

41. Mr. ECONOMIDES said that where an individual acting on behalf of a State committed a wrongful act, the State was responsible. He therefore saw no reason why an international organization would not be held responsible for a wrongful act committed by a State acting on its behalf. That position seemed perfectly tenable to him.

*The meeting rose at 12.55 p.m.*

## 2801st MEETING

*Wednesday, 19 May 2004 at 10 a.m.*

*Chairperson:* Mr. Teodor Viorel MELESCANU

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

### **Responsibility of international organizations<sup>1</sup>** *(continued)* (A/CN.4/537, sect. A, A/CN.4/541,<sup>2</sup> A/CN.4/545,<sup>3</sup> A/CN.4/547,<sup>4</sup> A/CN.4/L.648 and Corr.1)

[Agenda item 2]

#### SECOND REPORT OF THE SPECIAL RAPPORTEUR *(continued)*

1. Mr. PELLET said that while he disagreed with the general thrust of chapter I of the Special Rapporteur's report (A/CN.4/541), he could agree to the three draft articles proposed by the Special Rapporteur with only a few reservations, which he would clarify.

2. With regard to draft article 4, he had been among those members of the Commission who had expressed some hesitancy in connection with article 4 of the draft articles on responsibility of States for internationally wrongful acts at the time of their adoption in 2001<sup>5</sup>. At the time, he had held that in defining the term "organs of State", the Commission must restrict itself to reference to internal law. With hindsight, however, he now believed that he had been wrong and that the Special Rapporteur on that topic, Mr. Crawford, who had advocated a broader formulation that had resulted in the ambiguous wording of paragraph 2 of that article, had probably been right in thinking that international law had a contribution to make to such a definition.

<sup>1</sup> For the text of articles 1 to 3 of the draft articles and commentaries thereto adopted by the Commission at its fifty-fifth session, see *Yearbook ... 2003*, vol. II (Part Two), chap. IV, sect. C, pp. 18–23.

<sup>2</sup> Reproduced in *Yearbook ... 2004*, vol. II (Part One).

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> See 2792nd meeting, footnote 5.

3. However, that was certainly not the case with the draft articles on the responsibility of international organizations, and the Special Rapporteur had been right to state that only the "internal law" of an international organization could determine who might engage its responsibility. In his view, international organizations, unlike States, were too diverse to permit the formulation of a general rule. He had no objection to defining the "law" of an international organization as "the rules of the organization", since that term could be justified by the 1986 Vienna Convention. It was for that very reason, however, that paragraph 3 of article 4 should not depart from the definition of "rules of the organization" contained in article 2, paragraph 1 (j), of the 1986 Vienna Convention. To do so would require more convincing reasons than those cited by the Special Rapporteur in paragraph 25 of his report. It was unfortunate that the standard term "constituent acts" had been replaced with the much less common term "constituent instruments". He shared the Special Rapporteur's dissatisfaction with the term "decisions and resolutions", even though that term appeared in the Charter of the United Nations; but he was not much happier with the proposed alternative "acts of the organization", if only because it was not at all certain that a resolution was always a legal act, particularly if it took the form of a recommendation. He found both "established" and "generally accepted", which the Special Rapporteur had proposed as terms qualifying the practice of an organization, to be generally consistent with the terminology of the 1986 Vienna Convention.

4. Two additional interrelated problems with the drafting of article 4 were slightly more serious. Article 4, paragraph 1, of the draft articles on State responsibility confined itself to indicating that the responsibility of a State was linked to the conduct of its organs. The term "organs" included the officials who were covered by the definition contained in paragraph 2 of that article and in paragraph (12) of the commentary, which left no doubt that the word "person" could mean a natural or legal person, including an individual office holder. Thus the Commission might do better to reflect that language in the present draft articles and agree that the word "organ" included the officials of an organization, who triggered the responsibility of the organization only when they acted as organs or as representatives thereof.

5. He found it harder to comprehend what the Special Rapporteur meant by the references in paragraph 1 of article 4, to "another person entrusted with part of the organization's functions". In its advisory opinion in the *Reparation for Injuries* case (p. 177), ICJ had defined an "agent" as meaning any person through whom an organization acted. Given that that was an entirely satisfactory definition, he wondered why that definition had not been used in paragraph 1 of article 4 of the present draft, which could then simply read "The conduct of an organ or agent of an international organization shall be considered ...". Likewise, paragraph 2 would then read: "Organs and agents referred to ...". Indeed, the Special Rapporteur had himself taken precisely that approach in paragraph 19 of his report.

6. His final problem with article 4 had to do with the word "structure", at the end of paragraph 1. One characteristic

of agents who were not officials of an organization was that they did not fall within the structure of the organization. Count Bernadotte in the *Reparation for Injuries* case, for example, had been “outside the structure” of the United Nations.

7. Turning to draft article 5, he said he was somewhat perplexed by the reference to “another international organization”, since the relationship in question was usually one between an organization and a State rather than between two international organizations. Accordingly, the Drafting Committee should review that portion of the text. Apart from that drafting point, the article posed no problems of substance. He did, however, wish to question some of the supporting material provided by the Special Rapporteur in the paragraphs of his report introducing that article.

8. Firstly, he thought that the future commentary should make a clearer distinction between the situation contemplated in article 5 and that contemplated in article 4. Irrespective of any drafting problems it might pose, article 4 of the present draft covered the agents of an organization, whereas the draft articles on State responsibility did not. In that case, the Commission ought to—indeed, must—consider that officials placed by States at the disposal of international organizations became agents of the international organization. That seemed to be the situation in the case of a secondment contemplated in paragraph 30 of the Special Rapporteur’s report. There was thus some overlap between articles 4 and 5, and he believed that it was important to remove that overlap.

9. Secondly, while he was entirely convinced by the explanations given by the Special Rapporteur at the previous meeting regarding the example of peacekeeping forces, he was far less convinced by the explanation of the special nature of such forces given in paragraph 35 of his report. According to the Special Rapporteur, peacekeeping forces were themselves an organ of a State, being “made up of State organs”. However, the General Assembly was also “made up of State organs” in the person of the diplomatic representatives who had that status within the meaning of article 4 of the draft articles on State responsibility. Yet the General Assembly was unquestionably an organ of the United Nations, which was not, in his view, the case with a peacekeeping force. The defining characteristic of peacekeeping forces, which the Special Rapporteur had rightly stressed elsewhere, had to do not with their composition, but with the fact that although they were in a sense subsidiary organs of the United Nations, the troop-contributing State did not entirely relinquish control over them.

10. Thirdly, he disagreed with the opinion of Lord Morris of Borth-y-Gest,<sup>6</sup> cited in paragraph 39 of the report, which was more indicative of Lord Morris’ legal nationalism than of a legal truth: the fact that an opinion emanated from a British law lord did not mean that it must be true.

11. Fourthly, he wished to point out that the cacophony that had frequently characterized the recent debate in the Sixth Committee on the question of State responsibility

for internationally wrongful acts in situations involving peacekeeping forces, meticulously reflected in paragraph 44 of the Special Rapporteur’s report, showed the extent to which clarifications in the matter were necessary. He hoped that such clarification was provided in article 4, although the Commission might also wish to consider whether the specific question of responsibility relating to peacekeeping forces should perhaps be included in its long-term programme of work. In any event, he agreed with the Special Rapporteur that the present draft articles should not contain specific provisions relating to peacekeeping forces.

12. Fifthly, he did not see why joint control over a peacekeeping force should also leave the way open for dual attribution of conduct, as the Special Rapporteur maintained in paragraph 48 of his report. Rather, the sharing of control made it possible to parcel out responsibility, depending on circumstances. However, the problem was a broader one: he was concerned that the Special Rapporteur had focused unduly on the notion of joint or several responsibility, whereas one of the objectives of the report seemed to be the clear attribution of responsibility in specific cases.

13. Like those that preceded it, draft article 6, on *ultra vires* conduct, posed no substantive problems. However, the wording of article 7 of the draft articles on State responsibility—“exceeds its authority or contravenes instructions”—was much to be preferred to the wording “exceeds authority or contravenes instructions”. He also wished to draw attention to a translation error in the French text of several footnotes in the report, where the title *European Court Reports* had been left in English, instead of being rendered in its correct French version.

14. He had no disagreement with the Special Rapporteur regarding the text of draft article 7. A text perfectly parallel to article 11 of the draft articles on State responsibility was entirely appropriate. He also agreed that it was not possible to use articles 5, 8 or 10 of the draft articles on State responsibility as models. However, he did not agree that article 9 of those draft articles, on conduct carried out in the absence or default of the official authorities, had no bearing on the present articles, if only because there were increasingly cases in which international organizations assumed responsibility for the temporary administration of a territory. In such cases an equivalent of article 9 would be most useful, and he hoped that the Special Rapporteur would reconsider his position on the matter.

15. Those comments notwithstanding, he believed that draft articles 4 to 7 should be referred to the Drafting Committee.

16. His severest criticisms related to the chapter of the report on relations between attribution of conduct to an international organization and attribution of conduct to a State, which he had found difficult to understand, of debatable import once understood and, in fact, totally off the subject. The Special Rapporteur’s reply to the Chairperson at the previous meeting had confirmed his view in that regard. It was his understanding that the report dealt with the attribution of an internationally wrongful act to an international organization. Yet that chapter considered

<sup>6</sup> *All England Law Reports* (1969), vol. 1, p. 646.

the possibility that responsibility for an internationally wrongful act might be shared by an international organization and one of its member States, which was an entirely different problem. For that very reason he was somewhat reluctant to enter into a detailed criticism of that portion of the report at present. Nevertheless, he wished to make three general remarks.

17. Firstly, the Special Rapporteur's presentation did not focus sufficiently on the legal personality or "opacity" of an international organization. In his characteristically allusive way, the Special Rapporteur seemed to be on the brink of suggesting that conduct could be attributed to States by way of international organizations. Yet the veil of an international organization's legal personality was not that easily lifted.

18. Secondly, in paragraph 11 and elsewhere in his report, the Special Rapporteur cited statements by the European Community in which it assumed responsibility for the acts of certain of its member States in certain areas. He was not sure that the Community model—if such it was—was very convincing, and he wondered whether those statements might not be explained principally by the fact that, in view of the sophisticated jurisdictional mechanism afforded by the European Court of Justice, the European Community—or European Union—could, once it had acknowledged its responsibility, turn against its member States. The problem lay in the fact that the organization in question could subsequently settle its problems of responsibility with its members; not in the context of general international law, but in the context of the internal regulations of the organization. Accordingly, the Commission should be cautious about using the European Community as a model.

19. Lastly, he was not convinced that all possible scenarios involving the combined responsibility of a State or States and an international organization were covered by that chapter of the Special Rapporteur's report. There might be cases involving the responsibility of an international organization and its member States in which the responsibility was "*conjointe*" or "*solidaire*". The two types of responsibility were not the same, and the terms "joint" and "joint and several" responsibility used in the common law system were not exact equivalents in Romano-Germanic law systems, which further complicated matters. In any case, it seemed that such cases were relatively rare where the responsibility of international organizations was concerned. Accordingly, one of the objectives of the rules for attributing responsibility should be to prevent such cases from occurring. The more the Commission was able to identify precise criteria for attribution of conduct, the less the question of joint, or joint and several, responsibility would arise. That was an outcome to be devoutly wished for, and he accordingly urged the Special Rapporteur to reconsider his position.

20. Mr. PAMBOU-TCHIVOUNDA said that he had always questioned the relevance of proceeding by simply borrowing the normative techniques used to deal with one topic and applying them to a different topic. Codification was a creative endeavour, and was therefore also a demanding one involving the identification and highlighting of a topic's distinguishing features. The Commission

must therefore follow that rigorous approach in distinguishing between States and international organizations and in identifying the features of the regime that would govern the responsibility of the latter.

21. The Commission must resist the temptation simply to transpose the regime of States to the new topic, an approach that risked provoking feelings of indifference and a sense of *déjà vu* among its intended recipients. The Commission could not simply sidestep the complexity of the subject by resorting to short cuts imposed by time constraints or by succumbing to the lure of specious parallels. That would only render its work commonplace, and the international community would not be well served thereby. The Sixth Committee had been right, at its fifty-eighth session, to draw attention to the complexity of the topic, a complexity that the Commission had acknowledged as long ago as the 1960s, when it had decided to separate the topic of responsibility of international organizations from that of State responsibility. That complexity had to do with the diversity of international organizations—a diversity that, unfortunately, was not reflected in the Special Rapporteur's second report—and also with their instrumental nature and their desire to assert themselves as entities distinct from the States that had created them. Those complexities merited fuller emphasis.

22. International organizations differed from States in the manner in which they were established, their areas of competence and the degree of their powers, but especially by virtue of their means of implementing their policies as set out in the "rules of the organization". Like States, international organizations had policies without which they would not exist. Like States, they had limited means at their disposal, and it was generally temporal or geographical considerations that led them to intervene, adapting and modifying them as required and, where necessary, entering into alliances with other entities in order to carry out their mandates fully or, on occasion, to refrain from acting. It was through those actions or omissions that international organizations would be accountable for any injury or damage that might be caused to other entities or nationals thereof. Thus far, the situation was not different from the one that arose with States. Yet it must be acknowledged, as ICJ had pointed out, that international organizations were neither States nor super-States. Even when called upon to pursue policies of regional integration, they used the means at their disposal and were accountable for the consequences of those policies.

23. Therein lay the crucial point. In its 1996 advisory opinion in the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* case, the ICJ had stated, more clearly than it had in 1949 in the *Reparation for Injuries* case, that "international organizations are governed by the 'principle of speciality', that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them" (p. 78, para. 25). The criteria would seem to have been reversed between 1949 and 1996, and the Court would have done better to say in 1949 what it had finally said in 1996, when it had subordinated international legal personality to acknowledgement of the principle of speciality. That principle was the very linchpin of every branch of the law of the responsibility

of international organizations. However, was that law a regime that departed from the law of responsibility of States for internationally wrongful acts, or a *lex specialis*?

24. Such questions were at the very heart of the problems involved in formulating a regime specific to the responsibility of international organizations. To have addressed them would have yielded a different approach to the topic, and, in that case, the questions raised by the problem of attribution of responsibility would have been more sharply focused on the international organization as an entity. It would then have been possible to draw a real distinction, in the scope of attribution, between what pertained to international organizations and what pertained to States. However, since in the report both were addressed from the standpoint of practice—many examples having been cited by the Special Rapporteur—or through analyses in the literature, the question of attribution was ultimately a matter of degree.

25. He had a few drafting suggestions on article 4 concerning attribution. In paragraph 1, the words “*au regard du droit international*” (“under international law”), in the French version, should be replaced by “*en vertu du droit international*” (“in conformity with international law”), given that the law of responsibility for internationally wrongful acts had already been codified, even if it had not yet entered into force. The phrase “another person” should be replaced by the more neutral and general expression, “any other person”.

26. In paragraph 2, in the French version, the phrase “*ainsi désignés par les règles*” should be replaced by “*qualifiés comme tels par les règles*”. In paragraph 3, the words “constituent instruments” should be replaced by a more frequently used formulation such as “constituent acts”. The words “decisions and resolutions” could be simply subsumed under the generic term “relevant decisions”. There remained the question of what was meant by the “practice” of the organization. Was it established practice, or generally accepted practice? In his view, both those terms could be incorporated, since the real issue was the extent to which such practice could actually be invoked.

27. In draft article 5, two factors should be better reflected and highlighted. The first was the role of the agreements under which organs were placed at the disposal of an international organization. The Special Rapporteur considered that such agreements could not be invoked by persons who suffered injury, who were third parties thereunder. He himself was not sure about that. The agreement was intended to serve as one of the means for bringing into play the principle of speciality, and it seemed strange that persons covered by the agreement should be prohibited from relying on it. He would prefer to see those agreements accorded fuller attention in article 5. The second factor had been identified by the Superior Provincial Court of Vienna in its finding that what was decisive was the sphere in which the organ in question had been acting at the relevant time (paragraph 37 of the report).

28. He proposed that in order to incorporate those two factors, the words “unless the act of the organ is related

to the exercise of the organization’s competences or to the application of agreements placing it at the organization’s disposal” should be added to article 5.

29. Draft article 6, on *ultra vires* conduct, was much more problematic, since the reasons why an organ might exceed its powers were not addressed and the question of instructions and who issued them was hardly touched on at all by the Special Rapporteur in his report. Were such instructions in conformity with the organization’s field of competence and purposes; in other words, with the principle of speciality? Were they lawful, or were they not? If the person who carried them out had to exceed them, was he or she acting in conformity with the rules of the organization, or acting against them?

30. A distinction had to be drawn between acts that exceeded powers but were necessary and those that were not. ICJ had been right in stating in 1949 that one could exceed one’s competences, since even if they were not set forth in the constituent act of the international organization, certain acts might still be necessary for the very purpose of exercising such competences. That position was borne out by the decisions of ICJ and the Court of Justice of the European Communities, particularly with respect to the European Agreement concerning the work of crews of vehicles engaged in international road transport (AETR) and in the judgement in the *Sayag v. Leduc* case. Thus, there were two international organizations that considered that the theory of implicit competences should come into play as a means of implementing the principle of speciality.

31. Sometimes, acts that exceeded powers were necessitated by tacit agreement among member States of an international organization. Such was the case with ECOWAS. Although its constituent act made no mention of provision of military intervention forces, it had acted as a substitute for the United Nations in leading military interposition forces in Sierra Leone and Liberia, and none of the States members of ECOWAS had objected. It was the realities in the field that had rendered necessary that excess of authority. Such necessary excess of authority must be distinguished from other *ultra vires* conduct, and from the problem of instructions, to which insufficient attention had been devoted.

32. For those reasons, article 6 seemed out of place in the draft and he requested the Special Rapporteur to review it in its entirety.

33. Lastly, draft article 7 posed no particular problem. Such a provision was fully appropriate in a draft in which the principle of speciality was seen as central to the law of responsibility of international organizations.

34. Mr. KOSKENNIEMI said that at the previous session he had been under the erroneous impression that the topic would be relatively easy to deal with, but the report, which he found exceptionally thought-provoking, seemed to have led the Commission into very deep water. Indeed, it raised questions which to some extent challenged the whole thrust of the project. He agreed with Mr. Pellet that chapter I of the report was enigmatic and that it was hard to see how it related to the material presented later in the

report and to the draft articles. He himself read it as a set of preliminary reflections on the topic. It made a distinction between attribution of conduct and attribution of responsibility and emphasized the need to think of responsibility of international organizations in terms other than those of responsibility based solely on conduct. That in itself posed no problem: in State responsibility, a distinction had been drawn from an early stage between responsibility and liability, liability being based not on conduct but being attributed to the person liable, independently of how that person had behaved.

35. Chapter I indicated that that distinction was particularly useful in the law of international organizations, in that it allowed for the possibility of joint, or joint and several, responsibility. The Special Rapporteur suggested that a clear distinction need not be drawn between the person or organization responsible for an act and those actors—such as States—that were not, because two techniques were available: attribution through conduct and attribution unrelated to conduct. The international organization could be regarded as responsible even if no conduct could be attributed to it, for other reasons.

36. What, though, were those reasons? It was frustrating that the Special Rapporteur did not set them out in chapter I. In paragraph 53, however, he indicated, as a kind of policy justification, that the need to protect third parties required an extension of attribution of conduct for the same reason that underpinned the validity of treaties concluded by an international organization, notwithstanding minor infringements of rules concerning competence to conclude treaties. The policy rationale was thus the need to make sure that somebody was responsible, and, if that required joint and several responsibility to come into play, there was no problem, since the responsibility of the organization did not have to be related to its conduct. The Special Rapporteur described the underlying policy rationale in terms of an imperative need to expand the notion of conduct. That seemed unnecessary, however, since he had already decided, in chapter I, that there were types of responsibility that were completely unrelated to conduct.

37. Chapter I, then, presented a puzzle: why make a distinction between attribution of conduct and attribution of responsibility and then not use it in the draft articles? Articles 4 to 7 each dealt with attribution of conduct, and the vocabulary of attribution of responsibility was dropped after having been introduced with great flair and some useful policy justification in chapter I. He hoped that the Special Rapporteur would solve the puzzle and explain whether he intended to deal with attribution of responsibility as distinct from attribution of conduct.

38. Article 4 set out the standard for the attribution of conduct to an international organization. Two points seemed important. Firstly, persons whose activities were attributed to the organization were those that were “entrusted with part of the organization’s functions”. That was uncontroversial, but he wondered whether it addressed the issue of outsourced activities. Would the phrase “entrusted with” cover independent contractors, such as logistical support staff and employees of computer companies? He himself believed that it did, but that

point should be clarified in the commentary. Secondly, what determined that an act was attributable to a person? The Special Rapporteur indicated that there should be some connection with the “rules of the organization”, and although that phrase seemed adequate, what those rules were might be the subject of debate.

39. His last point on article 4 was that the issue of omissions needed to be discussed in the Commission, or in one of the Special Rapporteur’s later reports.

40. With regard to article 5, he did not object to the principle of effective control, especially if it was assumed, as the Special Rapporteur had done in chapter I of the report, that responsibility could be unrelated to conduct. Effective control then became just one criterion whereby responsibility was attributed to the State, and it might still be possible to attribute responsibility to the organization if it was deemed equitable or reasonable to do so, irrespective of any effective control. The importance of effective control as a criterion of responsibility diminished significantly if it was accepted that there could be attribution of responsibility that was unrelated to conduct. However, since the situations in which responsibility was attributed irrespective of conduct had not been dealt with by the Special Rapporteur in his draft articles, it seemed that considerable emphasis was being placed on effective control as a key criterion on the basis of which responsibility was attributed to an organization when an organ was placed at its disposal.

41. If the Special Rapporteur’s policy consideration—that responsibility should always exist, even if it required joint and several responsibility—was correct, then the principle of effective control might be too strict to meet that policy consideration, especially if, *de facto*, the Commission did not accept the possibility of responsibility unrelated to conduct. Thus, his position on the suggestion that effective control was the operative standard was contingent on whether the Commission intended to provide for an attribution of responsibility that was not related to conduct at all. Such responsibility might be operative in a situation in which, for example, the international organization had not been in effective control of a peacekeeping operation, but in which the organization might still be held responsible for the actions of that peacekeeping operation, on the basis of considerations of reasonableness and justice.

42. If the Commission wanted the draft articles to cover responsibility that was not attributed on the basis of conduct, which he thought might be a good idea, it would have dramatic consequences for the wording of the article. If the Commission rejected the Special Rapporteur’s conclusions in chapter I, that would have an impact on the strict definition of conduct attributed to an international organization, especially if the Commission agreed with the Special Rapporteur’s view that there should be wide-ranging responsibility, not only out of concern for third parties adversely affected by actions attributed to that international organization, but also because, firstly, the Commission believed that it was right to support the activities of international organizations, endorsed a strong view of their personality and saw them as playing a key role in the way the world should be governed

in the future; and, secondly, because the Commission believed that allocating responsibility to such organizations sent the strong message that it wanted them to have wide-ranging authority and functions. An international organization's most effective argument in support of its activities was that it was the representative of States and had powers precisely because it had responsibility. If the Commission wanted to promote a broad conception of the powers of international organizations, then it had good reason to support their having wide-ranging responsibility. Such responsibility might be based on conduct, but it would be easier to envisage, as the Special Rapporteur suggested in chapter I, an attribution of responsibility that was unrelated to conduct.

43. Mr. PELLET said that he was in full agreement with Mr. Koskenniemi's analysis but disagreed with his conclusions. Although he too had not been convinced by chapter I of the report, he thought that Mr. Koskenniemi's criticism was unjustified. In his own view, chapter I was off the subject. Mr. Koskenniemi's remarks would have been more to the point in connection with article 3, which the Commission had adopted in 2003;<sup>7</sup> perhaps unwisely, he had begun to think, having listened to his colleague's comments. It was unfortunate that the current discussion had not taken place in 2003. There were two conditions for an internationally wrongful act: there must be an action or omission which constituted a breach, and the breach must be attributable to the organization. That had been the Commission's conclusion in 2003. Now the Commission seemed to be saying that that was one possibility, but that another was that the organization could be responsible even when no conduct could be attributed to it. In that case, it was article 3 that needed to be revisited. On the other hand, where he disagreed with Mr. Koskenniemi's criticism was that, consistent with the general principles contained in article 3, it was an internationally wrongful act attributable to an organization which gave rise to responsibility. For the moment, the Special Rapporteur met that requirement in articles 4 *et seq.*, and that was perfectly convincing. Both Mr. Koskenniemi and the Special Rapporteur had "supposed erroneously" and confused two problems. The Commission should continue with the question of attribution and adopt the articles more or less as they stood, and when it addressed the consequences of responsibility, it should probably return to article 3 and incorporate wording to the effect that the "responsibility of the organization may be engaged by ...", which Mr. Koskenniemi had referred to as responsibility unrelated to conduct. Admittedly, it was not easy to formulate the idea; in so doing, the Commission would depart fundamentally from the problem of State responsibility. Too many things were lumped together; the Commission should confine itself for the time being to attribution. Chapter I of the report came either too late (it should have been taken up with article 3) or too early (it should be addressed later, when discussing the allocation of the consequences of responsibility); now was not the right moment to take it up.

44. Mr. Sreenivasa RAO, referring to the concept of attribution, said that it was difficult to dissociate the actions of a State or organization from its organs or officials.

<sup>7</sup> See footnote 1 above.

Thus, attribution arose in any case. In some instances, it was obvious and straightforward, whereas in others it was less so. He therefore wondered whether distinctions could really be drawn with regard to attribution in the same way as in other areas of law where, for example, an individual was liable and directly responsible for his own acts, and, if the acts were carried out by his agents, he was liable by association. The distinction that Mr. Koskenniemi made and the analogy with tort law did not really apply to the attribution of State responsibility because, by their very nature, the organizations did not act by themselves, but only through an agent or organ.

45. Mr. MANSFIELD said that he had been struck by the report's excellent legal analysis, but thought that it might convey unintended messages to managers and decision makers, particularly given the vast range of international organizations covered. Legal analysis sometimes required some interpretation or explanation if it was to be properly understood. That was particularly true of chapter I of the report, and also, to a lesser extent, of the chapter on conduct of organs placed at the disposal of an international organization by a State or another international organization.

46. One of the cornerstones of effective management was the need for clear lines of accountability. Put simply, who was in charge of doing what? Who bore personal consequences if things went wrong? If lines of accountability were blurred, there was a good chance that at some point things would go wrong, or at least would not go as well as they should.

47. The analysis in chapter I of the attribution of conduct between a State and an international organization established that conduct could in some circumstances be attributed both to an international organization and to one or more of its members. That was obviously correct, and in some circumstances it might also be unavoidable. However, it was to be hoped that it would be the exception rather than the rule and that, when it could not be avoided, careful thought would be given to keeping critical lines of accountability as clear as possible. That point should be stressed in the commentary.

48. He had no reason to challenge the Special Rapporteur's analysis of the situations to which he had referred. The Special Rapporteur was right in saying that there could be circumstances in which an organization might be responsible for conduct that was not its own but rather that of its member States, and in which such conduct could not be attributed in any meaningful sense to the organization. Whether those circumstances should be encouraged or discouraged was a point that concerned him as a practical matter. However, the fact that they could arise meant that article 3, as the Special Rapporteur noted, did not cover all cases in which an organization might be responsible for an internationally wrongful act.

49. With regard to the chapter of the report on the general rule on attribution of conduct to an international organization, he was inclined to agree with the Special Rapporteur's suggestion that the words "acts of the organization" and "generally accepted practice" were more accurate and probably more useful than the alternatives derived

from the 1986 Vienna Convention. He agreed with Mr. Koskenniemi's point on contractors and the question as to whether the phrase "person entrusted with part of the organization's functions" in article 4, paragraph 1, covered such individuals. He believed that it did and should. That was an issue to which far too little thought had been given by decision makers within organizations.

50. The departures from article 4, paragraph 1, of the draft articles on State responsibility which the Special Rapporteur had suggested (paragraph 27 of the report) seemed entirely appropriate.

51. Turning to the complex and, at least in the area of peacekeeping operations, somewhat delicate matters dealt with in chapter III, he said that nothing discussed therein should be taken to suggest that clear lines of accountability were not desirable or in most situations achievable. It might, however, be helpful to have that point made somewhat clearer. It must nevertheless be recognized that in certain situations the attribution of conduct to the State or organization might depend on an *ex post facto* analysis of which body had been exercising effective control over conduct at the time of the wrongful act. That did not in itself mean that the lines of accountability would not have been clear and clearly understood by those involved.

52. The rights and obligations of national troops were in most cases governed by national law, and in many cases the head of the armed forces could not divest himself or herself of the command of national forces. That state of affairs probably stemmed from the underlying notion that armed forces were perhaps the ultimate expression of State sovereignty. There were different types of command structure, and in many, if not all, situations, that might mean that no international commander had full command over the forces assigned to him or her. At a more specific level, the powers of command and punishment could be complex. There might well be standing orders and directives with which national peacekeeping forces would be required to comply. However, in some situations the question could arise as to whether the person issuing a direct order had lawful powers of command under national laws, a question that could be of significance for a defence which argued that a person was following the orders of a superior. Although the case of peacekeeping raised some of those issues very clearly, they could also arise in other situations, as discussed in the Special Rapporteur's second report. Accordingly, although article 5 and its reliance on the test of effective control might at first seem vague, it was probably the most accurate statement that could be made at the current time. Moreover, its application was likely to be less uncertain in practice than its somewhat general wording might suggest.

53. He had no particular comments on articles 6 and 7. With regard to article 6, it was his understanding that the person concerned must be acting in the relevant capacity at the time of the wrongful act.

54. He was in favour of referring the articles to the Drafting Committee. As to the chapter on other cases of attribution of conduct to an international organization, he had not yet given thought to the question whether the articles on State responsibility needed an equivalent in the

current draft articles, but was inclined to agree with the Special Rapporteur that there was no need to replicate them slavishly.

55. Mr. CANDIOTI agreed with the Special Rapporteur that the practice of international organizations had to be analysed in greater depth. The Commission should ensure that the Special Rapporteur was given as much material on such practice as possible.

56. In his view, the distinction between the attribution of conduct and the attribution of responsibility needed to be taken into account. He granted the possibility of dual or multiple attribution of the same conduct to the organization and to other subjects of international law and the possible existence of joint or joint and several responsibility. All the above showed the importance of establishing clear criteria for correctly attributing to an international organization conduct which gave rise to the internationally wrongful act.

57. He endorsed the inclusion of the four articles proposed by the Special Rapporteur and agreed with him that other rules on attribution of conduct should not be transposed from the draft articles on responsibility of States for internationally wrongful acts adopted in 2001, as they referred to situations that were rarely, if ever, applicable to the actions of international organizations. Some of those situations might be addressed in the commentary, leaving open the possibility of an application by analogy of the rules contained in the draft articles on State responsibility. If the Commission felt that it was useful to include a provision to cover conduct by agents or organs of an international organization in a territory in which it was exercising functions in the absence or default of the official authority, he could agree, bearing in mind that those were situations which were becoming more frequent in international life.

58. Turning to the draft articles themselves, he said that article 4 was appropriate in that it made the conduct of organs, agents or other persons entrusted with the organization's functions attributable to the organization and in that it referred to the rules of the organization to determine what those organs, officials or agents were. With regard to the phrase "part of the organization's functions", in article 4, paragraph 1, he did not think that the word "part" was always strictly appropriate or applicable to all types of organization; that matter should be taken up in the Drafting Committee. The same held for the use of the word "part" in article 6 and of the word "one" [of the functions] in article 5. The reference to functions might be formulated in a more general manner.

59. The Special Rapporteur's proposed definition for the phrase "rules of the organization" reflected a broadly accepted concept based on the definition in the 1986 Vienna Convention. He endorsed the proposal that that definition should be incorporated in the draft article on use of terms, and he agreed with the Special Rapporteur in preferring the phrase "acts of the organization", which was broader and more general than "decisions and resolutions", and on the importance of including the reference to "established practice".

60. As to article 5, he commended the Special Rapporteur for his excellent discussion of United Nations peacekeeping and other military operations and of situations which arose in practice, and agreed with his conclusions on the need to consider in each case whether such actions, when they constituted internationally wrongful acts, fell under the exclusive authority of the organization or whether they should be attributed, exclusively or concurrently, to troop-contributing States. All in all, he regarded as appropriate the choice of the criterion of the degree of effective control for determining whether to attribute to an international organization the conduct of organs or persons placed at its disposal for the exercise of its functions.

61. The question of the attribution of the *ultra vires* conduct of an organization's organs and agents was given proper treatment in article 6. The need to take into account the circumstance that the organ or official had acted in the exercise of functions entrusted to him by the organization and had acted in that capacity was a good way of attributing to the organization conduct which exceeded authority or contravened instructions.

62. He had no comments with regard to draft article 7. In conclusion, he had no hesitation in recommending that the four articles should be referred to the Drafting Committee.

63. Ms. ESCARAMEIA said that every sentence in the report was so carefully weighed that there were few comments to make. She was particularly appreciative of chapter I of the report, which other members had found controversial. The distinction made between the attribution of conduct and the attribution of responsibility was particularly illuminating. However, although she assumed that the purpose of the Special Rapporteur's comments was to alert the Commission to the fact that, owing to that distinction, joint responsibility could arise, she concurred with Mr. Koskenniemi that the comments could also lead the reader to the conclusion that objective responsibility could exist: the report stated that responsibility sometimes arose even if there had been no wrongful act on the part of the international organization.

64. She was struck by the fact that the proposed draft articles were modelled so closely on the draft articles on State responsibility. That was a risky approach, because they might end up saying more than was intended. International organizations differed from States in many significant respects, three of which could affect the Commission's view of their responsibility. Firstly, the fact that they were composed of States entailed a variety of inter-State relations, some of them hierarchical. The Commission could not dismiss such situations as being an internal matter for the organization in question, since inter-State relationships could affect the thinking behind some of the draft articles, such as the idea of *ultra vires* acts in article 6 or even the acknowledgement of conduct in article 7. A State might occupy such a dominant position within an organization that the latter might act *ultra vires* simply in response to the will of the former.

65. Another respect in which organizations differed from States and that might also affect the drafting of the articles was their more extensive relations with outside

actors. While the "effective control" test in article 5 was well founded, the question arose as to whether such control was overarching or affected only the conduct that gave rise to responsibility. The draft text seemed to suggest the latter. Another pressing question was whether, when an agreement between an organization and a State provided for exercise of control by the organization, such was necessarily the case. The question did not arise to the same extent where State responsibility was concerned.

66. A third issue not dealt with in the report was the fact that organizations might have to deal with the question of the criminal responsibility of individuals, as in the case of military commanders and their responsibility. Articles 4, 5 and 7 disregarded the question of individual criminal responsibility. Under article 4, for example, responsibility could arise for the organization alone or jointly for the organization and an individual. The same applied to article 5. However, the responsibility of an individual for criminal acts could not be precluded and that should be made clear in the commentary. As for article 7, the risk was that an organization that acknowledged conduct as its own might be used as a cover for the wrongdoing of an individual.

67. Turning to the drafting of individual articles, she suggested that, in article 4, paragraph 1, the words "entrusted with part of" should be replaced by the phrase "while performing or exercising": the word "part" suggested that the organization's work was somehow parcelled out, while the expression "person entrusted with" failed to stress that the person must be acting in an official capacity. In paragraph 3, of the alternative formulations she would prefer the phrases "acts of the organization" and "generally accepted", for the reasons given in the report, and in accordance with the advisory opinion of ICJ on the *Namibia* case.

68. In article 5, the phrase "one of that organization's functions" should be replaced by "one or more of that organization's functions", or words to that effect. More importantly, the phrase "and to the degree" should be inserted after the phrase "to the extent": there could be many situations in which joint responsibility arose and, even if an organization was responsible for an act, that responsibility might be shared to some degree with other entities.

69. The amendments that she had proposed to article 4 applied also to article 6. In addition, she would prefer to see the phrase "in that capacity" replaced by the phrase "in performance of those functions". As for paragraphs 64 to 67 of the report, she urged the Special Rapporteur to give further consideration to the possibility of including provisions modelled on articles 9 and 10 of the draft articles on State responsibility: international organizations increasingly administered territories and there was a commensurately greater possibility that situations like those covered by articles 9 and 10 of the draft articles on State responsibility might occur. A similar provision should be considered for the draft articles on responsibility of international organizations. Meanwhile, draft articles 4 to 7 should be referred to the Drafting Committee.

70. Mr. CHEE said that the Special Rapporteur had been wise to draw on the Commission's previous work on State responsibility since, as ILA had pointed out at its 2002 New Delhi Conference, it was widely accepted that the principles of State responsibility were applicable, with some variations and by analogy, to the responsibility of international organizations<sup>8</sup>. As stated in paragraph 34 of the report, most of the practice concerning attribution of conduct in case of a State organ placed at an organization's disposal related to peacekeeping operations. As such operations increased in volume, one way to control the responsibility of international organizations would be to establish *sui generis* legal regimes by means of special agreements between the relevant international organizations and the States involved. The Commission should explore the extent to which attribution overlapped with and differed from a simple linkage between an act and its author.

71. Turning to the detail of the text, he said that he was in favour of the formulations "acts of the organization" and "established practice", in article 4, paragraph 3. With regard to article 5, the question as to whether effective control existed was a matter to be determined on a case-by-case basis. Reference to the criterion of "degree of effective control", as used by the United Nations Secretary-General,<sup>9</sup> seemed the best way of describing the emerging practice of the United Nations.

72. With regard to article 6, while it was easy to conceive of an *ultra vires* act by the agent or official of a State, one might wonder whether it could also apply to international organizations, the agents or officials of which were expected to be devoted to the interests of the international community. However, that question was satisfactorily elucidated in paragraph 52 of the report. He therefore endorsed draft article 6.

73. Lastly, as international organizations such as the United Nations developed their own rules and practices, their law-making role would inevitably be enhanced to respond to new realities in international relations. He therefore believed that the draft articles should not take too hard a line on the question of responsibility of international organizations.

74. Mr. RODRÍGUEZ CEDEÑO said he shared the view expressed in the report that in some cases conduct could be attributed concurrently to an international organization and to a State; the Special Rapporteur had given several examples to that effect, such as that in paragraph 7 of his report. The general thrust of article 4 was clear and acceptable. He himself had some doubts, however, concerning the words "organ", "official" and "another person entrusted with part of the organization's functions". As used by ICJ, the term "agent" referred to a person acting on behalf of an organization, whether or not that person was an official from the strictly administrative point of view. While article 4 spelled out the categories of person whose conduct could be attributed to the organization, its scope should be further broadened to include all officials with a contractual relationship, such as external

consultants. As the text stood, such persons were not covered, even though they could act on behalf of the organization. Furthermore, the phrase "acts of the organization", in paragraph 3 of the draft article, was to be preferred to the phrase "decisions and resolutions", since it covered all acts, including recommendations, resolutions and decisions. Indeed, it could also cover administrative acts, such as the hiring of an external consultant who could act for the organization.

75. As for the draft article on *ultra vires* conduct, in accordance with both the literature and case law, an organization, by contrast with a State, possessed a limited competence, governed by the principle of speciality. Draft article 6 was acceptable, although he was doubtful whether it applied equally in all cases, namely in relation to organs, officials and other persons. The 1999 advisory opinion of ICJ in the *Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* case was not, in his view, enough to establish that an organization could incur responsibility for *ultra vires* acts of persons other than officials, as suggested in paragraph 54 of the report.

76. Lastly, draft article 7 seemed fully justified. An organization could undoubtedly acknowledge and adopt conduct as its own. Such conduct would constitute a unilateral act, though it must be formulated in accordance with the organization's rules. The draft articles as a whole should be referred to the Drafting Committee.

*The meeting rose at 1 p.m.*

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## 2802nd MEETING

*Friday, 21 May 2004, at 10 a.m.*

*Chairperson:* Mr. Teodor Viorel MELESCANU

*Present:* Mr. Addo, Mr. Baena Soares, Mr. Candiotti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskeniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Niehaus, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

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### Responsibility of international organizations<sup>10</sup> (continued) (A/CN.4/537, sect. A, A/CN.4/541,<sup>11</sup> A/ CN.4/545,<sup>12</sup> A/CN.4/547,<sup>13</sup> A/CN.4/L.648 and Corr.1)

[Agenda item 2]

#### SECOND REPORT OF THE SPECIAL RAPPORTEUR (continued)

<sup>10</sup> For the text of articles 1 to 3 of the draft articles and commentaries thereto adopted by the Commission at its fifty-fifth session, see *Yearbook ... 2003*, vol. II (Part Two), chap. IV, sect. C, pp. 18–23.

<sup>11</sup> Reproduced in *Yearbook ... 2004*, vol. II (Part One).

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>8</sup> ILA, *Report of the Seventieth Conference* (London, 2002), p. 794.

<sup>9</sup> A/51/389, para. 18.