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Summary record of the 2755th meeting

Topic:
Responsibility of international organizations

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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).

the meaning of article 2, paragraph 1 (*a*), of the 1969 Vienna Convention, which used the phrase "whatever its particular designation"—language that was similar to the wording in article 1 of the Regulations to Give Effect to Article 102 of the Charter of the United Nations, on the registration and publication of treaties and international agreements.[3] It would be noted that at the United Nations Conference on the Law of Treaties the United States of America had already proposed an amendment to article 2 of the Convention in order to define "treaty" as "an international agreement concluded between *two or more* States *or other subjects of international law*…".[4] Thus, once entities could be characterized as subjects of international law, there was no reason why they should not be able to establish an international organization.

3. International society had developed considerably over the past century. In a purely inter-State society, international organizations were strictly "intergovernmental". In the past 50 years, however, many non-State entities had emerged, some of which sat alongside States in international organizations. Today there were international organizations which had mixed membership even though they had been created by States. For that reason, he agreed with the argument that the Commission should not take into account, for the purposes of the study, the "intergovernmental" character of the organizations concerned in the strict sense of the term. It was nonetheless necessary to retain the criterion of establishment by States, in other words, by means of a treaty, which brought States or other subjects of international law together. That criterion was preferable to the criterion of control, mentioned in paragraph 6.

4. A third substantive point concerned the personality of the organization and its characterization as a subject of international law. In his view, the terms "international personality" and "international legal personality" were synonymous, as could be seen in the advisory opinion of ICJ in the *Reparation for Injuries* case and also in the comments submitted by Governments to the Court, notably those of Philip Nichols, representing the United Kingdom. That seemed to be the Special Rapporteur's opinion too, because he used the two terms interchangeably in paragraphs 15 to 20 of the report. The problem was not that the Special Rapporteur failed to address the question of the international legal personality of an international organization, but the way in which he did so. At first, he argued that international law could not impose obligations on an entity unless that entity had legal personality under international law and that, conversely, an entity had to be regarded as a subject of international law even if only a single obligation was imposed on it under international law (para. 15). That was a first criterion for characterization as a subject of international law. A second was given in paragraph 19, where the Special Rapporteur said that an organization merely existing on paper could not be considered a subject of international law. The entity needed to have acquired sufficient independence from its members so that it could not be regarded as acting as an organ common to the members.

5. That was not at all clear. Actually, an international organization was a subject of international law because it had international legal personality, which it acquired by virtue of the fact that it had been established by a treaty, whatever its particular form or designation, which was a legal act formulated by subjects of international law. In other words, it was the States, the original subjects of international law, which, through the act of establishment, conferred upon the international organization—the new legal being—a functional international personality, regardless of whether that personality was "objective". On the other hand, the personality must be legal and international. Only then could there be a subject of international law. In paragraph 19 of its advisory opinion in the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* case, ICJ had stated that the "object [of constituent instruments of international organizations] is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals" [p. 75]. He disagreed with the Special Rapporteur's assertion (para. 17 of his report) that, in the *LaGrand* case, the Court had stated that individuals were also subjects of international law: the Court had merely concluded that article 36, paragraph 1 (*b*), of the Vienna Convention on Consular Relations set out the receiving State's obligations with regard to an arrested person and required that State to inform the person concerned without delay of his rights. It was not the Court that declared that a person had rights; it simply took note of the rights States had created for that person in connection with a treaty instrument. Hence it could not be inferred that the Court recognized the characterization as a subject of international law for those persons, especially since the requirement—proposed by the Special Rapporteur—that an entity must have at least one obligation for it to be a subject of international law was not met in the current example.

6. The governmental function criterion, although tempting at first glance, was inappropriate and superfluous for a definition of an international organization, not because it would restrict the scope of the organizations concerned or of their activities, because even in administrative law, where it originated, the criterion of governmental function served to distinguish certain State acts, but could not be used to identify all such acts. The criterion should be left out because it was difficult to apply, even in internal law, and above all because it was not necessary, since it was sufficient for an entity to have international legal personality for it to be an international organization—in other words, one whose internationally wrongful acts would entail its responsibility.

7. The Special Rapporteur was right to say that the third general principle set out in article 3 of the draft articles on State responsibility for internationally wrongful acts[5] was unsuitable for the topic of the responsibility of international organizations, for the reasons cited in paragraph 37 of the report.

8. Draft article 1 did not pose any problems, assuming the Commission agreed that the subject should be

[3] United Nations, *Treaty Series*, vol. 859/860, p. XII.

[4] *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 111.

[5] See 2751st meeting, footnote 3.

extended to the aspects of State responsibility not covered by the draft articles on State responsibility for internationally wrongful acts. However, the wording in the first sentence needed to be modelled more closely on those draft articles, and draft article 1 must be divided into two paragraphs because it dealt with two different issues.

9. Draft article 2 should be reconsidered to take a number of elements into account: establishment of the organization by States and/or other subjects of international law; establishment by a treaty, namely an international agreement, whatever its particular form or designation; existence of international legal personality; and membership open to both States and other subjects of international law.

10. Draft article 3 should envisage not only the general principles applicable to the responsibility of international organizations but also those applicable to the responsibility of the State for acts by the international organization, unless the Special Rapporteur wanted to divide the report into two parts, the first on the responsibility of international organizations and the second on the responsibility of States, but such a course would be questionable. A third paragraph should therefore be inserted, with the following wording:

> "An internationally wrongful act of an international organization may [also] entail the international responsibility of a State:
>
> (*a*) Because the State has contributed to the internationally wrongful act of the organization; or
>
> (*b*) Because the international organization has acted as a State organ."

11. Mr. GALICKI said that the first three draft articles in the Special Rapporteur's excellent first report were indispensable for the codification of legal rules governing the responsibility of international organizations.

12. He endorsed the approach in article 1 of establishing the scope of the draft and limiting its application to the question of the international responsibility of an international organization for acts that were wrongful under international law. The Special Rapporteur also proposed that the draft articles should cover the question of the international responsibility of a State for the conduct of an international organization, but that did not change the basic approach to the question of responsibility as already set out in the draft articles on State responsibility for internationally wrongful acts, article 57 of which expressly left aside any question of the responsibility under international law of an international organization and also of any State for the conduct of an international organization.

13. However, that did not weaken the close linkage that should exist between the principal rules governing the responsibility of States and the responsibility of international organizations. Unifying those rules on the basis of the concept of an internationally wrongful act, either in the case of States or of international organizations, would clearly strengthen their position in the body of contemporary international law and in the practice of States. The wrongfulness of the act under international law was rightly stressed in article 1 and in the first general principle set out in article 3.

14. Limiting the scope of the future articles did not mean the Commission was ignoring the possibility of international organizations' being held liable for injurious consequences arising out of acts not prohibited by international law. On the contrary, at its fifty-fourth session, in 2002, the Commission had concluded that questions of the responsibility of international organizations were often coupled with those concerning their liability under international law.[6] For example, the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies and the Convention on International Liability for Damage Caused by Space Objects provided for both the international responsibility of international organizations for violation of international law and their liability for damage deriving from activities not prohibited by international law.

15. The Commission should draw upon its earlier decision to separate the topics of responsibility and liability and apply a similar approach in the case of international organizations. That would mean including in the agenda a new topic relating to the international liability of international organizations for acts not prohibited by international law, by analogy with State liability for such acts. It was not clear, however, whether the topic was ready for codification. In any case, the Commission should not employ the term "civil liability" in speaking of the responsibility of international organizations and should avoid using it in referring to responsibility, which should be neither civil nor criminal but only international.

16. By and large, draft article 3, on general principles, followed the pattern in Chapter I of the first part of the draft articles on State responsibility for internationally wrongful acts. Nevertheless, the reason given by the Special Rapporteur in paragraph 37 of his report for omitting a third principle modelled on article 3 of the draft articles on State responsibility for internationally wrongful acts was not convincing, because such an omission might suggest that there were two very different systems, one for States and one for international organizations. The misleading term "internal law" might be clarified by adding the words "of the member States of the organization". Suggestions to treat "internal law" as the internal law of international organizations were not in keeping with the original intention behind article 3 of the draft articles on State responsibility for internationally wrongful acts to differentiate between international and internal law systems. If it wished to speak of the "internal law of international organizations", the Commission would in fact remain within the same realm of international law. It was not enough to include a crippled version of article 3 in the present draft.

17. The most controversial question had to do with how to define "international organization", in article 2. Although the 1969, 1978 and 1986 Vienna Conventions and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character had already formulated definitions stating

[6] *Yearbook … 2002*, vol. II (Part Two), p. 93, para. 468.

rather simplistically that the term meant "intergovernmental organization", many members were of the view that such a definition was not in keeping with the purposes of the draft on responsibility. The Special Rapporteur proposed fleshing out the definition of international organization by adding "which includes States among its members" and "exercises in its own capacity certain governmental functions". According to the Special Rapporteur, it would then no longer be necessary to specify that the organization should be an "intergovernmental" organization.

18. The main problem was that a number of other criteria could also be used for the definition, but it was not clear which ones. Yet the general feeling was that neither conventional definitions nor the one proposed by the Special Rapporteur were appropriate. Many criteria were possible, including: the subjects establishing the organization, namely States; the instrument by which it was established, namely an international treaty; its membership—usually (but as practice showed, not exclusively) States; activities conducted on its own behalf (and not on behalf of States); legal personality, or the capacity to acquire rights and obligations under international law (it was important to differentiate between international legal personality and national legal personality, which was granted to virtually all organizations under the internal laws of their member States); and the capacity to exercise certain governmental functions. The Special Rapporteur had suggested the latter aspect, but the concept of "governmental functions" as exercised by international organization was not clear or precise.

19. To speak of "governmental functions" might create an illusion that powers similar to or replacing those possessed by State Governments were assigned to international organizations. Currently, however, very few such organizations possessed so-called supranational powers analogous to those of national Governments. The problem was further complicated by the Special Rapporteur's proposal that the exercise of "certain" of such functions would be sufficient for it to constitute an international organization for the purposes of the draft articles. Given the extremely wide and differentiated nature of such functions under member States' internal laws, that criterion did not seem to be appropriate for the purposes of article 2. A more promising one was that of international legal personality, especially as it might easily be tied in with the concept of international organizations as subjects of international law, and with the possibility of their bringing international claims, and of international claims being brought against them. That view was supported by a passage in the 1996 report of the United Nations Secretary-General on administrative and budgetary aspects of the financing of the United Nations peacekeeping operations, which read:

> The international responsibility [of an international organization] is an attribute of its international legal personality and its capacity to bear international rights and obligations. It is also a reflection of the principle of State responsibility—widely accepted to be applicable to international organizations—that damage caused in breach of an international obligation and which is attributable to the State (or to the Organization), entails the international responsibility of the State (or of the Organization)….[7]

[7] A/51/389, para. 6.

That opinion, albeit formulated not by a court or a jurist but by a high-ranking official of an international organization, should be borne in mind when the Commission attempted to finalize its work on defining the term "international organization" in a suitable manner.

20. Ms. ESCARAMEIA said the debate on which international organizations were to be included in the scope of the draft articles—namely, what "international" meant—was being made more difficult by a misguided attempt to assimilate the concept of an international organization to that of a State. Consequently, the debate was having recourse to vocabulary, legal concepts and regimes that were appropriate to States but not to organizations. Examples were the concepts of internal versus international law, and of governmental functions. The latter concept, for instance, was not appropriate, since international organizations in fact performed functions very different from those of Governments. Although the Special Rapporteur was right to use the draft articles on State responsibility as a guideline, it must be recognized that the present draft covered a very different area, since international organizations had different processes of creation from those of States, had different characteristics and were very diverse.

21. The fundamental issue in this draft was the decision on what organizations the Commission would want to cover. As Mr. Koskenniemi had pointed out, one could proceed by looking at the problems created by non-State international entities one would like to address and draft a list with types of organizations. Another way of proceeding would be to decide which characteristics an international entity must possess to be covered by this draft; this more formalistic path had been chosen by the Special Rapporteur.

22. The proposal to draw up an indicative list of organizations, stressing their functions, seemed the most attractive approach, although it would involve much research. Nevertheless, it would be helpful if the Special Rapporteur were to prepare a list of types of international organizations, singling out those that constituted borderline cases. The exercise would, however, merely postpone the problem of deciding whether—since the traditional definition of an international organization as an intergovernmental organization was inadequate for present purposes—to adopt a formal criterion, based on the organization's constituent instrument and composition, or a substantive criterion, based on functions, applicable law and the exercise of rights and obligations. The simplest course might be to decide, not which organizations would fall within the scope of the draft, but which were to be excluded.

23. The question of primary and secondary rules, raised by Mr. Yamada, also merited further consideration. While questions of civil liability perhaps arose in a majority of relevant cases, she had doubts as to the feasibility of including civil liability issues in the draft. However, the situation of international organizations created by means of unlawful procedures—a category that was particularly prone to incur international responsibility—should also be addressed.

24. On draft article 3, she agreed with the Special Rapporteur's view that internal law should be excluded, for,

in addition to the hierarchical problems to which it might give rise, the scope of the term itself was unclear.

25. In short, it would be useful to prepare a list of types of organization, on the basis of which a decision could then be taken on the criteria governing a definition. For reasons of practicality, a formal criterion might be more workable than a substantive one based on functions.

26. Finally, she supported Mr. Yamada's suggestion that ILA and the Institute of International Law should be involved in the exercise.

27. Mr. ADDO said that the Special Rapporteur's first report was lucid, well argued, comprehensive and painstakingly written. Given the object of the present exercise, its title was irreproachable and should be maintained. It was essential to settle on a definition at the outset, and that was precisely what the Special Rapporteur had set out to do. It could not be denied that, in its broadest sense, the term "international organization" could encompass organizations consisting not only of Governments but also of non-governmental organizations. Perhaps the most striking feature of the international scene was the tremendous growth of international organizations of all kinds. However, for present purposes the Commission must concern itself with international public organizations.

28. As a starting point, it must be determined what rights and duties, if any, the various international organizations were endowed with under international law. Both theory and practice suggested that the international organization must be an entity or personality distinct from its creators. Theory and practice further suggested that any "personality" international organizations might have in international law must be conferred upon them by States, or by other international organizations already expressly recognized by States as legal persons. In practice, it would seem that only international organizations created by States were treated as having rights and duties under international law. Admittedly, certain functions of ICRC with regard to prisoners of war might come close to implying the international legal personality of that non-governmental organization, but such personality was not expressly set out in its constituent instrument and must be left aside in the interim. The extent of the capacity of international organizations to incur rights and duties under international law depended on the constitutional documents—usually in the form of a multilateral treaty—under which they were created, and on the practice that had emerged around each organization. The question to be asked in each case was to what extent the organization acted as an entity in conducting international relations separate and distinct from the members that had established it. As a first step, it was important to establish that the organization possessed international personality, because that was what invested it with duties or obligations a breach of which might entail international responsibility.

29. Again, the possession of such international personality invariably involved the attribution of power to conclude agreements with other subjects of international law. Indeed, the Special Rapporteur covered all those cases by stating that the international organization must, for the purposes of the topic, be a subject of international law, and that for such organization to be held potentially responsible, it should have legal personality and some obligations of its own under international law.

30. He agreed with the Special Rapporteur that the scope of the study should be delimited to make it clear that the draft articles were to consider questions of international responsibility for wrongful acts. In addition, he fully agreed that, in approaching the question of a definition for the purposes of the draft, the weight of precedent could not be ignored. Precedent must also serve as a guide and had provided a good, albeit concise definition, but the Special Rapporteur's view was that the definition did not go far enough. Yet to take it further might only complicate matters and lead to disputation. He personally favoured sticking to the definition that precedent had provided. However, in order to make it clear that the organizations covered had been set up by Governments of States, he favoured rewording the definition in draft article 2 to read: "refers to intergovernmental and inter-statal organizations". The purpose was to ensure that the definition encompassed all the organs of the State, including the judiciary and the legislature, as well as the executive and its agencies. He was proposing that addition *ex abundanti cautela*, but if the term "intergovernmental" was subsequently deemed to cover all the organs of a State, he would not press the point. Finally, draft article 3 simply stated the obvious.

31. Mr. MANSFIELD said that the survey of the Commission's previous work on the topic was instructive and the conclusions drawn from it in paragraph 11 of the report were more or less inexorable. Rightly, the Commission should make no assumptions that the issues to be considered under the topic should lead to conclusions similar to those arrived at in respect of State responsibility, yet history surely suggested that, where the Commission's work indeed produced similar conclusions, it should follow closely the model provided by the draft articles on State responsibility for internationally wrongful acts.

32. The scope of the study and the definition of international organization were obviously closely intertwined. In a very elegant and condensed piece of writing, the Special Rapporteur pointed out in paragraphs 12 to 28 that, were it to adopt the traditional definition of an international organization as an intergovernmental organization, the Commission would find the scope of its exercise encompassing a much greater variety of organizations than those that would have been included when that definition was first made. It was simply a function of the rapid expansion of the range of international organizations for which obligations under international law were now considered to exist.

33. Did that matter? If one took a long enough view, maybe not. But the Special Rapporteur convincingly argued that if the Commission's work on the topic was to be developed as a sequel to the draft articles on State responsibility—and that was the course on which it had embarked—then a way or ways must be found of limiting the scope of the work (and therefore the definition of international organizations) to organizations that functioned in ways broadly analogous to the ways in which States functioned. He was in broad agreement with the Special Rapporteur on that score. What he had difficulty with was the process whereby the Special Rapporteur moved from that point to a new definition—though he had no quarrel

with the analysis or the conclusions to which it led, or even, at the present juncture, with the drafting.

34. Yes, for the purposes of the exercise, an international organization had to be one that included States among its members. But then again, the definition must be broad enough to cover at least some organizations that included non-State entities among their members. He had already made the point, at the previous session, that the trend towards increased involvement of civil society in its various forms, as well as of the private sector, in many aspects of international life was one that was likely to continue and even gather pace. As a result, more organizations operating at the international level in ways that were analogous to those of States were likely to have a mixed or hybrid character.

35. Again yes, the organizations to be covered needed to be ones that had a legal personality at international law. But, as the Special Rapporteur himself pointed out, that requirement did not really help to narrow the scope of the work adequately, and, as Mr. Koskenniemi had noted, it begged the question of what were considered to be the relevant powers, functions, rights and duties that gave rise to international legal personality.

36. Incidentally, at one level it sounded almost axiomatic that the draft should cover all international organizations that might be said to be subject to international legal obligations, but at another level it might prove much less helpful. Some high-level obligations at international law might well apply in principle to any organization that was established by States and had at least one or two States or State agencies among its members. But equally, the powers and functions of some such organizations meant that they might not operate in any way analogous to that of Governments, and there was little or no possibility they could in practice act in breach of the high-level obligations that might in theory apply to them. Was it necessary to cover such organizations in the current study? Probably not.

37. And yes, ultimately, it was likely that the types of organization deemed appropriate to cover would be the ones that operated like States in a functional sense and, of course, did so independently of their members.

38. But the process whereby those conclusions were reached was too abstract to generate confidence in them. That might be one of the reasons why a number of members had expressed concern about the apparent looseness or open-endedness of the criterion in draft article 2, namely, "[exercising] in its own capacity certain governmental functions". At that level of abstract discussion, it seemed impossible to be clear as to which types of organization would fall on which side of the line on the basis of that criterion. To one like himself, who tended to err on the side of an unduly practical approach, the Special Rapporteur's approach of working towards a definition—and hence towards the essential scope of the exercise—by abstract analysis seemed counter-intuitive.

39. By contrast, a more fertile approach might be for the Working Group to classify international organizations in three categories: those which, by common consent, were to be included in the study; those which, by common consent, should be excluded; and those about which there were doubts or differing views. An exercise of that kind would rapidly throw up the common factors linking the organizations in each of those three categories. The object of such an exercise or typology would certainly not be to produce a definitive set of the various types of international organization, still less a definitive listing of organizations within each category. Doubts might in any case remain as to whether the categories were exhaustive and the boundaries between them watertight or porous. Yet such an exercise would provide a reasonably sound basis for discussions on the definition, making it clearer which types of organization would be included or excluded under the various criteria.

40. For his part, he was happy to accept the Special Rapporteur's new definition as a kind of working hypothesis, but was unlikely to feel any more comfortable with it until he was much clearer about which types of organization it actually encompassed.

41. As to the other issues on scope raised in paragraphs 29 to 33 of the report, the Special Rapporteur's general conclusions were acceptable, at least at the present stage. Mr. Pellet, however, had raised a doubt in his mind as to whether the Commission could entirely avoid looking at some aspects of civil liability, and, in the long run, Mr. Yamada might well turn out to have speculated accurately that, in respect of international organizations as opposed to States, there might be relatively few examples of internationally wrongful acts but rather more situations that raised questions of liability for the consequences of acts that were not unlawful. Perhaps, as Mr. Galicki had suggested, a new topic might in due course be needed to address those questions.

42. An additional advantage of a typology was that it might help to clarify the nature and dimensions of the problem the Commission was endeavouring to address, namely, what kinds of wrongful act might conceivably be committed, by which types of organization, and the likelihood of their occurrence. In any event, it might be a useful supplement to whatever information the Special Rapporteur received from the organizations that had been approached for statements about their practice.

43. The reasons that had led the Special Rapporteur to propose his particular formulation of general principles in draft article 3, and in so doing to depart to some degree from the State responsibility model, were compelling. The two general principles seemed relatively straightforward, but it would be interesting to see whether the Special Rapporteur found it necessary to examine in more detail the difficult questions referred to in paragraph 37 of the report.

44. Finally, he wished to express support for Mr. Yamada's suggestion regarding the participation of ILA in the study.

45. Mr. PELLET, noting that Mr. Mansfield had congratulated the Special Rapporteur for showing that the traditional definition of an international organization, namely, as an "intergovernmental" organization, should not be retained in the present draft articles, said that he was far from convinced by what either Mr. Mansfield or the Special Rapporteur had said. In fact, matters had been

considerably complicated by trying to add to the traditional definition. He was not at all convinced by the reasoning given in paragraphs 12 *et seq*. of the report for restricting the categories of international organization to be covered by the draft. He was curious to know what organizations the Commission might want to exclude. Obviously, non-governmental organizations would be excluded, but the retention of "intergovernmental" would automatically achieve that. The term "inter-State" could be substituted for "intergovernmental", as suggested by Ms. Escarameia, but the meaning would remain the same.

46. He would like to hear just one example of an international organization that the Commission might want to exclude. His preference would be not to exclude any, to be all-inclusive, but if a member of the Commission could identify one such organization and give a convincing reason for excluding it, he would be prepared to consider a typology for determining which organizations to exclude. It was amazing that none of the members who had taken issue with the Special Rapporteur's abstract approach had bothered to give an example of an international organization that might pose problems with regard to the issue of responsibility of international organizations. If there was no such organization, there was no need for a typology, or for a list of organizations as suggested by Mr. Koskenniemi. A typology might be useful for other reasons, in that different rules might apply to different types of organization: an integration organization, for instance, was very likely to raise different problems from a traditional cooperation organization. However, he failed to see why a typology was necessary for exclusion purposes if no organization needed to be excluded.

47. His own approach was much more empirical. Broadly speaking, members knew what an international organization was—"I know because I can see it"—and the only purpose of a definition was to ensure that no international "thingamabob" was excluded. Ultimately, international organizations must know what rules of responsibility applied to them.

48. He basically supported the Special Rapporteur's views on draft article 3. In addition, it was essential to reproduce articles 1 and 2 of the draft articles on State responsibility for internationally wrongful acts unchanged. Those articles were superbly concise and were the fundamental contribution of Roberto Ago—and also of the Commission, which had had the intelligence to follow one of the pre-eminent legal experts of the twentieth century—to significant progress in international law. In fact, he was rather shocked that no one, not even the Special Rapporteur, had paid tribute to Mr. Ago during the current debate.

49. The only real problem, which the Special Rapporteur had analysed with his customary concision in paragraph 37 of the report, was whether the principle in article 3 of the draft articles on State responsibility for internationally wrongful acts, namely, that the characterization of an act as internationally wrongful was exclusively a matter of international law, must also be transposed to the present draft. He agreed with the Special Rapporteur that it must not, and had strong feelings on the subject.

50. If he understood the Special Rapporteur's characteristically dense reasoning, it was basically that, since an international organization was itself a creature of international law, it would not make much sense to say that its internal law could not conflict with general international law, as referred to in article 3 of the draft articles on State responsibility for internationally wrongful acts, of which it was actually a part. It was not a question of legal systems. Internal law had nothing to say about the international responsibility of a State or anyone else: that was the whole point of article 3 of the draft articles on State responsibility for internationally wrongful acts. In the present case, however, the Commission's task was not to distinguish between internal and international law but to establish a hierarchy of norms within the international legal system. With regard to the conduct of an international organization, the question was whether or not that conduct was consistent with the organization's obligations, which might stem from its constituent instrument, which provided the link between general international law and the organization's internal law; higher norms—for instance, the peremptory norms of general international law; rules deriving from treaties the organization was bound to observe; or ordinary norms of international law by which the organization was bound, to the extent that its constituent instrument did not derogate from those, it being understood that, in the relations between an international organization and its members, there could be derogations from such general rules of international law by virtue of provisions of the constituent instrument that might be very broad in scope, such as Article 103 of the Charter of the United Nations, or articles 306 and 307 or even the new article 292 (ex–article 219) of the Treaty on European Union (numbering revised according to the Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts).

51. In his view, those considerations were sufficient reason not to transpose article 3 of the draft articles on State responsibility for internationally wrongful acts to the present draft. The law of an organization was anchored in general international law and had far too complex a relationship with it for the Commission to reasonably say in the present draft that the characterization of an act as internationally wrongful was not affected by the characterization of the act as lawful by internal law. At some point, however, the Commission would have to tackle two questions. First, when it came to the question of the nature and the existence of the obligation whose breach gave rise to the organization's responsibility, the Commission would not be able to avoid a thorough discussion of the complex interplay of applicable legal norms. While that question was dispatched in article 12 of the draft articles on State responsibility because it did not raise very serious problems, in the present case it could not be dealt with so easily. When the Commission came to the equivalent article in the current draft, the Special Rapporteur would have to reflect very precisely on the difficult question of the nature and existence of the breached obligation.

52. Second, the Special Rapporteur's solution to the question of the relationship between general international law and the internal law of an international organization, namely, not to discuss it, was satisfactory if one was ap-

proaching the question from the standpoint of general international law. From the standpoint of the organization's internal law, however, any organization, and not just the European Union, created its own legal system which was a particular kind of international law. Within that system, problems of responsibility arose, including, very frequently, that of the organization's responsibilities to its staff and, less frequently, that of the staff's responsibilities to the organization. How should those problems of the organization's own legal system, of which the law of the international civil service was just one example, be approached? In his view, they should be left aside, but the Commission must take a decision as to whether it wanted to exclude them and why. If it did, it should say in draft article 1, and not just in a commentary, that problems of responsibility under an organization's internal law were not dealt with in the draft. If the Commission discussed the law of the international civil service in the present context, it would be heading in the wrong direction.

53. He suggested to the Special Rapporteur and the Commission that that question should be discussed, and if possible solved, at the current session, while the Commission was dealing with draft article 1 and the scope of the draft.

54. Mr. KAMTO said that, in his view, "intergovernmental" had ceased to be a relevant criterion in defining an international organization, since subjects of law other than States could be parties to the instrument establishing an international organization. Many organizations had not only States but also non-State entities among their members. The "treaty" criterion, on the other hand, was fundamental, since treaties were open to other subjects of international law in addition to States.

55. Mr. KATEKA commended the Special Rapporteur on his report and said that the starting point for defining an international organization in draft article 2 should be the traditional definition, namely, "intergovernmental". As stated by the Special Rapporteur, the main difficulty in arriving at a satisfactory definition of an international organization was the great variety of organizations in existence. Elements of uncertainty made the criteria of the membership—whether by States alone or States and other entities—and constituent instrument problematic. The Commission should start with the criteria of membership by States and establishment by treaty. Control was also among the criteria one could use, for there was a safety net when the majority of the members were States.

56. Because international organizations had become so numerous and so diverse, he was tempted by Mr. Koskenniemi's suggestion for a list and Mr. Mansfield's suggestion for a typology. The Commission should indeed classify organizations into those it wanted to include, those it wanted to exclude and those that fell between the two. There were simply too many organizations for the draft to cover them all.

57. International personality was yet another criterion. Some members of the Commission contended that some international organizations had more personality than others, the latter presumably being non-governmental organizations. It might be problematic to establish such a characterization. In the *Reparation for Injuries* case, ICJ had said that the legal personality of the United Nations was different from, and less than, that of States. While the legal personality of international organizations could be characterized *vis-à-vis* that of States, however, the Commission could not grade the relative legal personality of international organizations among themselves.

58. He had some doubts about introducing the concept of international governance for international organizations. If that meant situations such as the transitional administrations established by the United Nations in Namibia or East Timor, there was no problem. Otherwise, the concept could be problematic. Some international organizations were already very powerful, indeed more powerful than some countries, over which they exerted considerable influence. That was also true of some transnational corporations and even some non-governmental organizations.

59. The mushrooming of international organizations in recent years complicated the consideration of the topic of international responsibility, which was why a typology was needed to rationalize it. Mr. Brownlie had suggested at the previous meeting that the Commission should look into the phenomenon of some regional international organizations that had changed their original aims, for instance, the European Union and ECOWAS. There were others, such as SADC, that had also done so. It might be that the failure or imperfect implementation of the security system set up by the United Nations was prompting some regional organizations to fill the vacuum. In the case of the European Union, however, as early as the 1960s, in a case involving a Dutch company, the European Court of Justice had reasoned not only on the basis of the Treaties Establishing the European Communities but also by reference to a grand vision of the kind of legal community it expected for the future, one that transcended the original intention of economic integration.

60. He shared the concerns expressed by some members about the criterion of "certain governmental functions". Furthermore, issues of civil liability should be excluded, for the topic was complicated enough already. Finally, he agreed with the inclusion in the second sentence of draft article 1 of a reference to State responsibility for the conduct of an international organization, although it might be more appropriate to put it in a separate sentence.

61. Mr. COMISSÁRIO AFONSO commended the Special Rapporteur on an excellent report and said he agreed that the definition of an international organization was important because it had a bearing on the scope of the draft articles. However, in the present case, the consequences of adopting a new definition were not very clear. He understood the need for a more inclusive definition but disagreed that the traditional definition used in so many treaties, including the 1969 and 1986 Vienna Conventions, should be sacrificed. No single definition would succeed in encompassing the diversity of international organizations.

62. The Special Rapporteur might consider the viability of linking the issue of definition to the notion of legal personality by indicating the most relevant criteria pertaining to such personality. That might require identifying the tricky problems of fact and law related to the legal personality of international organizations, but it would

ultimately permit the inclusion of the largest possible number of international organizations. There would be another advantage in doing so. The very important issues of responsibility raised by the International Tin Council case had never been adequately addressed, and it would be useful if the Commission could tackle them. Those issues had to do with the relationship between an international organization and its member States or third parties, including other international organizations. A very clear distinction also needed to be made between the responsibility and the immunity of international organizations. In the International Tin Council case, the decisions adopted had depended heavily on English law, but the overall case had illustrated the problems involved under international law.

63. The content of draft article 1 appeared to be in line with article 57 of the draft articles on State responsibility for internationally wrongful acts. He had no objection to it, but wondered whether that was the right place for it. Article 2 should comprise two paragraphs, the first giving the traditional definition of an international organization and the second covering a new category of organizations that were mixed and hybrid in nature and composition. Article 3 should be split in two, with the first paragraph becoming a new article 1 and the second constituting what was now article 3.

64. In paragraphs 30 and 31 of his report, the Special Rapporteur, probably correctly, took the position that matters of international liability for injurious consequences arising out of acts not prohibited by international law should be excluded from the scope of the draft. However caution was needed on that point. Regimes of strict liability were already incorporated in legal instruments and applied to some international organizations, for example, the treaty regimes relating to outer space. Perhaps a provision acknowledging that situation should be envisaged.

65. Mr. Sreenivasa RAO said the Special Rapporteur had provided a scholarly and thought-provoking report. After some useful background on the topic, he attempted to carefully delineate the scope of the topic through a series of propositions. The recommendation that issues already settled in the work on State responsibility should not be reopened must be kept in mind.

66. Clearly, an international organization must be an intergovernmental organization: that was recognized in the 1978 and 1986 Vienna Conventions and in the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character. But he agreed with the Special Rapporteur that a less concise and more precise definition was required at least in order to determine the scope of the study. While there might be differing opinions on the type of organization that should be included, non-governmental organizations should undoubtedly be excluded. Mr. Rodríguez Cedeño was right to say that the organizations should normally be those established by States. Whether it was to be done by an international instrument, and, if so, whether it should be binding, were separate issues.

67. He agreed with Mr. Pellet that the scope of the topic should not be unduly restrictive. Moreover, it should not matter whether an organization was established by an instrument that was only recommendatory, non-binding, or by parallel acts pertaining to municipal laws. It might also be possible to cover issues arising from the contractual obligations of international organizations and administrative matters, for example, service problems of staff members. Mr. Pellet had brought up the case of organizations established by a group of international organizations, and that could also be envisaged in the context of organizations with treaty-making capacity. All organizations with a headquarters agreement automatically had, and exhibited, such treaty-making capacity, as did international organizations that routinely concluded agreements with States on their privileges and immunities.

68. Dag Hammarskjöld and Boutros Boutros-Ghali, both former Secretaries-General of the United Nations, had spoken of its parliamentary diplomacy and peace enforcement functions. Such functions involved a network of arrangements between the United Nations and other international organizations to discharge various specific functions ranging from the supply of food, medicine and clothing, the operation of refugee camps and the maintenance of law and order to the establishment of international criminal courts. In more recent times, the wholesale administration of a territory before it was handed over to the elected Government, as in the case of East Timor, was another example of functions an international organization could perform.

69. International organizations established by States, such as the Centre for Science and Technology of the Non-Aligned and Other Developing Countries set up in 1989, offered another example of functions that could be of interest for the study. The fact that the organization had never materialized was a separate matter: indeed, an organization could be established but fail to function effectively. As he understood paragraph 19 of the report, the Special Rapporteur was recommending that organizations that were never established despite the conclusion of a constituent instrument should not be included within the scope of the draft.

70. The Special Rapporteur rightly recommended that a homogeneous category to serve as the source of the study should be identified. The exercise could be facilitated by following Mr. Brownlie's suggestion that the functions performed by the organization should be given greater attention than the existence of a constituent instrument establishing it. His own brief listing of functions of international organizations did not bring the Commission any closer to identifying a homogeneous category. Perhaps the functions could be listed in an illustrative manner or categorized broadly as "governmental functions", as in draft article 1, or perhaps the two techniques could be combined.

71. Other important points had to be taken into account. The organization must exercise functions as a legal entity in its own right and under its own responsibility, independently and separately from its members, so that its obligations and the wrongfulness of any impugned conduct could be attributed to it. If that criterion was met, it should not matter if the international organization was made up of States and other international organizations. As was noted in paragraph 24 of the report, it was useful

to say that international organizations to which the draft articles applied could include other international organizations. The issues noted in paragraph 32 should certainly fall within the scope of the study.

72. Again, the study should exclude issues of civil liability. The Commission could well revert to the topic in future, after sufficient progress had been made with the topic of international liability. While certain issues connected with private international law could be better studied by other institutions, the Commission could deal with the allocation of loss in the event of harm or damage arising from the activities of international organizations. International organizations, like States, were liable for any damage they caused, irrespective of the legal status of the activity in which they were engaged and, he would add, of the immunity from judicial process in a national tribunal that they might otherwise enjoy, unless the State which had agreed to provide such immunity had also agreed to underwrite any liability arising from its activities within its territory.

73. As to draft article 1, when an international organization entered into an agreement on privileges and immunities with a State and responsibility was thereby incurred by that State for the conduct of an international organization, the matter should come within the scope of the study. Accordingly, such agreements were numerous enough to warrant retention of the second sentence.

74. The Drafting Committee would undoubtedly give suitable attention to the many other useful points made. In the articles themselves, some governmental functions should be specified in an illustrative manner, as that would obviate the need to refer to "certain" governmental functions in draft article 2. It was a word that seemed to imply some sort of limitation, which presumably was not the intention. He was not in favour of specifying to which international organizations the draft articles would apply. The Commission had tried that kind of technique in other topics, without success. A more general approach with greater attention to the functions performed by the organizations should be the basis for delimiting the scope. He agreed entirely with the general thrust of draft article 3 and endorsed the Special Rapporteur's view that there was no need to enter into the characterization of a wrongful act, whether at the international or national level. Characterization at the national level of an act of an international organization was at variance with the status of such an organization and the fact that its constituent instruments were rarely governed by national laws. The Drafting Committee might wish to look into that issue.

75. Mr. AL-MARRI thanked the Special Rapporteur for his valuable report. It would be impractical to try to differentiate among or categorize international organizations; rather, common criteria must be identified, general norms put forward. The treaty criterion was one that might need to be reconsidered, as it could prevent subjects of international law from undertaking functions that might prove important in the future. Finally, he fully agreed with the comments made by Mr. Sreenivasa Rao and Mr. Pellet.

76. The CHAIR, speaking as a member of the Commission, said the excellent first report on the topic had sparked a stimulating debate.

77. He fully endorsed the wording of the first sentence of article 1 but thought the second should be deleted or placed in square brackets pending further elaboration of the topic. The draft must not give the impression that there was a special normative regime, separate from the one set out in the draft articles on State responsibility for internationally wrongful acts adopted by the Commission at its fifty-third session, in 2001, that covered the responsibility of a State for the wrongful acts of an international organization. That might raise problems of attribution of responsibility or of joint, residual or shared liability which should be elucidated in the context of the law of international organizations. In any event, nothing could substantially alter the general features of the regime for responsibility of States developed in 2001.

78. Draft article 2, in addition to explaining the use of terms, sought to define a fundamental aspect of the scope, namely which international organizations would be covered. In view of the proliferation and variety of international organizations, for practical reasons, and as had been done in other instances, the Commission would have to confine the study to responsibility for the wrongful acts of a single category of organizations, those that were sufficiently visible and identifiable. He accordingly agreed that the study should concentrate on the responsibility of intergovernmental organizations. In the interests of progressive development and in the light of ongoing events in the international arena, however, he could agree to including mixed organizations in which, together with States, entities other than States were members, as the Special Rapporteur proposed. It should also be possible to include a "without prejudice" clause stating that the rules set out in the draft applied to intergovernmental or mixed organizations, without prejudice to their application to other international organizations.

79. He was sceptical, on the other hand, about the functional aspect to be included in the definition. Like other members, he considered "certain governmental functions" to be vague, not always a prerequisite and difficult to pinpoint. He would prefer to see the emphasis placed on another precondition that was essential, namely that, on the basis of the capacity granted to them by their constituent instruments or developed through their functioning, the international organizations in question should be subjects of international law, capable of assuming rights and, most importantly, of being bound by obligations the breach of which would trigger international responsibility.

80. He fully agreed with the Special Rapporteur's proposal to set out in the first paragraph of draft article 3 the principle that international responsibility was entailed by a wrongful act of an organization and to incorporate in the second paragraph two essential elements of that responsibility, namely attribution of the wrongful act to the organization in conformity with international law and the existence of a breach of an international obligation. On the other hand, he had some reservations about the advisability of not stating the principle that an act must be characterized as wrongful on the basis of international law and that such characterization could not be affected by the fact that in other legal systems the same act might be considered lawful. He would prefer the principle to be set out very clearly since, in view of the wording of the draft articles on State responsibility for internation-

ally wrongful acts, omitting it might raise doubts about whether it applied to the responsibility of international organizations, something about which he personally had absolutely no doubt.

81. Mr. GAJA (Special Rapporteur), summing up the discussion, expressed his gratitude for the kind words and thoughtful comments of many members. There had been criticism, too, which he did not intend to underrate, but the general approach in the report and the structure of the proposed draft articles had emerged relatively unscathed. Even on the most controversial point, the definition of international organizations, most of the criticism concerned the way the definition should be drafted rather than the identification of the core organizations whose practice would be relevant to the study.

82. The main purpose of draft article 1 was to define the scope of the topic as accurately as possible by making it clear that the draft applied to questions of responsibility in relation to acts that were wrongful under international law. Several members had expressed the view that the question of liability for injurious consequences arising out of the acts of an international organization that were not prohibited by international law should be dealt with in the context of, or as a sequel to, the study now being undertaken with regard to States. References had been made to harm that was caused or might be caused by space organizations or organizations engaged in technical assistance or disarmament control. If the resulting harm did not imply a breach of an obligation under international law, questions of liability should not be regarded as part of the current topic. He was aware, as had been pointed out in the course of the debate, that there were treaty regimes which seemed to combine the two aspects, but these regimes provided special rules. This situation would have to be referred to in the draft, but in the meantime enough progress might well be made in the study of the fragmentation of international law to give a clearer idea of what *lex specialis* meant.

83. The proposal to leave out matters of civil liability had also met with significant support, together with some dissent, although that dissent did not concern the exclusion of matters governed by private law, in other words, within the realm of civil liability, or of administrative law in civil-law countries. International law did not generally regulate such matters: as had been pointed out, there were very few treaties and, he would add, hardly any other instruments of international law that had specific provisions thereon.

84. It had been suggested that the study should be extended to rules of international law that could affect the responsibility of member States for the wrongful act of an organization, even if that act was connected with a contract and the dispute was submitted to a national court for commercial arbitration. While he did not wish to commit himself before gaining an idea of the Commission's views, he thought that consideration could indeed be given to whether there were rules of international law that might be relevant in private litigation. That would be in line with the approach taken by the Institute of International Law at its 1995 session in Lisbon in dealing in a similar context with issues of civil liability and international law.

85. The international responsibility of States for the conduct of international organizations was central to the study: the bulk of the writings on responsibility of international organizations and the best-known instances of practice related to that very question, not to questions of attribution to international organizations. Irrespective of whether the Commission concluded that States could be responsible for such conduct, it could not ignore that central question, which was no doubt also one of the most difficult. It had been left out of the draft articles on State responsibility for internationally wrongful acts, in which State responsibility for aid or assistance to an organization in the commission of a wrongful act and other aspects of Chapter IV of Part One had likewise not been considered. In article 1, paragraph 1, he had simply reproduced what was said in article 57 of the draft articles on State responsibility. Several members had suggested transposing the second sentence of that paragraph to a separate paragraph, and he had no difficulty with that suggestion, despite the similarity of the issues mentioned. The phrase "acts that are wrongful under international law" in the first sentence had been criticized for not reflecting the language of article 1 of the draft articles on State responsibility, namely "internationally wrongful acts". The reason, as was stated in paragraph 32 of his report, was that if the definition was to be comprehensive and accurate, one could not speak only of the responsibility of an organization for its own conduct, since such responsibility could also arise for the conduct of another organization of which the first organization was a member.

86. To conclude his summary of the discussion on draft article 1, his preference for the provisions on the scope of the topic was to have as accurate a description as possible of the questions covered. Certain members of the Commission appeared to prefer a less comprehensive description, focusing on the main issues, but that, together with the other points he had raised so far, could be left to the Drafting Committee.

87. The CHAIR said that Mr. Yamada's suggestion, supported by others, that consideration should be given to establishing contact with ILA in connection with the responsibility of international organizations, could be taken up by the Planning Group once it was established.

The meeting rose at 1 p.m.

2756th MEETING

Tuesday, 13 May 2003, at 10.05 a.m.

Chair: Mr. Enrique CANDIOTI

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Dugard, Mr. Economides, Ms. Escarameia,