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Summary record of the 2754th meeting

Topic:
Responsibility of international organizations

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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.

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. Escameia, 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.4/532,¹ 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,² 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

¹ Reproduced in *Yearbook ... 2003*, vol. II (Part One).

² See 2751st meeting, footnote 3.

did not participate directly, but through governmental agencies. Should they be excluded from the draft articles? The functional criterion, namely, the exercise of governmental functions, contained an unfortunate ambiguity: it could be understood in two ways, either as the exercise of functions analogous to those of national governments or as a form of participation in international governance. Moreover, the functional criterion was too restricted because it excluded from the scope organizations devoted solely to scientific research, such as the European Forest Institute, with headquarters in Finland, whose status as an international organization no one would think of contesting. It would be preferable to speak of “functions analogous to those of national governments or international governance functions”.

6. To delimit the scope of the draft articles, it would be better not to be restricted to a simple definition, but to establish a typology of as many international organizations as possible. Perhaps the Special Rapporteur could focus on that question in his next report.

7. He fully agreed with the content of draft article 3. He merely drew the attention of the members of the Commission to an important question raised the day before by the Special Rapporteur, namely, the relationship between the internal law of an organization and international law, which should be addressed later in greater detail. In the case of the European Union, a situation could easily be imagined in which an act of that organization was perfectly lawful under European law, but illegal under international law. The case of WTO could prove more complicated: WTO could very well take a decision that was lawful under “WTO law”, but illegal under international law. That raised the problem of the fragmentation of law, which had already come up in the Commission’s discussions: Could “WTO law” be conceived of as a special legal regime whose occasional deviations from international law did not constitute illegality? Finally, the Commission should examine the case of the normative hierarchy within international law. Although the principles that governed it were rather ambiguous, principles such as *erga omnes* and *jus cogens* were universally recognized.

8. Mr. DUGARD said that it was essential to delimit the scope of the draft articles by means of a definition, however elusive it might be. However, he took issue with the proposal to distinguish between international and national governmental functions in the definition. As international lawyers, the members of the Commission were probably prepared to accept that there was such a thing as international governmental functions, but many Governments still objected to the very suggestion that there was any form of international governance, and that might frighten the horses in the Sixth Committee. He was surprised that Mr. Koskenniemi should present organizations devoted solely to research as a special case; surely scientific research was a governmental function.

9. Mr. FOMBA, commending Mr. Koskenniemi on his excellent and thorough statement, requested clarification on a point that was unclear to him, namely, the idea that, in order to define the type of international organizations to which the draft articles applied, establishment by treaty was not necessary, but should be sufficient. Logically, it would be preferable to say that, although more formal and

sound from a legal standpoint, establishment by treaty was not an absolute or essential criterion. Did Mr. Koskenniemi take “sufficient” to mean that that was the only sufficient criterion, or that it was one sufficient criterion among others?

10. Mr. CHEE said that the expression used by ICJ in the *Reparation for Injuries* case was “international personality” and not “international legal personality”. That should be borne in mind when assessing decisions on reparations. Noting that all non-governmental organizations operated on the basis of terms of reference, he questioned whether the internal acts of such organizations should be characterized as legal or illegal under international law.

11. Mr. KOSKENNIEMI, replying to Mr. Dugard, said that, if scientific research was a “governmental” function, then the list of other activities that came within that category would be very long. If such a list were compiled, the very notion of “governmental function” would lose all meaning.

12. Concerning a comment by Mr. Fomba, he said that his choice of the word “treaty” as a sufficient but not necessary condition had been deliberate. That meant that, if an organization had been established by treaty, there was no need to ask whether it was an international organization: that was automatically the case. It was also possible to have international organizations not established by treaty, but to be established by treaty sufficed.

13. Mr. Chee’s comment on the question of the legality of the internal constitution of non-governmental organizations under international law raised a number of difficult problems and opened Pandora’s box. As those issues concerned the fragmentation of international law, it would be preferable to deal with them at a later stage.

14. Mr. BROWNLIE said that the subject being pursued raised some difficult questions. The first was the issue of the organization’s acting as an organ of one or more States in the context of State responsibility, referred to in paragraphs 27 and 33 of the report, which, according to the Special Rapporteur, should not be set aside, but referred to at least by way of illustration. He himself was a little uneasy about the general relationship between the topic of the responsibility of international organizations and the topic of State responsibility. It made sense to treat the latter as a sort of builder’s yard from which material could be extracted as the need arose. But the assumption that State responsibility and the responsibility of international organizations were somehow the same—an assumption that might or might not be one made by the Special Rapporteur—gave rise to a certain unease. If he himself preferred to use the very vague term “analogous”, that was because he felt that there was a problem and that the question of the role of international organizations acting on behalf of States should be treated separately, as a special category. It should not be allowed to impinge too much on the Commission’s general approach to the topic.

15. Regarding the issue of governmental functions, the question was what rationale lay behind the selection of such a criterion. In paragraph 20 of his report, the Special Rapporteur referred to the need to address only questions relating to a relatively homogeneous category of interna-

tional organizations. He himself did not find that argument very persuasive and believed that the Commission must face up to the fact that international organizations, even those consisting in whole or in part of States, were so protean that it was very difficult to get away from the multiplicity of types. Perhaps Mr. Rosenstock's suggestion that they should in a general way behave like States could be accepted as a working assumption as to the existence of a standard type of international organization. But it did not seem helpful to include an express restriction in article 2.

16. The question of the polarity between responsibility under international law and civil liability, referred to in paragraph 29 of the report, had been the subject of some criticisms by Mr. Pellet. Perhaps the source of the difficulty might be the determination of applicable law: in the way in which different organizations functioned, several applicable laws were often brought into operation for different purposes. For instance, the European multilateral conventions dealing with nuclear risk used civil liability as an instrument for the distribution of loss. The Commission should concern itself with questions relating to the identification of applicable law and should reserve at least some room for references to the role of civil liability. The basic problem seemed to be the individuality of international organizations. Each had its own internal applicable law. Of course, States too had their own internal law, but the interrelation between the internal law and the external relations of States was much more easily recognized and better established than the relationship between the external relations of international organizations and their "internal law". The Commission was thus stuck with a subject in which everything was in a sense *lex specialis*, and the question arose why international organizations were bound by international law. A possible suggestion was that they were bound for the same reasons of practicality and principle for which new States were so bound.

17. One more point no doubt merited further consideration. It had been acknowledged for some time that perfectly well-recognized international organizations of States had taken it upon themselves to suddenly change their characters. One of the more dramatic instances had been the gradual bringing about of a change of regime in the former Yugoslavia. The dear old European Union had detached itself from economic questions in order to play a major role in that change of regime. NATO had also stepped well outside the purposes stated in its constituent treaty (North Atlantic Treaty). In western Africa, ECOWAS had also changed its function. Perhaps such cases should be treated merely as political turbulence, but perhaps, too, they raised questions of principle to which a little thought should be given.

18. Mr. PELLET said he agreed with Mr. Brownlie that applicable law was a sound basis on which to proceed and that if, by proposing to exclude civil liability, the Special Rapporteur meant that the Commission should not deal with internal law, he appeared merely to be stating the obvious. But it was important not to throw the baby out with the bathwater by disregarding situations such as the bankruptcy of the International Tin Council which might entail the responsibility of the organization, under the pretext

that the problem could also be settled in the context of the internal legal order.

19. Mr. MOMTAZ said that, among the cases where an international organization acted as an organ of one or more States, one could cite, for example, the case where an international organization supervised elections at the request of a State. According to the Special Rapporteur, in that type of situation, the conduct of the international organization should be attributed to the State (para. 27 of the report). In other words, the international organization acted as an organ of the State. That was precisely the case provided for in articles 4 and 5 of the draft articles on State responsibility for internationally wrongful acts. If he had understood Mr. Brownlie correctly, a special category of international organizations was being referred to in situations of that type. The question was thus whether the act performed by such an organization on behalf of the State would be attributed not to the State but to the organization.

20. Mr. BROWNLIE said that the difficulty was that, at the time of the establishment of an organization, arrangements were not always made for the division of risks. For example, the European Space Agency (formerly ELDO and ESRO) appeared to have made no express arrangements for the losses that might be caused by its activities. But the real problem was that it was not always easy to know in advance whether an organization was not only a risk-taking organization but also one that had internalized those risks. In other words, it was difficult to know whether it was ready to pay up if non-members—or even members—were damaged. The ultimate problem about the individuality of international organizations was that they could be hired for different purposes, in the same way as a private organization could be selected and used by a State, and could become a State entity for certain purposes or for a period of time. It was very difficult to know that in advance because an element of pragmatism entered into play, and because international organizations were often willing to change their own objectives or to accept roles that nobody could have foreseen, at the behest of individual States or groups of States. Much depended on the particular relationship created.

21. Mr. YAMADA said he agreed with the Special Rapporteur that it would be unreasonable for the Commission to take a different approach from the one it had adopted on State responsibility unless there were specific reasons for doing so, and that the model of the draft articles on State responsibility for internationally wrongful acts should be followed both in the general outline and in the wording of the new text. Nevertheless, there were a number of differences between international organizations and States warranting a different approach in some areas.

22. In paragraph 15 of his report, the Special Rapporteur seemed to imply that his study would deal with secondary rules and not with primary obligations. It might thus be asked whether there was a sufficient accumulation of laws and practice on the responsibility of international organizations at the level of primary rules, as had been the case for State responsibility; whether those primary rules were so different as to justify the Commission's leaving them out and concentrating on the secondary rules; and whether it would not be more meaningful to examine and

codify, to the extent possible, the most important areas of primary rules concerning international organizations so as to contribute to the progressive development and codification of those rules.

23. While fully agreeing with the proposal to limit the scope of the study to questions of international responsibility for internationally wrongful acts, he nevertheless had the impression that instances of international organizations committing internationally wrongful acts were few and far between: there was no comparison with the number of instances of wrongful acts committed by States. It was more likely that harm would be caused by international organizations performing acts not prohibited by international law. For instance, technical assistance programmes and lawful acts of international organizations always carried a risk of causing harm. Currently, however, organizations obtained immunity by inserting "hold harmless" clauses in the agreements concluded with recipients, and the burden thus fell on the countries of the developing world. He was not for a moment suggesting that the liability aspect should be dealt with at the current stage; rather, it should be a separate topic. However, the Commission should at least have a rough picture of the relative importance of the responsibility and liability of international organizations.

24. Turning to the draft articles proposed by the Special Rapporteur, he said he had no further comment to add to those he had already made concerning the first sentence of article 1. As to the second sentence, he recognized the need to include the question of the international responsibility of the State for the conduct of an international organization in the scope of the draft articles. He assumed that question would be treated more fully at a later stage in the subsequent articles. It was already well covered in chapters II and IV of the draft articles on State responsibility for internationally wrongful acts. The question of the responsibility of a member State of an organization for a wrongful act committed by that organization called for careful study.

25. Regarding draft article 2, it was really too early to examine the question of the definition of international organizations, and this should be done only out of practical necessity, to establish a preliminary starting point for the study. The question should be re-examined after the study was further along. As a matter of principle, a simple and concise definition would be preferable. But as the responsibility of international organizations was at issue, the definition should be precise and free of all ambiguity.

26. The three main features identified by the Special Rapporteur in the definition that he was proposing, namely, that the organization must include States among its members, that it must exercise certain functions in its own capacity and that those functions must be comparable to governmental functions, were of the utmost importance and should be formulated more precisely. The first feature might need further refinement, for the fact that an organization was open to States was not sufficient. The organization must also have been created or established by States and not by non-State entities. States might even need to constitute the dominant majority of the membership. The second feature had to do with the question whether the organization was a subject of international

law. Further thought should be given to whether the term "in its own capacity" was appropriate. Third, the functions of the organization must be defined clearly. They must be comparable to governmental functions, but an international organization was not a government, and he did not know whether its functions could be described as "governmental". It exercised the governmental functions its member States delegated to it, and the appropriate term for that concept needed to be found. It was rather difficult to discuss the definition in the abstract. Perhaps, as Mr. Koskenniemi had suggested, the Special Rapporteur should provide a list of the major international organizations that he hoped to cover in his study, giving their basic data, such as membership and main functions. That would certainly help the Commission to define the international organizations to which the draft articles were to apply.

27. He had no comments on article 3.

28. On another matter, he noted that the Special Rapporteur, like himself and Mr. Dugard, had close personal contacts with members of ILA. The Association and the Commission had common undertakings, namely, to produce authoritative statements on the present status of international law and on its desired development. The promotion of a cooperation arrangement between the two bodies would be mutually beneficial. The Commission should perhaps consider what form such future cooperation with the Association, and with other bodies such as the Institute of International Law, might take. That issue should be discussed at an early date, either in the plenary or in the Planning Group.

29. The CHAIR said that consultations would be held on that subject.

30. Mr. PELLET said he personally thought that it would be absolutely disastrous to change approach radically and abandon the consideration of secondary rules at the present stage in favour of the consideration of primary rules. In the same spirit, he was utterly opposed to the idea put forward by Mr. Koskenniemi, and taken up by Mr. Yamada, of drawing up a list of organizations. What was important was to adopt an approach that was broadly similar to that followed with regard to States. The example of technical assistance used by Mr. Yamada to show that problems of the responsibility of international organizations arose more frequently with activities not prohibited by international law than with internationally wrongful acts seemed to be the worst that could be found. While an international organization could incur responsibility in the context of technical assistance, such responsibility would be incurred by a wrongful act, and it was hard to see why it would be incurred by activities that were not prohibited. However, in his statement Mr. Yamada had put his finger on a problem that the Commission would have to address at some time or another, that of the immunity of international organizations, which conflicted with the implementation of their responsibility. The problem of immunity and that of responsibility had common points, but the Commission would have to take care not to confuse the two.

31. Mr. KOSKENNIEMI said that what he had suggested was that, based on empirical studies, the Special

Rapporteur should draw up a set of types of international organizations on which the Commission might base its deliberations. He supported Mr. Yamada's proposal that cooperation should be established with ILA, as well as other associations.

32. Mr. BROWNLIE said he agreed with Mr. Koskeniemi. He emphasized that the suggestion was not to produce a complete repertory of international organizations, something that would be an impossible task, but to make a typology of some kind which, while not highly developed, might be helpful for the Commission's deliberations.

33. Mr. KEMICHA said that the approach taken by the Special Rapporteur was in line with the Commission's earlier work, in particular the draft articles on State responsibility for internationally wrongful acts, and seemed to meet with general approval. With regard to draft article 1, he supported the proposed drafting improvements, even though they might seem premature at the present stage. As to the definition given in draft article 2, he noted that all members seemed to agree that the text should apply only to intergovernmental organizations and not to non-governmental organizations, but he would prefer the term proposed by one member, namely, "organization established by States". The wording "in its own capacity certain governmental functions" also gave rise to problems, and the criterion of international legal personality seemed to be an adequate basis for the notion of the responsibility of international organizations. He had no criticisms of draft article 3 to make at the present stage.

34. Mr. BAENA SOARES said that he agreed with the approach taken by the Special Rapporteur and his decision to limit the scope of the draft articles to "the international responsibility of an international organization for acts that are wrongful under international law". Going back to the Special Rapporteur's review of the Commission's earlier work, he emphasized that the latter must be relied on purely for purposes of guidance, given the changes that had occurred in the meantime.

35. Turning to draft article 1, he noted that it envisaged two distinct situations which should perhaps be kept separate. That was a matter for the Drafting Committee. With regard to draft article 2, he emphasized the need to agree on a preliminary definition that could be altered later. There was general agreement that the draft articles must apply to intergovernmental organizations, which could be defined by retaining some of the suggested elements, such as the fact that the organization exercised in its own capacity certain functions analogous to governmental functions. The criterion, proposed by some members, of organizations established by States would remove any ambiguities. It would be possible to specify that the international organization must have a constituent instrument defining its goals, structure and functions.

36. He emphasized that, in order for provisions to be implemented effectively, they must be formulated clearly and objectively. Finally, the proposal to produce a kind of typology of international organizations seemed a prudent one.

37. Mr. SEPÚLVEDA said that the nature and functions of international organizations had evolved dramatically

since the time, 40 years previously, when distinguished legal experts had deemed it preferable to exclude from consideration subjects of international law other than States. It had since become a legal necessity to study the international responsibility of international organizations, for such organizations were now recognized as subjects of international law. In order to determine the scope of the draft articles, it should first be specified how the responsibility of an international organization was entailed. Taking the draft on State responsibility as a model, it could be said that any internationally wrongful act of an international organization entailed its international responsibility, as the Special Rapporteur in fact established in draft article 3. That principle was not clearly stated in draft article 1, however, where it was necessary to introduce the notion of attribution and a causal link between the wrongful conduct of an international organization and the existence of an internationally wrongful act. The first sentence of article 1 should therefore be combined with the first sentence of article 3, so that the draft articles would begin by stating general principles and defining the scope of the draft articles and article 3 would characterize the internationally wrongful act of an international organization. With regard to the question of the international responsibility of a State for the conduct of an international organization, as mentioned in article 1, the text should make it clear that a State was responsible only for the *wrongful* conduct of an organization. The draft articles must deal with that question, since, as the Special Rapporteur noted in paragraph 8 of his report, it had been omitted from the draft articles on State responsibility for internationally wrongful acts. It was true, however, that article 1 did not refer to another possible legal situation, that of the responsibility of an international organization for the conduct of another international organization of which it was a member.

38. Turning to the definition of an international organization, since the definition established in various multilateral conventions was, as the Special Rapporteur had said, concise but not necessarily precise, he suggested that a number of elements should be added to it. First, the organization must be intergovernmental, in other words, have been established by States and have States as its members, a definition that would exclude non-governmental organizations. There might be exceptions—for instance, organizations whose members included States and non-State entities—but a specific clause could be adopted to cover those special cases, the important issue being to establish a general principle that was applicable to the vast majority of international organizations. Second, the organization's constituent instrument must be a treaty, although here too there might be certain exceptions. Third, in order for an international organization's responsibility to be entailed, the organization must be a subject of international law with its own legal personality. Fourth, the organization must exercise functions analogous to governmental functions. In that connection, he felt that it would be preferable for the Spanish version of draft article 2 to use the term *ejercicio de atribuciones del poder público*, which was used in articles 5, 6, 7 and 9 of the Spanish version of the draft articles on State responsibility for internationally wrongful acts, rather than *ciertas funciones de gobierno*. Incorporating all those elements in the definition would make it possible to arrive at a set of common denominators for establishing a more homogeneous category of

international organizations for the purposes of attributing responsibility.

39. Finally, while the present draft articles dealt with the responsibility of international organizations for internationally wrongful acts, the Commission should consider at a later stage the liability of international organizations for acts not prohibited by international law. In so doing, it would establish a set of norms embracing the responsibility of States for internationally wrongful acts, the liability of States for acts not prohibited by international law, the responsibility of international organizations for internationally wrongful acts and the liability of international organizations for acts not prohibited by international law.

40. Mr. KABATSI said that he supported the Special Rapporteur's approach of closely following the model of the draft articles on State responsibility for internationally wrongful acts. He had no problem with the proposal that the title of the draft articles should be changed, even though, as it now stood, it was acceptable. If the title were to be changed, however, he suggested that it should read: "The responsibility of international organizations for internationally wrongful acts".

41. On article 1 relating to the scope of the draft articles, he supported the Special Rapporteur's proposal that the scope should be limited to responsibility for acts prohibited by international law, and that liability arising out of acts not prohibited by international law and civil liability should be left aside. The question whether the topic should also cover the responsibility of a State for the conduct of an international organization might well be dictated by the fact that it had not been given much consideration during the work on the topic of State responsibility. In fact, article 57 of the draft articles on State responsibility for internationally wrongful acts presumed such responsibility, and articles 16, 17 and 18 of those draft articles also applied to international organizations. That being said, and at the present stage, he thought it might be clearer to limit the scope to the responsibility of international organizations.

42. In article 2, the definition of an international organization should be recast to emphasize that the draft was dealing with organizations established by States which exercised functions similar to those of States. The international organization should, of course, also have legal personality of its own, separate from that of its States parties. The definition should thus make it clear that an international organization was an intergovernmental organization established by States to exercise certain governmental functions. Of course, such a definition did not resolve the problem of entities that were known as international organizations even though they had not been established by States such as ICRC. Such organizations constituted exceptions and could perhaps be given special treatment.

43. Finally, he supported the approach used by the Special Rapporteur for setting out general principles, namely, the transposition into a single article, article 3, of the content of articles 1 and 2 of the draft on State responsibility for internationally wrongful acts.

44. With regard to the supremacy of international law over internal law arrangements, he said it was unlikely

that the two legal orders would conflict. Nevertheless, cases might arise when the internal rules of international organizations ran counter to the provisions of international law, and it might be useful to provide for treatment similar to that given to States.

45. Mr. MOMTAZ said he thought that the approach to the topic under consideration should be no different from the one used for the responsibility of States, since similar questions arose in both contexts, even though the solutions were not always the same. In any event, the draft articles on State responsibility for internationally wrongful acts must at least serve as a reference. The Commission should accordingly not be concerned with primary rules and should focus on breaches of secondary rules by international organizations. He did not think that the Commission should catalogue the primary rules applicable to international organizations, as Mr. Yamada had proposed, since he believed that, despite their particular features, international organizations were obliged to respect the rules of international law in the same way as States were. There was also no need to go into the responsibility of international organizations arising from acts not prohibited by international law. That question, which was of the greatest importance, should be studied in the context of the topic of international liability for injurious consequences arising out of acts not prohibited by international law.

46. With regard to the exclusion of the issue of civil liability from the scope of the study, he said that, like Mr. Pellet, he wondered whether the Special Rapporteur should not consider the matter further. In his own opinion, it should be included.

47. Turning to the draft articles contained in the report, he said he believed that the point of reference for article 1 was indeed the escape clause contained in article 57 of the draft articles on State responsibility. Accordingly, that ought to be reflected in the wording of article 1.

48. Regarding the definition of international organizations, he had difficulty understanding why the Special Rapporteur had abandoned the traditional and well-established terminology relating to intergovernmental organizations in favour of a new definition based on the criterion of function. The reasons given by the Special Rapporteur in paragraph 14 of his report did not seem very convincing. While he agreed with the Special Rapporteur that there was no reason today why non-State entities should not be considered fully fledged members of international organizations, he did not think that meant that the words "intergovernmental organization" could be taken as not covering that new category of international organizations. In his view, the authors of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter "the 1986 Vienna Convention") had chosen to use that expression advisedly. He feared that the criterion of function discussed in paragraph 20 of the report might unduly restrict the scope of the draft articles. The reference to governmental functions reduced the number of international organizations that actually exercised functions that could be described as governmental. In addition, the use of that criterion might raise problems of interpretation and, consequently, of the application of the draft. The determining factor in the definition of international or-

ganizations should be that of legal personality. It was precisely because they had legal personality that international organizations had the capacity to acquire rights and had to respect international law. In short, all international organizations that had obligations under international law could have their responsibility come into play in the event of a breach of such obligations. Contrary to what the Special Rapporteur suggested in paragraph 26 of the report, he therefore saw no need to include in the topic international organizations that had no international obligations, since the issue of their responsibility would never arise.

49. Mr. CHEE said that, in attempting to characterize an international organization, the Special Rapporteur referred to the 1969 Vienna Convention, article 2, paragraph 1 (*i*), of which stated that “international organization” meant “intergovernmental organization”. He subscribed to that definition, which had also been used in other international conventions, even if it left non-governmental organizations out of the scope of the study. As he saw it, consideration of the topic would be easier if the concept of international organization was divided in two: non-governmental organizations and governmental organizations. If the international organization was characterized as an intergovernmental organization, that meant that it was a treaty-based institution as opposed to a non-governmental international organization.

50. The Special Rapporteur had wisely not taken up the question of civil liability because it was generally in the realm of domestic law and, as such, had never really entered into the corpus of public international law.

51. Turning to the draft articles proposed by the Special Rapporteur, he said that article 1 created a duality of responsibilities, those of the international organization and those of the State which was a member of it. That was not a sound approach, and a uniform legal regime should be envisaged.

52. The words “governmental functions” in draft article 2 should be avoided, as they gave rise to problems. In his opinion, the definition of an international organization should be in line with the traditional one based on article 2, paragraph 1 (*i*), of the 1969 Vienna Convention. There was a contradiction in stating clearly, on the one hand, that international organizations were intergovernmental organizations and then speaking of governmental functions, which might be carried out by certain non-governmental organizations.

53. He accepted the wording proposed by the Special Rapporteur for article 3.

The meeting rose at 1 p.m.

2755th MEETING

Friday, 9 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.

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

[Agenda item 7]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. KAMTO said that he fully subscribed to the approach explained in paragraph 11 of the report (A/CN.4/532). But insofar as the scope of the study included the international responsibility of States for the conduct of an international organization, he thought the title should be recast to read: “The responsibility of international organizations, as well as of States, owing to the conduct of the former”.

2. One of the basic concepts at issue was the nature of the constituent instrument, which, according to the Special Rapporteur, could be not only a treaty but also a non-binding instrument of international law or one governed by municipal laws (para. 14 of the report). For the first such case, the report cited the constituent instrument of the World Tourism Organization, although the Commission had seen that it was not a good example. The report gave no example for the second case, but referred to a work by Seidl-Hohenveldern.² Although ICRC came to mind, it would have been useful if the Special Rapporteur had cited several examples so that the Commission could see whether the instance was an isolated one or part of a more widespread phenomenon. Since the first case was not relevant, and in view of the paucity of examples illustrating the second, he concluded that a treaty—an international legal act in written form—continued to be the instrument best suited to the establishment of an international organization. He was speaking of “treaty” within

¹ Reproduced in *Yearbook ... 2003*, vol. II (Part One).

² I. Seidl-Hohenveldern and G. Loibl, *Das Recht der Internationalen Organisationen, einschliesslich der Supranationalen Gemeinschaften*, 7th ed. (Cologne, Heymanns, 2000).