities of international organizations when pursuing the parallels between that topic and that of State responsibility.

54. In the matter of substance, he queried the need to raise the question of what criteria should be used to define the international organization for the purposes of the present study. Surely it was answered in the literature as well as in the codification conventions cited in paragraph 28 of the report. Was there any reason to depart from the definition in those conventions? He thought not. Any international organization whose acts or omissions could engage its international responsibility was manifestly an intergovernmental organization. It would be prudent and appropriate to the Commission's past practice, he believed, to hew to that description of an international organization.

55. By referring to acts or omissions which might engage the responsibility of an international organization, he had been alluding to the source of the international responsibility of the international organization. One could agree with the Special Rapporteur in that regard that a functional definition of the international organization was appropriate, as was made clear in paragraph 25 of the report: "What seems to be significant for our purposes is not so much the legal nature of the instrument that was adopted for establishing the organization, as the functions that the organization exercises."

56. The reason for stressing the functional aspect was that, in pursuing the purposes and objectives which an international organization had assigned itself, specific functions were exercised in the form of acts or the failure to act, and those functions were at the origin of any prejudice that might be caused to other subjects of international law, whether States or international organizations. The concept of function was crucial, stemming as it did from the idea of international legal personality. It was the attribute that made the international organization a subject of international law, even if the organization did not have sovereignty, because an international organization was not a State, but it had legal personality, which was implicitly

conferred to it by the States that created it, thereby making that organization a subject of international law. But at the same time, an international organization had obligations towards other subjects of international law, and that included the obligation to be responsible for the possibly prejudicial character of the acts through which its functions were exercised. Mr. Pellet had rightly referred to the overriding importance of responsibility's being linked to international legal personality. Those key concepts must be defined in one of the draft articles.

57. The Special Rapporteur had asked the Commission to consider the scope of the criterion of legal personality since the *LaGrand* case. But it might be argued that ICJ had gone rather too far in some instances. It would not have occurred to anyone in the Commission to treat an international organization as an individual just because, in the *LaGrand* case, the Court had found that an individual had an international legal personality. Similarly, in its advisory opinion in the *Reparation for Injuries* case, the Court had had the idea of assimilating a State to the United Nations and, by extension, to an international organization. Everyone knew in what terms the Court had produced the advisory opinion: it had done so saying that the United Nations was neither a State nor a supra-State. Should the Commission say, on the basis of the *LaGrand* case, that the United Nations or an international organization was neither a State nor something less than an individual? That would be an affront, if not to States that created an international organization, then at least to the international organization as a subject of international law. Of course, nowadays anything was possible. What had just happened in Baghdad might lead some to conclude that the United Nations was worthless and that States could decide to do as they pleased.

58. Regardless of whether an international organization was established for the purpose of cooperation or integration, it was the product of those who created it and had assigned it its purposes and objectives and its powers. That was a point on which he disagreed with Mr. Pellet. Even in the case of regional integration organizations, it was the constituent instrument that defined what the organization could and could not do. It was not advisable to try to make too many distinctions.

59. Draft article 1 focused on the question of attribution. Yet, as it stood, it seemed to be meant as a reply to article 57 of the draft articles on State responsibility for internationally wrongful acts. Article 1 made two points, which should have been presented separately. The attribution to an international organization of responsibility that stemmed from its own conduct should form the subject of a separate paragraph, because in its present wording the article gave the impression that both sentences dealt with the same issue. A second paragraph should be inserted to meet that concern and address a question that had not been covered in the draft on State responsibility. Furthermore, the words "for acts that are wrongful under international law", at the end of the first sentence, should be replaced by "for acts which, owing to the conduct of that organization, are wrongful by virtue of international law": it was by reference to the international law of responsibility, which the Commission had already codified, that the responsibility of international organizations must be defined.

60. As to draft article 2, was it sufficient to pose questions of definition? Since legal personality and the functions exercised in accordance with an organization's purposes and objectives were taken into account, it would be better to include the scope of the subject in the title of article 2. For the sake of concision, article 2 should be recast to read: "For the purposes of the present draft articles, the term 'international organization' refers to an intergovernmental organization exercising, by virtue of its international legal personality, the functions required to realize the object and purpose defined in its constituent instrument." Such a wording would cover the whole discussion on the concept of governmental functions.

61. The CHAIR invited the Special Rapporteur to introduce draft article 3 of his report, which read:

*"Article 3. General principles*

1. Every internationally wrongful act of an international organization entails the international responsibility of the international organization.
2. There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:
  - (a) Is attributed to the international organization under international law; and
  - (b) Constitutes a breach of an international obligation of that international organization."

62. Mr. GAJA (Special Rapporteur) said that the main reason for separating the presentation of article 3 from the other two articles was that articles 1 and 2 considered the scope of the topic, while article 3 related to the substance of the rules and also raised different types of questions.

63. The draft articles on State responsibility for internationally wrongful acts adopted by the Commission at its fifty-third session contained in Part One a short chapter consisting of three articles of an introductory nature. Pursuant to article 1, every internationally wrongful act of a State entailed the international responsibility of that State. The meaning of "responsibility" was not defined, but emerged from Part Two of the text. Article 2 gave the elements of an internationally wrongful act. They consisted of the attribution of conduct to a State and the breach of an international obligation. Article 2 contained an implied reference to Chapters II and III of Part One. He would return to article 3 of the text on State responsibility later on.

64. Introductory draft articles of the type adopted on State responsibility might prove useful with regard to international organizations. In the present articles, those provisions would be less prominent, because they would follow the articles on scope, whereas in the draft articles on State responsibility for internationally wrongful acts, they were placed at the very beginning.

65. The propositions contained in articles 1 and 2 of the draft articles on State responsibility for internationally wrongful acts were hardly controversial and could be transposed to international organizations. But a few questions arose. The first was whether the statement concerning the attribution of conduct was appropriate in view of

the possibility that an international organization incurred responsibility for conduct which was not its own but that of a State or another organization. Since those cases were of marginal importance and general principles did not exclude that responsibility could otherwise be incurred under certain circumstances, the statement concerning the attribution of conduct might be justified.

66. The second question arose if one accepted the proposal to include the issue of the international responsibility of a State for the conduct of an international organization within the scope of the draft articles, currently in the second sentence of draft article 1. There might seem to be an inconsistency between the provision regarding the scope, which mentioned questions of State responsibility, and the article on general principles, which referred only to the responsibility of international organizations. There again, it could be said that the general principle did not exclude the case of State responsibility, which might be dealt with in other provisions later in the draft.

67. As to drafting, was it necessary to state each general principle in a different article, as had been done in the text on State responsibility? Since the principles were closely interrelated, it might be preferable to combine them in a single article. Logically, the wrongful act occurred first, and then international responsibility arose. However, as had been done with State responsibility, it might be thought that in the draft articles on international responsibility, the stress should be on responsibility. Thus, the same order could be followed as in the draft articles on State responsibility, namely starting with the paragraph on responsibility, then explaining when a wrongful act arose and referring to attribution and the breach of an international obligation.

68. Another issue was whether the draft should include a text similar to article 3 of the draft articles on State responsibility for internationally wrongful acts. As the Commission had noted in its commentary on that article, the idea expressed in article 3—that the characterization of an act of a State as internationally wrongful was governed by international law—was already implicit in article 2: if there was a breach of an obligation, it was of an obligation under international law. Once it was stated that an internationally wrongful act constituted a breach of an international obligation, it hardly seemed necessary to say that that characterization depended on international law.

69. Some might want to follow closely the precedent of the draft articles on State responsibility for internationally wrongful acts and repeat what was arguably implicit. But, on balance, it seemed preferable not to do so, the main reason being that article 3 on State responsibility had been adopted mainly because of a rider, which created a number of problems with regard to international organizations. Article 3 went on to say that the characterization which was governed by international law was not affected by the characterization of the same act as lawful by internal law. A similar statement with regard to international organizations would be controversial, because it was by no means certain what was part of the internal law of an organization. At the previous meeting the Drafting Committee had briefly discussed whether or not the constituent instrument was part of the internal law of an organization. It could be argued that it was, but then one could not

ignore the fact that it was also part of international law. If it was a constituent treaty, as it was in most cases, how could that treaty, which the 1969 Vienna Convention regarded as such, not be part of international law?

70. The situation of international organizations was also different in another respect. It was clear that for a State, its internal law, which was the result of its unilateral choice, could not prevail over international law. That was the idea that article 3 was meant to convey. For a State, international law could not be derogated from by internal law. The same did not necessarily apply for international organizations, whose internal laws might well be the result of the collective choice of member States and might even affect treaties that were in force among them. One could not assume that States were bound *inter se* by treaties in such a way that the law of an international organization could not have any consequence for them. The question of the hierarchy between international law and the internal law of the organization did not need to be addressed at this stage, when it was not yet certain that it was relevant.

71. Everything contained in the draft articles on State responsibility had to be considered, and he agreed on the need for a parallel approach. However, it was not necessary for the Commission to state the same rules with regard to international organizations as it had done with regard to States. Such a course would make for a very long text and would not always be justified. The Commission should aim for a shorter text that only included issues that had to be dealt with specifically. His own suggestion was thus not to aim for an entirely parallel text. There was no parallel in draft articles 1 and 2, and draft article 3 could encompass all the general principles and say what was currently contained in articles 1 and 2 of the articles on State responsibility. Certain matters could be developed in the commentary.

*The meeting rose at 1.05 p.m.*

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## 2754th MEETING

*Thursday, 8 May 2003, at 10.05 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Yamada.

## The responsibility of international organizations (continued) (A/CN.4/529, sect. E, A/CN.4/532,<sup>1</sup> A/CN.4/L.632)

[Agenda item 7]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. KOSKENNIEMI said that, as a new member, he was struck by how much the legal background of the members of the Commission influenced their approach to a subject. That cultural clash had been particularly evident in the discussions the day before on the question whether legal personality should be a criterion for defining an international organization. In his view, that was like putting the cart before the horse. Legal personality was the consequence of rights, obligations and powers, not their source. That was one of the lessons of the advisory opinion by ICJ on the *Reparation for Injuries* case, in which the Court had said that international organizations all differed in their nature, their rights and their duties. That was tantamount to saying that there was no *a priori* concept of legal personality, but that everything depended on what responsibilities the various sources of law conferred on a given organization.

2. He thanked the Special Rapporteur and congratulated him on his thought-provoking report. There was little to object to in the three draft articles.

3. The second sentence of draft article 1 was problematic, as Mr. Pellet had already indicated the day before. Although State responsibility might be incurred through the conduct of an international organization, that came within the scope of the draft articles on State responsibility for internationally wrongful acts,<sup>2</sup> and it was odd to refer to such problems in the first article on the responsibility of international organizations. It might be preferable to deal with the question by referring to the draft articles on State responsibility later on, either in the final articles or in a section entitled "Miscellaneous".

4. He agreed with the Special Rapporteur that an international organization did not necessarily have to be established by treaty in order to be regarded as such, but he took issue with the idea that "an organization merely existing on paper cannot be considered a subject of international law" (para. 19 of the report). Many lawyers had taken part in the establishment of paper organizations which might acquire a *de facto* existence if it proved useful; such operations were not necessarily shady and could take place for perfectly honourable motives. In the final analysis, the criterion of establishment by treaty, if present, ought to be sufficient. It could be said that it was perhaps not necessary, but sufficient.

5. He endorsed the substantive criterion discussed by the Special Rapporteur in draft article 2, namely, that the organization should include States among its members, but further thought needed to be given, for example, to the question of when a State could be considered to be a member of an organization. In some organizations, States

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<sup>1</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

<sup>2</sup> See 2751st meeting, footnote 3.