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Summary record of the 2841st meeting

Topic:
Responsibility of international organizations

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wording of draft article 8, paragraph 2, did not fully reflect the idea expressed in paragraph 22 of the report that the scope of the draft articles should include breaches of obligations under the rules of the organization to the extent that those rules had retained the character of rules of international law.

74. Turning to the chapter of the report on the responsibility of an international organization in connection with the act of a State or another organization, he said that draft article 12 on help or assistance in the commission of an internationally wrongful act could, like draft articles 8 to 11, be sent to the Drafting Committee. However, draft articles 13, 14 and 16, which touched on the fundamental distinction between States and international organizations, should not just reproduce the corresponding articles on responsibility of States. An international organization, in contrast to States, could oblige other international organizations to commit certain acts and coerce them into acting in a certain way by adopting decisions that were binding in relation to them. An international organization could therefore have normative control over the activities of other subjects of international law. States did not have that possibility, except within their own territory. The Commission faced the problem of defining the effects of the binding decisions of an international organization in the context of international responsibility, a problem that was compounded by the fact that international organizations had members who took part in the adoption of decisions within the organization. The adoption of the binding decisions mentioned in draft article 16, paragraph 1 (*a*), could in many cases be considered a form of coercion. If it was possible to talk about “normative control”, it was also possible to talk about “normative coercion” (para. 35 of the report). In fact, he believed that the decisions adopted by the Security Council under Chapter VII of the Charter could be considered a coercive measure. If the coercive measures covered by draft article 14 referred to measures other than binding decisions adopted by international organizations, that point should be made clearly.

75. Another issue was whether the adoption by an international organization of a binding decision was conduct attributable to the organization itself, rather than to its members. If the answer was in the affirmative, the organization would bear responsibility not, or not only, for the conduct of its members but also for its own conduct, as expressed in the relevant decision. The example given in paragraph 34 of the report demonstrated that in the case of *Krohn & Co. v. Commission of the European Communities* the Court of Justice of the European Communities had found that the unlawful conduct was to be attributed to the Commission of the European Communities because such conduct could have taken place only as a result of the adoption of the relevant decision. He wondered if a binding decision by an organization could be considered as conduct giving rise to the attribution of responsibility to that organization.

76. Similarly, with regard to draft article 13, on the direction and control exercised over the commission of an internationally wrongful act, he wondered if the adoption of a binding decision by an international organization could be considered as a form of direction and control. In paragraph 35 of the report, the Special Rapporteur spoke

of the concept of control being extended to encompass normative control if it directed and controlled the member State in the commission of a wrongful act. That seemed to suggest that draft articles 13 and 16 overlapped to some extent.

77. The chapter of the report on the responsibility of an international organization in connection with the act of a State or another organization raised questions about the responsibility of member States of international organizations, particularly with regard to the adoption of decisions contrary to international law, and the implementation of such decisions, whether or not the individual member had voted for them. It was not clear whether the responsibility of States for the decisions of organizations of which they were members belonged to the field of State responsibility or of the responsibility of international organizations.

78. Lastly, he agreed with the application of the criteria of the member State’s liberty to act or use discretion in implementing the binding decisions of an international organization, as mentioned in paragraphs 30 and 32 of the report and discussed by the delegations of France and the Russian Federation in the Sixth Committee.¹²

Organization of work of the session (*continued*)*

[Agenda item 1]

79. The CHAIRPERSON announced that, following consultations, it had been agreed that the working group established to discuss the topic of shared natural resources would be composed of Mr. Candiotti (Chairperson of the Working Group), Mr. Comissário Afonso, Mr. Daoudi, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Mansfield, Mr. Matheson, Mr. Operti Badan, Mr. Sreenivasa Rao, Mr. Sepúlveda, Ms. Xue, Mr. Yamada (Special Rapporteur), and Mr. Niehaus (Rapporteur, *ex officio*).

The meeting rose at 12.55 p.m.

2841st MEETING

Thursday, 19 May 2005, at 10 a.m.

Chairperson: Mr. Djamchid MONTAZ

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candiotti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, 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. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Yamada.

* Resumed from the 2836th meeting.

¹² See *Official Records of the General Assembly, Fifty-ninth Session, Sixth Committee*, 22nd meeting (A/C.6/59/SR.22), para. 13; and 23rd meeting (A/C.6/59/SR.23), paras. 22–23, respectively.

Responsibility of international organizations (*continued*) (A/CN.4/549 and Add.1, sect. A, A/CN.4/547, A/CN.4/553, A/CN.4/556, A/CN.4/L.666/Rev.1)

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. MATHESON said that the first set of articles in the report (arts. 8–11) was a reasonable adaptation of the corresponding articles on State responsibility for internationally wrongful acts.¹ He agreed in particular with the Special Rapporteur that a wrongful act of an international organization could consist of either an act or an omission and that both possibilities should be covered by the draft articles. However, he was not convinced by the example given in paragraph 10 of the report, which suggested that the United Nations might be held responsible for failing to prevent the genocide in Rwanda. Although he believed that the Security Council should have authorized the use of force under Chapter VII of the Charter of the United Nations, he doubted whether the Security Council had a legal obligation to do so or that it could be held legally responsible for not doing so. It might be preferable to refer in the commentary to examples that did not involve the Security Council's discretionary powers under Chapter VII of the Charter. In any event, draft articles 8–11 could be sent to the Drafting Committee.

2. With regard to the second set of articles (arts. 12–15), on the responsibility of an international organization in connection with the act of a State or another organization, he agreed in principle with the Special Rapporteur's proposals. An international organization could indeed be held responsible for aiding or assisting, directing, controlling or coercing another organization or a State in the commission of an internationally wrongful act, although one might ask how the principle applied in specific cases: it was not certain, for example, that the imposition by an international financial organization of strict conditions for a loan constituted coercion, as suggested in paragraph 28 of the report.

3. With regard to draft articles 13 and 14, according to which an international organization was responsible only if the act of the State would be internationally wrongful if committed by the organization, he wondered how that provision would apply to acts that could be committed by a State but not by an international organization, such as the imposition of national economic sanctions or the failure to prosecute, under domestic law, individuals who had committed certain types of crime. He would appreciate some clarification on that point by the Special Rapporteur. Having said that, he was in favour of sending draft articles 13–15 to the Drafting Committee.

4. The most problematic article was without a doubt draft article 16 on decisions, recommendations and authorizations addressed to member States and international organizations, since it went further than the corresponding articles on State responsibility. Paragraph 1, which stipulated that an international organization incurred international responsibility if it adopted a decision binding a member

State or international organization to commit an act that would be internationally wrongful if taken by the former organization directly, was acceptable. It should be made clear, however, either in the article itself or in the commentary, that responsibility was not incurred if the State concerned was in a position to comply with the decision in a manner that did not constitute an internationally wrongful act. He did nevertheless have doubts about paragraph 2, according to which an international organization incurred responsibility if it authorized or recommended an internationally wrongful act, although he agreed that such an authorization or recommendation might, in certain circumstances, fall within the scope of the conduct covered by articles 12–14, on aid or assistance, direction and control, and coercion. That point could, if necessary, be clarified in the text or commentary. However, it would be going too far to claim that authorizations and recommendations made by an international organization entailed the organization's international responsibility in other cases, since, as the report indicated, States were not obliged to act upon such decisions and were, after all, best placed to judge whether it was possible to do so in a lawful manner. In his opinion, it was questionable whether the international organization was automatically responsible in such cases.

5. He agreed that the wording of article 16, paragraph 2 (*a*) was designed to limit the reach of that provision, but he doubted that the proposed criterion was suitable. It would, in fact, be very difficult to judge whether a particular act "fulfils an interest of the same organization". It was probably extremely rare for an organization to authorize or recommend any action if it did not believe that doing so was in its own interest. He was also concerned that if international organizations incurred responsibility for an authorization or recommendation in circumstances other than those set out in draft articles 12–14, they might be unduly inhibited in carrying out one of their essential roles, which was to give advice and authorization. It would be questionable to impose on an organization the burden of judging whether its recommendations could be lawfully implemented in all cases and to hold it responsible if a State acted unlawfully in carrying out such recommendations. The paragraph should therefore be reconsidered.

6. Paragraph 3 of draft article 16 should also be reworded or explained, as it was unclear whether an international organization could be held responsible for requiring a State to commit an act that did not breach the international obligations of that State. Draft article 16 raised substantive issues that needed to be resolved before it was referred to the Drafting Committee.

7. Lastly, he wished to raise a question that was not directly dealt with in the draft articles but was mentioned in the body of the report (para. 19), and on which the Commission had sought the views of States in 2004: namely, whether the Commission should consider, under the current topic, breaches by an international organization of its obligations towards its member States (see A/CN.4/556). He did not believe it should, as such matters were governed by the agreements establishing the organization, the rules and decisions adopted pursuant to those agreements and the practice of the organization

¹ See 2838th meeting, footnote 5.

and its members. It would therefore be difficult to draft general rules applicable to all organizations; moreover, no set of generic rules should override the obligations imposed or decisions taken by the competent organs of the organization. For example, if the General Assembly took a decision on the allocation of responsibility between the United Nations and its Member States with respect to peacekeeping operations, or if the Security Council took a decision under Chapter VII of the Charter on the allocation of responsibility between a Member State and the Organization, such decisions ought not to be called into question on the basis of the general provisions of the draft articles. Accordingly, the Commission should in due course consider adopting an article making it clear that the draft articles did not govern the relations between an organization and its member States. At the very least, it should be specified that the articles did not override the decisions or practice of organizations. He suggested that the Commission begin to think about that question and encourage States to express their views on it.

8. Mr. PELLET said that he found Mr. Matheson's comments very interesting and agreed with most of them, particularly those concerning article 16, paragraph 1. However, he was not convinced by his last remark, notwithstanding the merits of the arguments put forward. It was essential that the draft articles should cover the responsibilities of international organizations towards their member States. To delete that aspect from the study outright would render the exercise meaningless.

9. Mr. MATHESON suggested that it might be better to defer the debate on that point; in any case, the draft articles did cover the relations between organizations and third States, which could be important for organizations that did not have universal membership.

10. Mr. BROWNLIE agreed with Mr. Pellet that the topic would lose much of its interest if the Commission decided not to deal with the crucial question of the occasional attempts by States to evade their responsibility by hiding behind an international organization.

11. Mr. GAJA (Special Rapporteur) pointed out that an aspect of the relations between international organizations and their member States was addressed in article 8, paragraph 2, and in the commentary. It was not consideration of that aspect of the topic that had been deferred but consideration of the responsibility of member States for an internationally wrongful act of an organization. For the time being, the Commission should deal with the responsibility of an international organization towards its members or towards other States or other international organizations.

12. Mr. ECONOMIDES agreed with Mr. Pellet's position. International organizations could certainly be responsible with respect to third States, but they also incurred responsibility for acts committed by their member States, unless there was a special regime governing responsibility in the relations between the organization concerned and its member States. A general clause should therefore be included at the end of the draft articles to specify that the articles were not applicable when a special regime governing responsibility was already in place.

13. Mr. Sreenivasa RAO said that the methodology adopted by the Special Rapporteur, which consisted of following the general pattern of the articles on State responsibility, had allowed the Commission to make progress in its work. However, as the Special Rapporteur himself had recognized, the reports and debates on the topic had been highly theoretical, and it was difficult for Commission members who had not taken part in the tumultuous debates on State responsibility to analyse the draft articles in depth or in a critical manner. Leaving that problem aside, he was not entirely comfortable with the basic thrust of the draft articles. There were 200 to 300 international organizations around the world that had been established by international treaties or other instruments of international law, and their members consisted not only of States but also of other entities. Their constituent instruments and mandates differed widely, as did their decision-making procedures. Most international organizations made recommendations and set standards, leaving their member States to implement them according to their means and particular circumstances. It was well known that the recommendations of international organizations had played a more important role in the implementation of international law than their binding decisions. Furthermore, in many international organizations, and particularly in financial institutions, policies were decided by member States but their implementation was left to the organization. The activities of international organizations were mainly governed by the rules of the organization, generally defined as their constituent instruments, resolutions, decisions and established practice. It was open to question whether in determining the legal basis for the conduct of the organization it was possible to rely solely on the rules of the organization without taking into account the collective responsibility of the member States who set the organization's overall policy.

14. It would also be desirable to look more closely at the role of the recommendations or authorizations provided by an organization to its member States for the pursuit of conduct that might later be considered as wrongful in establishing responsibility. In the area of State responsibility, there was little difference between recommendations and authorizations, inasmuch as States had some leeway in acting upon them. However, the responsibility of international organizations might be slightly greater in the case of an authorization. Those matters were more important for determining the remedies needed as a consequence of responsibility than for establishing the responsibility of international organizations and their member States.

15. The diversity of international organizations and their mandates made it necessary for the Commission to take a more nuanced approach to the attribution of responsibility to an international organization. Discussions had already revealed certain differences, depending on whether the subject was the work of the United Nations or the situation of the European Union. The situation would be equally different in the case of the IMF or the World Bank. For example, according to paragraph 28 of the report, "an international organization could incur responsibility for assisting a State, through financial support or otherwise, in a project that would entail an infringement of the human rights of certain individuals". That example and others required further study before the Commission

could conclude that the organization concerned had incurred responsibility. One important consideration for establishing responsibility was whether or not the international organization was aware of the circumstances in which the internationally wrongful act had been committed. Another important consideration was whether the member State that received aid or assistance had any choice but to accept the aid and the constraints attached to it. It should also be determined whether several options were available to the State concerned and whether some of them were consistent with its international obligations, including those related to human rights.

16. As far as the decisions of the United Nations Security Council or NATO were concerned, they were undoubtedly mandatory and binding on their member States and could to some extent be considered as orders, but they were always taken on the basis of a set procedure. Accordingly, member States that approved the decisions taken under such a procedure could not subsequently claim that those decisions had been forced on them and that they were therefore absolved of any responsibility for following or implementing them. In every case responsibility was shared jointly and severally by the organization and all its member States. After all, an international organization was the sum of its members. Similarly, it was not easy to directly attribute responsibility to the United Nations for not preventing the genocide in Rwanda, since any action that had to be taken by the Organization could only be taken in accordance with the applicable decision-making procedure. Member States and, in particular, the permanent members of the Security Council played an indispensable role in that procedure and thus incurred responsibility. He agreed with Mr. Kolodkin that the mere fact that the Secretary-General had recognized that the United Nations could have played a role was not sufficient to establish the Organization's responsibility.

17. There were few examples of practice relating to the responsibility of an international organization that deliberately and willingly assisted or aided, directed and controlled, or coerced another organization or State in the commission of an internationally wrongful act, as the Special Rapporteur himself admitted. Perhaps the European Community and its institutions, which were in many respects *sui generis*, should be given special treatment. The responsibility of the United Nations in the case of wrongful acts committed by peacekeeping forces operating under its general direction and control should also probably be treated separately, in the light of the relevant status-of-forces agreements between the United Nations and troop-contributing Member States.

18. Subject to those general comments, he had no particular objections to the basic thrust of the draft articles presented in the third report, but he did think that they would have to be revised, or formulated or organized differently in the light of further comments by the various specialized international organizations and remarks by Commission members.

19. He did hope that the words "origin and character" in article 8, paragraph 1, would be explained in the commentary and that they would cover not only acts but also omissions. Although he had no particular problem with

the use of the phrase "in principle" in article 8, paragraph 2, he thought that the comments made by Mr. Pellet and Mr. Yamada should be considered before the paragraph was finalized.

20. Draft article 16 was particularly complicated; although Mr. Pellet had put forward some interesting arguments, recommending that paragraph 1 (b) should be redrafted and paragraph 2 (b) deleted altogether, and even wondering whether the issue dealt with in paragraph 2 should not be treated in the same way as a breach consisting of a composite act, he did not fully share those views (see paragraphs 4–6 above). As he understood it, draft article 16 meant that a mere decision by the organization was not sufficient to have the act in question considered as completed unless it had been committed by the State or by the other organization concerned. In the case of a composite act, in which the breach might involve a series of events, the first event in the series was in itself a complete act for the purpose of establishing responsibility, whereas the case contemplated in draft article 16 could be considered as an incomplete act in that it had been conceived and prepared but not actually committed. He concluded by expressing the hope that international organizations would help the Special Rapporteur by sharing their observations with him and providing him with information on their practice.

21. Mr. BROWNLIE said that the Commission had not yet addressed the issue of risk creation and the fact that the amounts an organization might have to pay out in damages were not necessarily budgeted for. For example, it was virtually certain that the budget of organizations that developed and launched space vehicles did not make provision for any damage those vehicles might cause. That raised the preliminary question of whether an international organization was a risk-creating body, acknowledged that it was such a body, and was legally and practically prepared to pay out large sums of money in cases of harm. If an organization was not a risk-creating body, its member States would be responsible on a residual basis. That issue should be studied closely, given the scale of compensation that would have to be paid in cases of dereliction of duty by peacekeeping forces.

22. Mr. ECONOMIDES said that Mr. Sreenivasa Rao's argument that States that approved a decision of an international organization could not then be absolved of any responsibility incurred in respect of that organization ran contrary to all law governing international organizations. Clearly, the acts of international organizations were autonomous acts that were not considered to be agreements between the States members of the decision-making body. In theory, then, the question of responsibility might arise even in respect of the States members of the organization. If that argument was accepted, it would no longer be possible to talk of responsibility in respect of any States that had not taken part in the vote but had suffered harm as a result of an internationally wrongful act.

23. Mr. GAJA (Special Rapporteur), responding to members' comments, said that the issue of the responsibility of the States members of an international organization would be addressed in his fourth report. It was not the subsidiary responsibility of member States that should

be considered at present, since the rules governing the responsibility of international organizations must first be established before the relations between them and their member States could be considered.

24. Mr. Sreenivasa RAO said that the responsibility of international organizations and State responsibility were two sides of the same coin. That being said, some of the statements cited in the report claiming that organizations and not States were solely responsible in certain cases were debatable.

25. With regard to the comment made by Mr. Economides, he said that he had never suggested that an organization did not incur a share of responsibility as an organization. He had simply been making a distinction between States that could not be absolved of responsibility for decisions that the organization had taken at their prompting and that they had encouraged and implemented, and States that had disagreed with those decisions, voting against them or abstaining in the vote on them. However, as an organization was the sum of the States that composed it, the responsibility of its member States was also implied by acts of the organization as such, even if those States disagreed with the decision in question. The problem was therefore clearly one of the responsibility of international organizations. Like the Special Rapporteur, he believed that the decision-making procedure and the involvement of member States therein did nothing to diminish the solemn nature of the obligations contracted by an organization as such.

26. Mr. BROWNLIE clarified his earlier comments, saying that it must be acknowledged that some organizations had not been intended to take on certain risks. That was a preliminary problem that needed to be considered regardless of the order in which the various aspects of the topic were tackled. The purposes and budgets of some organizations did not allow them to make provisions for delictual responsibility. In a way, the problem was one of the status of international organizations.

27. Mr. GAJA (Special Rapporteur) asked whether Mr. Brownlie meant that an international organization might be exonerated from any responsibility for a breach of an international obligation by reason of its status.

28. Mr. BROWNLIE said that he was not trying to promote lawlessness, but the Commission was in danger of treating international organizations as if they were just another kind of legal person, even though some of them might have a special quality. In his opinion, there was an intimate link between the nature of an organization and any residual responsibility of member States for risks actually created through that organization, even though its founders had probably never considered making any budgetary provision for responsibility. In short, he thought that the status of some international organizations did not allow them to assume responsibility for significant harm even when they caused it.

29. Mr. MANSFIELD said that it was necessary to proceed on the basis of the agreed definition of international organizations and scope of the draft articles. Such an approach was quite valid from a methodological

standpoint, even if it subsequently proved necessary to face up to reality.

30. Mr. KATEKA drew attention to the genocide in Rwanda, which was discussed in paragraph 10 of the report and which had been mentioned by various members, and said that it would be unfortunate if the Commission gave the impression, in its commentary, that it was dealing with abstractions when events of that type had actually taken place. Even if it did not express an opinion on the responsibility of international organizations in such cases, the Commission should not appear to be downplaying the fact that serious crimes could be committed without the intervention of the organization concerned, whether by omission or for any other reason, or to be suggesting that it found that situation normal.

31. Mr. CHEE said that an international organization consisted of individual States, and it was thus quite possible for it to be responsible for a crime that had actually been committed by individuals, or for it to commit delictual acts in the name of a State.

32. Mr. Sreenivasa RAO said that he fully agreed with the point made by Mr. Kateka and was glad that he had raised it. It was not at all a question of exonerating the United Nations from moral responsibility for its failure to intervene during the genocide in Rwanda and thus for having been incapable of fulfilling the mission for which the Organization had been created. Allowing the genocide to take place was a particularly serious failure for an organization that aimed, among other things, to promote and defend human rights. It was simply a question of making a distinction between the moral and legal issues involved.

33. Mr. MATHESON, clarifying his previous statement, said that the Security Council should have taken more forceful action in Rwanda but was under no legal obligation to do so, even though it might be morally responsible.

34. Mr. KOSKENNIEMI said that the two sets of issues considered in the report—the objective element, consisting of the breach of an international obligation, and the breach of an obligation in a context where several actors were involved—had many aspects on which there were few differences of opinion. With regard to the first set of issues, addressed in draft articles 8–11, he said that he had no objection to taking the draft articles on State responsibility as a model, as the similarities between the two topics were self-evident. His only reservation concerned the words “in principle” in draft article 8, paragraph 2, which should be deleted. Paragraphs 18–22 of the report, however, posed a problem. It was not the Commission’s task to make judgments on the nature of the rules of an organization. What mattered was the relationship between those rules, regardless of their nature, and the responsibility of the organization under general international law; that question was clearly closely linked to the interaction between *lex specialis* and *lex generalis*. Most of the major international organizations had special rules to deal with a breach of an internal rule, and it was clear that such rules ought to take precedence over the general rules that the Commission was drafting, but that certainly did not mean that general law was set aside. It should

therefore not be implied that special rules constituted a self-contained or entirely separate regime. The Commission should reject Mr. Matheson's proposal to include a general article specifying that the draft articles did not cover the relations between an organization and its member States. Apart from the fact that it would considerably diminish the usefulness of the exercise, as Mr. Pellet had pointed out, such an article would be genuinely dangerous, as it would forcefully reintroduce the notion of the self-contained regime.

35. With regard to the second set of issues and the three situations identified in the draft articles by the Special Rapporteur—those in which the organization provided aid or assistance (art. 12), exercised direction and control (art. 13) or exercised coercion (art. 14)—he agreed with the idea of taking as the criterion for the attribution of responsibility the fact that the organization acted with full knowledge of the facts. However, it was unnecessary to add that the act would be internationally wrongful if committed by the organization. To do so revealed an unconscious analogy with a type of thinking more appropriate to criminal law, which could place too great an emphasis on conduct.

36. He welcomed the fact that the Special Rapporteur intended to look more closely in his fourth report at the relations between the various actors who might incur responsibility.

37. With regard to draft article 16, he endorsed paragraph 1, under which an international organization incurred responsibility if it adopted a binding decision that was implemented by means of a wrongful act by a member State or international organization, but he disagreed with the idea in paragraph 2 that the responsibility of the organization should be treated differently if the entity committing the wrongful act acted either on its recommendation or with its authorization. While it was true that conduct was not the basis for responsibility, it was not appropriate to exonerate the organization in such cases. Organizations had to be taken seriously, and they should be held responsible if they authorized or recommended wrongful acts. Unlike Mr. Matheson, he was not afraid that doing so might prevent organizations from adopting clear-cut positions or taking clear decisions.

38. In his view, all the draft articles could be sent to the Drafting Committee.

39. Mr. DUGARD acknowledged that the Special Rapporteur had a very difficult task, largely because he had to consider the practice of very different international organizations. However, it was unfortunate that he had relied so heavily on the jurisprudence of the European Union, to the detriment of other, less integrated organizations such as the African Union or the Organization of American States, and it was to be hoped that he would redress the balance in his next report.

40. It was quite appropriate to model the draft articles on those on the responsibility of States for internationally wrongful acts, the provisions of which could often be transposed in full into the articles on the responsibility of international organizations. He therefore agreed with

the Special Rapporteur's viewpoint on the responsibility of an organization for omissions and disagreed with that of the General Counsel of the IMF on the same subject. In the same way that a State could not hide behind its internal law, an organization could not invoke its internal rules to avoid its international responsibilities. Accordingly, it might be useful to include a provision based on article 3 of the draft articles on the responsibility of States for internationally wrongful acts, according to which the characterization of an act of a State as internationally wrongful was governed by international law and was not affected by the characterization of the same act as lawful by internal law.²

41. With regard to the very disturbing example given in paragraph 10 of the report, he agreed with Mr. Kateka that an international organization could not be absolved of all responsibility for failing to intervene in situations like the genocide in Rwanda. It was clearly morally responsible; the question was whether it was legally responsible. He agreed with draft article 8, paragraph 2, but, like Mr. Pellet, who had already said all that needed to be said on the subject, he would prefer to delete the words "in principle". Draft articles 8–11 could be sent to the Drafting Committee, as could draft articles 12–15, which were based on the equivalent articles on State responsibility.

42. With regard to draft article 16, he thought that international organizations should be held responsible for decisions they had taken or acts they had authorized. As the Special Rapporteur had pointed out, paragraph 1 (b) was necessary because a wrongful act must have been committed as well as a decision taken. With regard to State responsibility, if a State adopted legislation that violated international law, no internationally wrongful act was committed until effect was given to that legislation. That was the case with the highly controversial Cuban Liberty and Democratic Solidarity Act, or Helms–Burton Act, which allowed United States courts to punish companies that invested in property that had been nationalized in Cuba. The Act had been adopted by the United States Congress but had not been put into effect;³ the United States could not be held responsible until some effect was given to the Act. In the same way, an international organization could not be held responsible until some effect was given to its decisions. He was therefore in favour of retaining draft article 16, paragraph 1 (b). Draft article 16, paragraph 2, referred to the power of international organizations to make recommendations; that was particularly relevant to the United Nations, which issued more authorizations and recommendations than binding decisions. When an international organization acted by way of a recommendation, it often found itself in an area of doubtful legality. For instance, the United Nations could recommend that a State should intervene in order to secure human rights in a particular area and might recommend for that purpose that it should violate a treaty, such as an aviation agreement. That type of situation arose frequently, and the jury was out on whether such recommendations were lawful, given that they certainly did not have the same weight as decisions taken by the Security Council under Article 103

² *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 36–38.

³ "Cuban Liberty and Democratic Solidarity (LIBERTAD) Act" (Helms–Burton Act), *ILM*, vol. XXXV, No. 2 (March 1996), p. 359.

of the Charter of the United Nations. The General Assembly and, to some extent, the Security Council, frequently engaged in such “unlawful” conduct, and it would be wrong to try to discourage them from doing so. At the same time, it would be wrong to hold States alone responsible for actions taken in pursuance of such recommendations, as that might discourage States from acting upon them in the future. In such circumstances, then, international organizations ought to be held responsible and States should have secondary or residual responsibility.

43. Lastly, with regard to draft article 16, paragraph 2 (a), he tended to agree with Mr. Matheson that it was difficult to imagine a situation in which an international organization would adopt a recommendation that ran counter to its own interests. A trade embargo recommended by the General Assembly might result in a violation of treaty obligations yet still clearly further the general interests of the United Nations in maintaining international peace and security, promoting human rights or protecting the environment. The paragraph might therefore be considered superfluous, although it was not quite clear whether the Special Rapporteur’s intention had been to require that the act committed by the organization should be *intra vires*; that would not be the correct approach in any case, and did not necessarily follow from the paragraph in question. Particular attention should therefore be paid to that phrase. Nevertheless, he was in favour of sending draft article 16 to the Drafting Committee, together with the rest of the draft articles submitted by the Special Rapporteur.

44. Ms. ESCARAMEIA observed that the Special Rapporteur dealt with two issues, namely the breach of an international obligation by an international organization and the responsibility of an international organization in connection with the act of a member State or another international organization. She agreed with Mr. Yamada that it would be useful to draft two separate documents, modelled on the reports on State responsibility. Three issues arose in connection with the breach of international law by an international organization, as covered in draft articles 8–11, and State responsibility, as covered in draft articles 12–15: (a) the first concerned omissions and due legal process; (b) the second concerned the European Union, when the implementation of treaties it had concluded with third States was left to its member States, as was often the case; and (c) the third concerned the rules of the organization—an issue that was closely linked to the European Union issue and that had given rise to some confusion, which the Special Rapporteur would no doubt be able to dispel. With regard to the first issue, the Special Rapporteur believed that, despite the objections raised by some international organizations, the internal procedures of a State were the same as those of an international organization, and there was therefore no need to make any distinction between them. There was a need for further reflection on that question, since, in a normal international organization, States were not organs of the organization; moreover, in a domestic setting, States often had more power over their organs than an international organization had over its member States. States should not be allowed to evade their responsibility by shifting it to an international organization. States were also subject to international law and could not be allowed to breach

their obligations and allow an international organization to take responsibility in their stead.

45. With regard to the European Union and the implementation of treaties by its member States, the most appropriate working hypothesis would be to consider member States as necessary organs at the permanent disposal of the European Union for the purpose of implementing treaties. The European Union could not in any case avoid that, or fully control its member States. Perhaps a special article should be devoted to regional integration organizations. In any case, draft article 4, paragraphs 1 and 3, which had already been provisionally adopted by the Commission in 2004,⁴ should apply, as they dealt with the organs of an organization that were implementing the organization’s policy or assuming its obligations. To establish the parallel, an article stipulating that draft article 4 was applicable to regional integration organizations should be included.

46. The discussions to determine whether the rules of an organization fell under internal or international law or some other type of law seemed closely bound up with European law, but she could not bring herself to consider the enormous body of Community law as “rules of the organization” and even doubted whether it would fit the definition in article 2, paragraph 1 (j), of the 1986 Vienna Convention. The European Union did not constitute a good example of what draft article 8, paragraph 2, was probably trying to say. Although other opinions had already been expressed on that question, it seemed to her that whenever an organization had an obligation towards a third State, that obligation was governed by international law, not by the rules of the organization, unless those rules were so important that the organization had lost control of the way in which its international obligations were met; she would appreciate some clarification on that point from the Special Rapporteur. She also had a problem with the phrase “in principle” in draft article 8, paragraph 2, and thought that the paragraph should be redrafted or even deleted.

47. With regard to the responsibility of an international organization in connection with the act of a State or another organization, she still did not see why the title of draft article 13 should speak of “direction and control exercised over the commission of an internationally wrongful act” rather than “direction or control”, as either one or the other would suffice. Thus, in the example given by the Special Rapporteur in paragraph 28 of his report, the fact that neither NATO nor the United Nations had exercised both direction and control of the international security force in Kosovo (KFOR) at the same time did not mean that neither of them bore responsibility. Similarly, it should be specified whether responsibility arose at the time of the act of direction or control or at the time of the commission of the unlawful act, and whether the unlawful act really had to have been committed; she did not think it did.

48. Perhaps draft article 15, the “without prejudice” clause, should not refer to draft article 14, on coercion,

⁴ See 2839th meeting, footnote 16.

but should consider other types of responsibility, such as joint, separate, proportional or residual responsibility.

49. Turning to draft article 16, she said that decisions, recommendations and authorizations were not the same thing—decisions were more binding—and that distinctions should probably be made between them. Paragraph 1 seemed to duplicate draft article 13, which dealt with the same situation, though it did not require that the act should be committed. For responsibility to be incurred, it seemed sufficient for a decision that was binding on a State to be taken, even if no act was committed. As for paragraph 2, an international organization should be held responsible for authorizing or recommending the commission of an unlawful act, even if the act did not directly further its interests, as the organization was in some ways the co-author of the act. Like many other members of the Commission, she could not accept the current wording; as anything could be in the organization's interest, it should at least be specified that the interest in question was a direct interest. Generally speaking, international organizations should be held responsible for what they did. In conclusion, she was in favour of sending all the draft articles to the Drafting Committee.

50. Mr. MANSFIELD agreed with the general approach to the topic taken by the Special Rapporteur, particularly the idea of following the articles on State responsibility where there was no reason to depart from them. On the general issue of omissions, discussed in paragraphs 8–10 of the report, he agreed with the Special Rapporteur's analysis that, where an international organization had an obligation to act under international law, it could not excuse its failure to act by pointing to difficulties in the decision-making process, since States, too, sometimes faced comparable difficulties in their legislative and other bodies. He also thought that it was unnecessary to list in the draft articles the different types of obligations discussed in paragraphs 13 and 14 of the report. As to the question of whether the rules of an international organization were part of international law, the answer was surely yes, even though that was not the case for certain rules in certain organizations; however, that did not necessarily mean that the issue needed to be addressed directly in the draft articles. Besides the fact that it seemed superfluous, as the Special Rapporteur noted in paragraph 22, to say that the breach of an international obligation might concern an obligation set by the rules of the organization, draft article 8, paragraph 1, actually referred only to the breach of an international obligation by an international organization. If an obligation arising under the rules of the organization was not a rule of international law, it was not covered. That raised the question of whether paragraph 2 of the draft article was necessary and whether the issue could be dealt with in the commentary; if not, paragraph 2 should be redrafted to clarify the meaning. In any case, since he, like others, had a real problem with the inclusion of the phrase "in principle", he would prefer to have the paragraph deleted.

51. With regard to the question of the responsibility of an international organization for aiding, directing,

controlling or coercing a State or another international organization in the commission of an internationally wrongful act (draft articles 12–15), the Special Rapporteur had clearly shown that in those complex areas the nature of the decision taken by the international organization, in terms of whether it was binding on member States or whether the latter had room for manoeuvring to avoid breaching an international obligation, was decisive. In many cases, the criterion set out in paragraph 31, namely whether the organization's decision was not only binding but also actually required the commission of the wrongful act, seemed to be the key. However, that criterion would be difficult to apply in some circumstances and in any event did not solve one potentially serious problem to which the Special Rapporteur had drawn attention, which was a situation where an international organization that was bound by a particular obligation used its power to compel member States that were not bound by that obligation to allow it to circumvent that obligation. The arguments put forward for including draft article 16 in order to deal with such a situation were persuasive (paras. 32–33 of the report), but the current wording of the draft article was not entirely satisfactory. If, as Mr. Pellet had suggested, paragraph 1 (b) was omitted, draft article 13 would become redundant, as draft article 16 would have the same effect as that article, though without the additional requirement that the organization concerned must have acted with knowledge of the circumstances of the internationally wrongful act.

52. The case dealt with in draft article 16, paragraph 2, was generally more complex, but the requirement set out in subparagraph (b), that responsibility arose only when the act was committed, seemed even more difficult to justify in that situation. If responsibility was to be incurred, it was because the international organization was seeking to circumvent its obligation by authorizing, although not compelling, a member State to commit the act in question. In the case in point, it was hard to see why the responsibility of the international organization should be dependent on whether or not the member State exercised its discretion and committed the act. Subparagraph (a), on the other hand, was necessary, even though it should perhaps be redrafted. There was certainly an advantage in making it apparent in the draft articles that international organizations needed to be aware that their member States might have wide-ranging international obligations and that the organization should be careful not to encourage, or require, them to act in contravention of those or other related obligations.

53. He hoped that the Special Rapporteur would clarify the thinking that had led him to draft the article in its current form, and he wondered whether it might not be necessary to seek the assistance of the legal counsel of an international organization in order to consider the different ways in which the article might be redrafted.

The meeting rose at 12.48 p.m.