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Summary record of the 2842nd meeting

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2842nd MEETING

Friday, 20 May 2005, at 10.05 a.m.

Chairperson: Mr. Djamchid MOMTAZ

Later: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Mansfield, Mr. Niehaus, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Yamada.

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. ECONOMIDES said he agreed with the general approach taken by the Special Rapporteur in basing his third report on the articles on responsibility of States for internationally wrongful acts,¹ which the draft articles on the responsibility of international organizations should follow as closely as possible.

2. With regard to the question raised by the General Counsel of the IMF in paragraph 8 of the report, whether the organization could be held responsible for not taking action if its non-action was the result of the lawful exercise of their powers by its member States, he fully agreed with the Special Rapporteur that omissions were clearly wrongful when an international organization was required to take some positive action and failed to do so. On the question whether the United Nations could be held responsible if, in a case of armed aggression, the Security Council did not take the measures necessary to maintain international peace and security, in accordance with Article 51 of the Charter of the United Nations, he believed that even if the Security Council was prevented from acting as a result of the exercise of its veto by a permanent member, the United Nations would still be responsible towards the State or States that were the victims of the armed aggression, as the right of veto did not constitute a circumstance that precluded wrongfulness within the meaning of chapter V of the articles on responsibility of States and under general international law. In that connection, he endorsed the spirit of Mr. Kateka's comments on the example of the genocide in Rwanda given in paragraph 10 of the report (see the 2841st meeting, above, para. 30).

3. The Commission should study more closely whether responsibility arising as a result of a binding decision of an organization, especially a regional integration organization such as the European Community, lay exclusively

with the organization rather than with the members required to implement it. He found the view expressed by the European Union in paragraph 12 of the report reasonable and legally sound. In the case of an obligation to implement a binding decision of the organization, the State's action should be directly attributed to the organization by means of a special provision on attribution of responsibility, which could be added to draft article 4.

4. With regard to rules of the organization, he fully agreed with the comments made by Mr. Pellet (see the 2840th meeting, above, paras. 42–52). Such rules, whether or not they dealt with the internal workings of the organization, were automatically part of international law as they were dependent on the international treaty constituting the organization. He did not believe that rules of the organization, including those of the European Union, could be considered as not being part of international law: there was as yet no intermediate law between international law and the internal law of States, at least as traditionally understood.

5. Draft article 8, paragraph 2, with the words “in principle”, would be hard to accept. In his view, the words “regardless of its origin and character”, in paragraph 1 of that article, covered all international obligations, including those flowing from the rules of the organization. In the current state of the law, draft article 8, paragraph 2, was therefore redundant and should be deleted.

6. He noted that draft article 15, on the effect of the preceding articles, did not appear to be identical to article 19 of the draft articles on the responsibility of States for internationally wrongful acts, which had a wider scope.²

7. He agreed with the Special Rapporteur that the draft articles already provisionally adopted should be reviewed before the end of the first reading. In that context, draft article 16, paragraph 1, on unlawful binding decisions, should be addressed within the framework of draft article 4, on the general rule on attribution of conduct to an international organization. In draft article 16, paragraph 2, a distinction should be made between an authorization that implied a competence of the organization and a recommendation that left the State some choice in the matter, if not complete freedom of action. In the case of an authorization, the international organization and the State taking action should incur shared responsibility, whereas, in the case of a recommendation, the State committing the act should incur principal, if not sole, responsibility.

8. In conclusion, he considered that all the draft articles under consideration, with the exception of article 8, paragraph 2, which should be deleted, and draft article 16, which needed further work, could be referred to the Drafting Committee.

9. Mr. FOMBA said that the key issue in approaching the responsibility of international organizations was to decide how to interpret the relations between States and international organizations in their capacity as primary and secondary subjects of international law. At the heart of that issue lay the question of the link between international

¹ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 76.

² *Ibid.*, p. 27.

legal personality and the international responsibility to which such personality gave rise. While the responsibility of States for internationally wrongful acts had already been elucidated by the Commission, the very concepts of the “international organization” and its “responsibility” were still controversial subjects in legal doctrine, and practice shed little light on them. It was therefore essential to carry out a comprehensive, in-depth comparison of States and international organizations in order to determine the characteristics of the latter. The first step was to establish whether the international organization had its own legal personality and its own will, and, if so, how they differed from those of its member States. In that connection, he drew attention to the 1995 resolution of the Institute of International Law on the legal consequences for member States of the non-fulfilment by international organizations of their obligations toward third parties, article 1 of which stated that the resolution dealt with issues arising in the case of “an international organization possessing an international legal personality distinct from that of its members”.³ The next step was to identify the various possible instrumental consequences of the responsibility of international organizations. The possibilities could be categorized according to whether they concerned the international organization itself, the international organization and its members, the international organization and third States, the international organization and other international organizations, member States alone, member States and third States, or member States and other international organizations. Such an analysis revealed the existence of two broad categories of responsibility: exclusive responsibility and “shared” responsibility. In that connection, it should be noted that related terms such as “joint”, “joint and several” or “solidary” derived from national legal systems needed to be used with care in the context of international law, as had been pointed out by the Special Rapporteur on State responsibility, Mr. Crawford, in his second report.⁴ Once the theoretical framework had been established, the practice of international organizations and States should be studied, to see if it was necessary or possible to propose new legal rules on the subject. At that point, and on the basis of the Special Rapporteur’s proposals, the Commission would be in a position to ensure that the draft articles were both relevant and appropriate.

10. He agreed with the suggestion in paragraph 1 of the report that the draft articles that had already been provisionally adopted in 2003 and 2004 should be reconsidered by the Commission before the end of the first reading in the light of comments made by States and international organizations, especially as there was little in the way of practice or new material to guide the Commission. He also agreed that the draft articles should follow the general pattern of the articles on responsibility of States for internationally wrongful acts—an approach which did not exclude replicating those articles *mutatis mutandis*.

11. He commended the Special Rapporteur’s approach to the question of a breach of an international obligation on

³ See *Yearbook of the Institute of International Law*, vol. 66-II (1996), p. 444, at p. 445.

⁴ *Yearbook ... 1999*, vol. II (Part One), document A/CN.4/498 and Add.1-4, pp. 45-46, para. 161 (a).

the part of an international organization, which involved taking the articles on responsibility of States as the starting point, examining them to see if and how they could be adjusted to be applicable to international organizations, and then analysing the questions raised, including wrongful acts consisting of an omission, difficulties with compliance due to the political decision-making process, and breaches of obligations by international organizations under a rule of general international law. He was especially interested in the last point, for which the Special Rapporteur had given as an example in paragraph 10 of his report the failure of the United Nations to prevent the genocide in Rwanda. While a member of the Commission of Experts established pursuant to Security Council resolution 935 (1994) of 1 July 1994, with a view to examining violations of international humanitarian law committed in Rwanda, he had been approached informally by Rwandans and Burundians with questions about the responsibility of France and the United Nations. He had drawn their attention to the obligation of the Contracting Parties to the Convention on the Prevention and Punishment of the Crime of Genocide to prevent genocide (art. I), the possibility of calling on the competent organs of the United Nations to take such action under the Charter of the United Nations as they considered appropriate for the prevention of acts of genocide (art. VIII), and the obligation to submit disputes relating to the interpretation, application or fulfilment of the Convention, including those relating to the responsibility of a State for genocide, to the ICJ at the request of any of the parties to the dispute (art. IX). He had concluded that, if all the necessary conditions were met, some form of legal proceedings could be envisaged.

12. With regard to organizations such as the European Union that were empowered to conclude with non-member States treaties whose implementation was left to authorities of member States, two types of rules governed such organizations. One consisted of primary law (*droit primaire*), which was part of traditional international law, and the other of secondary law (*droit dérivé*), which was not, as it was based on the primacy of Community law over members’ internal law and took immediate effect in members’ domestic legal systems. It was not clear whether, and if so, to what extent, the attribution of conduct and responsibility should be the same for the two types of rules.

13. On the question of the definition and legal nature of the rules of the organization, he agreed with the Special Rapporteur that a distinction needed to be made between rules that had the character of rules of international law and those of which that was no longer true, and that the draft articles should also include a proviso for the existence of special rules, or perhaps a general final provision.

14. On the whole, the Special Rapporteur set out those substantive questions very ably, even though his arguments were not always clear to the reader. He himself had as yet reached no fixed conclusions on the main points of contention.

15. Draft articles 8 to 11 followed closely the articles on responsibility of the State and posed no particular problem, except for draft article 8, paragraph 2, which dealt

with a matter that did not arise in the case of States. The paragraph raised two questions: the first was whether it was necessary to take a formal position regarding the nature of a rule of the organization as compared to international law; the second was whether a breach of an obligation set by a rule of the organization should be treated in the same way as a breach of an international obligation. The retention of the qualifier “in principle” would suggest that the two types of rule and the obligation arising thereunder were considered as being on an equal footing. He therefore saw three options: if the two types of obligation were regarded as equal in terms of their nature, regime and treatment, the words “in principle” should simply be deleted; or, if that assumption was not made, the whole of paragraph 2 should be deleted; or else those two options could be combined, accepting that there was no need to deal separately with an obligation set by a rule of the organization and explaining in the commentary that such an obligation was already covered by the phrase “regardless of its origin and character” in paragraph 1. While he had no clear preference for any one of those options, he tended to think it would be better to retain a reworded paragraph 2, or else, if that posed insurmountable difficulties, to rely on an explanation in the commentary, in which case paragraph 2 could be deleted.

16. With regard to the responsibility of an international organization in connection with the act of a State or another organization, he agreed with the idea of applying the scheme devised for States to international organizations (para. 26). He also agreed that a distinction should be made between cases involving binding decisions and those involving authorizations or recommendations, as discussed in paragraph 30 *et seq.* On the question of the amount of assistance and the ensuing degree of responsibility (para. 43), he agreed that the degree of responsibility concerned the content of responsibility but not its existence, and that the question should be examined at a later stage. He also agreed that, in addition to the four draft articles 12 to 15 corresponding to articles 16 to 19 on State responsibility, a further article was needed to cover cases in which responsibility of an international organization was involved because it would otherwise circumvent an international obligation by requesting member States to take a certain conduct which the organization would be forbidden to take directly.

17. He had no particular problem with draft articles 12 to 15. Draft article 16, however, had elicited many comments, and appeared to need further consideration. While there seemed to be general agreement on the distinction between binding decisions, on the one hand, and recommendations and authorizations, on the other, there appeared to be none on the general mechanism to be proposed for formulating and implementing the responsibility of the international organization in respect of those two categories of acts. For example, it was not entirely clear if the international organization should bear exclusive responsibility, or whether it should be shared by the organization and its members, and there was no agreement on the very concept of the wrongful act. The case cited by Mr. Pellet could be taken by way of illustration: did the fact that a State had adopted legislation contrary to international law suffice for it to incur responsibility, or

must the law enter into force and actually be applied? (See the 2840th meeting, above, paras. 54–56.)

18. The specific options available to the Commission were either not to refer draft article 16 to the Drafting Committee, or to request the Special Rapporteur to revise the draft article on the basis of the discussion or to set up a working group to elucidate the substantive issues concerning that article. Subject to the Special Rapporteur’s approval, his own preference was for the third option. However, draft articles 8 to 11 and 12 to 15 could be referred to the Drafting Committee.

19. The CHAIRPERSON, speaking as a member of the Commission, said that a number of speakers had raised an issue that troubled him, namely, the obligations of the Security Council regarding threats to the peace, breaches of the peace and acts of aggression. The Charter did not define any of those three situations, but the practice of the Security Council in recent decades revealed that it had very broad discretionary powers to identify them. For the Security Council to have obligations in such situations, there had to be a specific rule. In the absence of a definition, did the obligation exist? If not, could one say that the Security Council bore responsibility for failure to discharge its duties, and that that omission entailed the responsibility of the United Nations?

20. Mr. PAMBOU-TCHIVOUNDA said that the Chairperson was not alone in being troubled by that issue. In view of the lack of definitions of the three broad concepts mentioned, he wondered whether the bringing of a dispute before the ICJ might shed some light on the matter.

21. The CHAIRPERSON noted that Mr. Pambou-Tchivounda had raised another troubling issue, namely, jurisdictional control by the ICJ over the acts of the Security Council.

22. Mr. CHEE recalled that on 14 December 1974 the General Assembly had adopted resolution 3314 (XXIX), “Definition of Aggression”. That definition, however, had never been put to effective use. The best course of action was for States and the Security Council to treat cases on a case-by-case basis.

23. Mr. GAJA (Special Rapporteur) said that the question was whether an international organization such as the United Nations might be under an obligation, and whether the failure to comply with this obligation would cause it to incur responsibility. The fact that the rules of an organization did not provide the means for complying with an obligation was not decisive. The Commission had not yet dealt with circumstances precluding wrongfulness; that subject would be addressed at its next session. However, he found it hard to imagine that an organization could invoke its own rules in order to justify a breach. The Commission was not really concerned with the internal machinery of the United Nations or with the question whether, under Articles 39 *et seq.*, the Security Council had an obligation to respond to an act of aggression. The Commission was working on the basis of the hypothesis that the organization had an obligation, and while there

might be difficulties with compliance, the mere fact of the existence of rules that did not facilitate compliance was not relevant to the discussion at the present stage.

24. Mr. ECONOMIDES endorsed the Special Rapporteur's remarks. The Security Council was an organ of the United Nations and, like all such organs, was bound by its constituent instrument. The Charter was an international treaty, and the primary responsibility of the Security Council was thus to respect the obligations set out therein. If those obligations were breached, the United Nations must incur responsibility for any act of omission.

25. Turning to the question raised by the Chairperson, he said that while the pivotal terms in the Charter were not defined, one crucial element was that aggression must always take the form of armed aggression. There was also the General Assembly resolution 3314 (XXIX) with the extremely useful Definition of Aggression. The characteristics of armed conflict were thus fairly well known. The characteristics of self-defence were also well known, since it was the diametrical opposite of aggression. The only thing that remained unresolved was what constituted a threat to the peace, a concept that had recently been extended, generally in the right direction, by the practice of the Security Council. Collective security had become such a crucial issue of international law that he had once proposed that the Commission should look into the law of collective security. That proposal had not been taken up, however.⁵ In any event the Charter already provided enough material to enable individual situations to be dealt with on a case-by-case basis, as Mr. Chee had pointed out.

26. Mr. GALICKI said the problem raised by the Chairperson was highlighted in draft article 10, paragraph 3, on the breach of an international obligation requiring an international organization to prevent a given event. The Charter placed an obligation on the Security Council to take measures that would prevent an event that constituted a threat to the peace from occurring. Theoretically that was a very simple matter, but there was no binding definition or description in the Charter of the concept of a threat to the peace. In practice, the Security Council itself had first to establish whether a situation could be so described. If it found that there was a threat to the peace, it then had an obligation to react. It was not clear, however, to what extent the Security Council had an obligation actually to establish the existence of a threat to the peace. Was that connected to its primary obligation to react to a threat to peace, or was it a separate obligation not directly assigned to it? The provisions of the Charter were not exhaustive and did not specify how the Security Council should operate. In situations where the Security Council had failed to react, other solutions had been sought, as in the case of General Assembly resolution 377 (V) of 3 November 1950, on "Uniting for peace". The Commission should consider to what extent an organization was bound by an international obligation when the description of the obligation was not exhaustive or did not clearly indicate that it should react. The case covered by draft article 10, paragraph 3, of an obligation to prevent

an event from occurring, needed to be given particular consideration, since the legal basis for that obligation of prevention remained obscure, especially as it applied to the Security Council.

27. The CHAIRPERSON, speaking as a member of the Commission, said that while the Security Council had primary responsibility for the maintenance of international peace and security, it had sometimes decided that identifying a given State as an aggressor would not facilitate the discharge of that primary responsibility, and might indeed be counterproductive.

28. Mr. PELLET said that the somewhat emotive question raised by the Chairperson had reduced the discussion to the rather narrow question whether the Security Council could trigger the responsibility of the United Nations, given that the concepts of aggression and threat to the peace were not clearly defined. A much more interesting general issue was what happened when there was no general agreement as to the scope of international obligations. The Commission's work both on State responsibility and on the responsibility of international organizations showed that there were indeed such international obligations but it did not pinpoint the circumstances in which a breach of those obligations occurred. That determination had to be made on a case-by-case basis.

29. Could a problem of that type be brought before the ICJ? That certainly could and should happen, although States rarely seized the Court of such matters. It was also possible for an organization to request an advisory opinion. In the latter case, the Court might well say that given the lack of precision surrounding the concept of aggression, it was not in a position to rule on the matter. Such a finding was not very laudable, but had already been made, for example in the *Legality of Use of Force* cases, and, in the context of an advisory opinion, seemed not unreasonable. On the other hand, it was also perfectly feasible for a contentious case to be brought before the Court. Bosnia and Herzegovina had envisaged bringing a case against the United Kingdom for having failed to veto the resolution imposing an arms embargo on the States that had emerged from the former Yugoslavia. If it had done so, the Court would have had to address the question of whether it was the United Nations that bore responsibility, or its Members, particularly those that could have prevented the adoption of the resolution by using their veto. As counsel to Bosnia and Herzegovina, he had dissuaded it from engaging in a fascinating academic exercise which, nevertheless, had seemed unlikely to lead to any practical results. In such a situation, however, the Court would not be able to shirk its duties and would have to reply on the basis of the circumstances of the case.

30. What form would that response take? Surely not an abstract definition of aggression, but rather, a finding that in the specific instance, the organization had or had not failed to discharge its duties, either by omission or by commission. It seemed clear that as the Security Council was an organ of an international organization, it did not really represent a special case. Other than for the intellectual pleasure some derived from berating the Security Council, there seemed little to be gained from discussing

⁵ See *Yearbook ... 1999*, vol. I, 2575th meeting, p. 56, para. 3, and 2610th meeting, p. 313, para. 61.

whether obligations existed in the absence of rules. What was more interesting was what happened when a rule was vague. General Assembly resolution 3314 (XXIX) did not give an operational definition of aggression and in any case amounted to nothing in that it concluded by saying that the Security Council could characterize aggression as it saw fit.

31. On the substance of the Chairperson's question, he had the feeling that the Security Council probably had an obligation of conduct, although Article 24 of the Charter was quite vague, speaking of the "discharge" of duties (para. 2). One might thus conclude that the primary responsibility of the Security Council was to fulfil its duty. The word "duty", however, as distinct from "obligation", had connotations that were less legal than political. Could one say that the Security Council had an "obligation" to act in the legal sense of the term, even in a situation that was obviously one of aggression? Articles 41 and 42 of the Charter were couched in very soft legal language, providing that the Security Council "may decide", "should" it consider The Security Council's discretionary powers thus seemed fairly broad from the legal standpoint. He therefore doubted whether one could say that the Security Council had a legal obligation to act with respect to threats to the peace, breaches of the peace or acts of aggression. However, he had no doubt whatsoever that it had a political responsibility to do so. The *travaux préparatoires* for the Charter clearly showed that the five permanent members, especially the United States and the Soviet Union, had sought to retain the possibility of preventing the Security Council from acting and had considered that there was no legal obligation in such situations. Thus, before involving itself with the definition of aggression and threats to and breaches of the peace, the Commission had first to establish whether the Security Council had an obligation to act, something he was very far from ready to concede.

32. With regard to Rwanda, he was of the view that the responsibility of the United Nations was incurred to a certain degree, which had to be determined, along with that of the responsibility of certain States, in particular Belgium and France, but not because of the Security Council's failure to act—after all, it was under no absolute obligation to do so. In any case, it was not clear whether there had been a threat to the peace, strictly speaking, in Rwanda. Nonetheless, responsibility was incurred for other reasons, which had to do more with the hasty withdrawal of the small peacekeeping force and other similar actions.

33. Mr. Sreenivasa RAO said that the Special Rapporteur's approach was to develop the topic within limited confines that could not be extended to include other issues, regardless of how urgent, important or tempting they might be. That said, he agreed with Mr. Pellet that the Security Council was a political organ, and General Assembly resolution 3314 (XXIX), on Definition of Aggression, was only an aid, even though some had argued that it should be more than that. The Security Council could find that an act of aggression had taken place, or it could remain silent if it saw fit. Thus, the parties could be forced, by use of the veto, not to resort to armed force, but to use

persuasion and other means to deal with an act of aggression. Use of the veto did not mean that a particular crisis could simply be ignored, but that there was no consensus in the Security Council to deal with it by armed force, and that any State which decided to take unilateral action did so at its own risk.

34. Mr. CHEE said that Mr. Pellet appeared to be claiming that the Security Council operated in isolation; however, Articles 24 and 25 of the Charter made it clear that it could not simply do as it liked. Article 24, paragraph 2, limited its power. The Commission should not condemn acts of omission by the Security Council: under Article 24, paragraph 1, Member States agreed that in carrying out its duties the Security Council acted on their behalf; and under Article 25 they agreed to carry out its decisions.

35. With regard to Mr. Galicki's remark on the question of a threat to the peace, he recalled that the draft code of crimes against the peace and security of mankind, as adopted on first reading, had contained the crime of "the threat of aggression".⁶ On second reading, that crime had been eliminated, supposedly because the concept was too vague,⁷ although it had to be said that there was nothing vague about a situation in which 700,000 troops were massed on a country's borders and thousands of pieces of artillery were pointed in its direction. In the fourth edition of his *International Law*, Malcolm Shaw made the point that modern technology had evolved to a stage at which threats to the peace were visible and easy to identify.⁸

36. Mr. ECONOMIDES said that the Special Rapporteur had more or less settled the problem by saying that omissions were illegal when the international organization was bound to act but failed to do so. That applied to all international organizations, including the United Nations. If an obligation existed and was not complied with, the omission was illegal and the organization was responsible.

37. On Mr. Pellet's comments he said that in his view "duty" and "obligation" were synonymous. Even if one accepted—which he did not—that "duty" had a connotation slightly weaker than that of "obligation", duty denoted an obligation. He could not accept the proposition that "duty" was a political term with no legal connotation. Although the Charter conferred discretionary powers on the Security Council in many areas, a number of its provisions required it to take immediate action, for example with regard to the right of self-defence, in connection with which the Security Council was clearly and unambiguously required to take measures necessary to maintain international peace and security. Thus, in certain cases the Security Council had considerable leeway, whereas in others it must decide in a manner specified. He therefore disagreed with the assertion that the Charter did

⁶ See *Yearbook ... 1991*, vol. II (Part Two), chap. IV, p. 96, article 16. For the first version of the text, see *Yearbook ... 1989*, vol. II (Part Two), chap. II, p. 68, article 13.

⁷ See *Yearbook ... 1995*, vol. II (Part Two), p. 22, para. 74; *ibid.*, vol. I, 2380th–2382nd meetings, pp. 10–26, *passim*. For the draft articles and related commentary adopted by the Commission, see *Yearbook ... 1996*, vol. II (Part Two), para. 50, pp. 17–56.

⁸ M. Shaw, *International Law*, 4th ed., Cambridge University Press, 1997.

not lay down legal obligations which must be carried out by the organs responsible for those obligations.

38. Mr. MANSFIELD said that the debate seemed to have strayed from the point. He had not heard anyone argue that a clear obligation under international law for an international organization to take a certain course of action could be disregarded. In other words, omission could entail responsibility, and difficulties in the decision-making process were no excuse for failing to take action. That was the essential point, and it applied to all international organizations, including the Security Council. However, it was not the Commission's task to discuss whether there was a clear obligation under international law for all organizations to take action in every conceivable circumstance. As far as the Security Council and indeed any other international organization were concerned, that would hinge largely on the specific case and an interpretation of the facts as they related to the role of the body in question. In the case of the Security Council, that involved consideration of its important political responsibilities. The general proposition was thus clear, and although it was doubtless interesting to discuss the question with regard to particular international organizations, such a course would not get the Commission very far.

39. Mr. PELLET said he was surprised at the categorical positions taken by some members, particularly Mr. Economides. The Security Council clearly had obligations, which should be considered in the light of the means at its disposal. The permanent members of the Security Council had a right of veto, and it was not reasonable to interpret its legal obligations without taking that fact into account. Mr. Economides had peremptorily asserted that there was at least one case in which the Security Council had an obligation to act, but he had chosen the worst possible example, namely Article 51, pursuant to which States had a right of self-defence "until the Security Council has taken measures necessary to maintain international peace and security". Article 51 thus clearly provided for the case in which the Security Council did not take action, and he did not see how it could be said that the provision was proof that the Security Council was required to act. In fact, the last sentence of Article 51 gave the Security Council broad discretionary powers, because it provided that measures taken by Members in the exercise of the right of self-defence must be immediately reported to the Security Council, which was authorized "to take at any time such action as it deems necessary in order to maintain or restore international peace and security".

40. With regard to a comment by Mr. Chee and the more general problem of Article 24, on a number of occasions the ICJ had noted that the Security Council had only primary responsibility and had not excluded the possibility of action being taken by other bodies, in particular the General Assembly. *A contrario*, he concluded that the failure of the Security Council to take action did not automatically entail its legal responsibility, irrespective of the circumstances. He was not sure that the notion of primary responsibility was a legal one, but in any case, the Organization had a global responsibility. If the aim was for the Organization to incur responsibility, then the Commission

must decide whether the General Assembly was bound to step in when the Security Council did not fulfil its primary obligation: otherwise, the word "primary" was meaningless. Although he did not have any particular affection for the Security Council, it was an easy target for those given to righteous indignation; unfortunately international relations were more complicated than that.

Mr. Pambou-Tchivounda (Vice-Chairperson) took the Chair.

41. Mr. KABATSI commended the Special Rapporteur's third report, which enabled the Commission to continue making significant and rapid progress on the topic. Articles 8 to 11 had been closely modelled on four similar provisions in the draft articles on responsibility of States for internationally wrongful acts, an approach he fully supported. There was no need to reinvent the wheel if the available wheel did the job. Those articles were ready for referral to the Drafting Committee.

42. The Special Rapporteur was correct in saying that the wrongful act of an international organization might consist in an action or in an omission, that omissions were wrongful when an international organization was required to take some positive action and failed to do so (paragraph 8 of the report), and that internal constraints on an international organization which might result in a breach of its international obligations should not absolve it from responsibility for the breach. As had been pointed out by a number of members, States might sometimes try to evade responsibility by shifting their obligations to international organizations which they had put in place for that purpose. It would be unfortunate if those organizations were allowed to shirk their responsibility by claiming that they had been unable to comply with their international obligations owing to difficulties in their internal decision-making process. Such dangerous gaps should not be allowed to exist even as a matter of positive international public policy. As to the question posed by the General Counsel of the IMF and cited in paragraph 8 of the report, as to whether an organization would be responsible for not taking action, if that non-action was the result of the lawful exercise of their powers by its member States, the answer was an emphatic yes.

43. Given that the Organization had been formed on the basis of a determination to save succeeding generations from the scourge of war, which had brought untold sorrow to mankind, and that its universal membership at its making had reaffirmed its faith in the dignity and worth of the human person, there could hardly be any question that the United Nations was obliged, as a rule of general international law and where the evidence was available, to prevent genocide. The Convention on the Prevention and Punishment of the Crime of Genocide had not introduced that obligation, but had codified it as a rule of general international law that had already existed as such. The failure to stop the genocide in Rwanda could not be attributed to ignorance of the fact that it had been happening. As recent events in Rwanda and the Balkans had shown, omissions could be as bad as, if not worse than, acts of commission in terms of negative consequences. For that reason, he would have favoured inclusion of the

word “omission”, as an extension of “act”, in article 8 paragraph 1, but for the fact that the corresponding provision in the draft articles on State responsibility did not do so. He hoped that the commentary to the article would expand on that issue. He also supported the deletion of the words “in principle” in article 8, paragraph 2.

44. Draft articles 12 to 16 presented no problems and could also be referred to the Drafting Committee, which should be able to take into account all the comments made on article 16 and bring it more closely into line with article 13.

45. Mr. CHEE, referring to wrongful omissions on the part of an international organization and of a State, said that an international organization, while a subject of international law, did not operate on the same plane as a State in relation to international law, as had been noted by the ICJ in the 1949 *Reparation for Injuries* case. Further clarification was needed of the meaning of the words “in principle”, in draft article 8, paragraph 2. Draft articles 9 to 11 posed no problems. Draft articles 12 and 13 dealt respectively with the cases of an international organization which aided or assisted in the commission of an internationally wrongful act or which exercised direction and control over the commission of an internationally wrongful act. However, there seemed to be little State practice in that area. The position adopted by the Special Rapporteur with regard to those articles in paragraphs 27 and 28 of his report was not sufficiently substantiated by footnotes. He nevertheless supported the two draft articles, which covered events that were likely to arise in the future. However, there seemed to be no need for the proviso in draft article 15.

46. Turning to draft article 16, paragraph 2, he agreed that member States of an international organization were prone to act on the basis of authorizations and recommendations from that international organization. State practice in that regard should not therefore be ignored. Also relevant was the 1962 advisory opinion of the ICJ in the *Certain Expenses of the United Nations* case.

47. As to the failure of the Security Council to act to prevent the genocide in Rwanda, interesting parallels could be drawn between that situation and the situation in Kosovo and the Balkans, where NATO had intervened to prevent further conflict or a spread of the conflict. What conclusions were to be drawn from a comparison of those two situations remained a moot point.

48. In conclusion, he recommended that all the draft articles with the exception of draft article 16, paragraph 2, should be referred to the Drafting Committee.

49. The CHAIRPERSON invited members wishing to participate in the work of the Drafting Committee on the topic of responsibility of international organizations to inform the Chairperson of the Drafting Committee of their intention.

Reservations to treaties⁹ (A/CN.4/549 and Add.1, sect. D, A/CN.4/558 [and Corr.1] and Add.1 [and Corr.1]–2,¹⁰ and A/CN.4/L.665)

[Agenda item 6]

REPORT OF THE DRAFTING COMMITTEE

50. The CHAIRPERSON invited the Chairperson of the Drafting Committee to introduce the first report of the Committee for the current session, on the topic of reservations to treaties (A/CN.4/L.665).

51. Mr. MANSFIELD (Chairperson of the Drafting Committee) presented the report of the Drafting Committee on the topic. The Committee had held two meetings on the topic, on 9 and 10 May 2005, at which it had considered two draft guidelines referred to it by the Commission during its fifty-sixth session. The two draft guidelines dealt with the definition of objections. Draft guideline 2.6.1 dealt with the definition of objections *per se* and draft guideline 2.6.2 dealt with a specific category of objections, namely those to the late formulation of reservations or to the widening of the scope of reservations.

52. The new text of draft guideline 2.6.1 read:

“Definition of objections to reservations

‘Objection’ means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the former State or organization purports to exclude or to modify the legal effects of the reservation, or to exclude the application of the treaty as a whole, in relations with the reserving State or organization.”

53. The new text of draft guideline 2.6.2 read:

“Definition of objections to the late formulation or widening of the scope of a reservation

‘Objection’ may also mean a unilateral statement whereby a State or an international organization opposes the late formulation of a reservation or the widening of the scope of a reservation.”

54. Draft guideline 2.6.1 had first been introduced by the Special Rapporteur in his eighth report in 2003.¹¹ Other versions of the guideline had been proposed by the Special Rapporteur in his ninth report in 2004,¹² and in the report of the Commission on its fifty-sixth session, taking into account the views expressed in plenary session.¹³ The Drafting Committee had worked on the latest version of the guideline, which had appeared in paragraph 293 (e) of the Commission’s report.

⁹ For the text of the draft guidelines provisionally adopted so far by the Commission, see *Yearbook ... 2004*, vol. II (Part Two), para. 294.

¹⁰ Reproduced in *Yearbook ... 2005*, vol. II (Part One).

¹¹ *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/535 and Add.1.

¹² *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/544.

¹³ *Ibid.*, vol. II (Part Two), chap. IX, sect. B, paras. 275–293.

55. The Drafting Committee had discussed at length whether the definition of objections should focus on the effects of objections, as did the text proposed by the Special Rapporteur, or whether an objection should constitute a factual statement whereby the objecting State or international organization indicated that it did not accept the reservation or considered it unlawful. Various arguments had been put forward in support of or in opposition to those two approaches. It had been pointed out that a strictly factual definition would be incomplete or would risk including mere political declarations which were not intended to be “objections” producing legal effects; some members had thought that such a definition would be tautological. The Drafting Committee had tried to combine the two approaches in a single definition but it had become obvious that such a definition would be excessively long and impractical.

56. The Committee had finally agreed that the words “exclude or modify” were key elements of any objection purporting to produce legal effects and that, without necessarily listing all the possible effects of an objection, the definition based on them should include a very general description of such effects. That description followed the one found in article 20, paragraph 4 (b), and article 21, paragraph 3, of the 1969 Vienna Convention. Such a definition should include the possible exclusion of the application of the treaty as a whole, reflecting article 21, paragraph 3, of the 1969 Vienna Convention.

57. The Committee had also thought that the definition should not be overly elaborate, since future draft guidelines would deal with other aspects of objections. The current wording closely followed the wording of the draft guideline proposed in 2004. The term “formulated” had been retained as more appropriate than the term “made”, in view of the fact that under the Vienna Convention a reservation was deemed to be “formulated” until no objection had been made. The French term “*auteur de la réserve*” had been rendered in English as “the reserving State or organization”. The definition did not affect the ability of States to make statements or comments about reservations on political grounds, a point that would be developed in the commentary. The commentary would likewise make it clear that the definition was without prejudice to the validity or legal effects of objections. Draft guideline 1.6 (Scope of definitions) was of particular relevance in that context.

58. Draft guideline 2.6.2 followed closely the original drafting as proposed by the Special Rapporteur. The Committee had contemplated modifying the wording to align it with that of draft guideline 2.6.1 by using the words “purports to oppose” rather than “opposes”, but had abandoned that idea, realizing that the two draft guidelines covered different cases. The purpose of draft guideline 2.6.2 was to underline the fact that the term “objection” might also be used in relation to opposition to late formulation of a reservation or to the widening of the scope of a reservation.

59. The Drafting Committee had agreed that a more appropriate placement for draft guideline 2.6.2, which was currently placed immediately after draft guideline 2.6.1, would be between guidelines 2.3.2 (Acceptance of late

formulation of a reservation) and 2.3.3 (Objection to late formulation of a reservation). The current numbering had, however, been retained, in order not to upset an already complex numbering of the draft guidelines, on the understanding that on second reading it should be placed in the section dealing with late formulation of reservations.

60. The Drafting Committee recommended to the Commission the adoption of the two draft guidelines.

61. Mr. Sreenivasa RAO said that the question of the definition of objections to reservations was important, because States had been known to make declarations that were subsequently construed as objections by the depositary, as had happened in the case of India’s declaration relating to the constituent instrument of the International Maritime Organization. He would have preferred to see objections purporting to exclude the application of the treaty as a whole treated separately from objections purporting to exclude or to modify the legal effects of the reservation. However, the Drafting Committee had chosen to deal with both in the same guideline, and he was willing to live with that decision.

62. The CHAIRPERSON said that if he heard no objection he would take it that the Commission wished to adopt the titles and texts of draft guidelines 2.6.1 and 2.6.2 as contained in document A/CN.4/L.665.

It was so agreed.

Guidelines 2.6.1 and 2.6.2 were adopted.

63. Mr. PELLET (Special Rapporteur) welcomed the adoption of guidelines 2.6.1 and 2.6.2, which had necessitated two years of hard work. Responding to Mr. Sreenivasa Rao’s remarks, he noted that India’s difficulties regarding the constituent instrument of the International Maritime Organization had concerned reservations, not objections. That said, it was true that differences of opinion could arise between States and depositary bodies or international jurisdictions as to the nature of submissions made by States. One need only think of the *Belilos v. Switzerland* case of 29 April 1988, in which the European Court of Human Rights had found that what purported to be a declaration in fact constituted a reservation. Hence the importance of the two guidelines.

64. He also recalled that in his eighth report he had expressed his intention of first proposing a general definition, before moving on to specific definitions of the various types of objections, including the refusal by a State to be bound by a treaty with the State making the reservation.¹⁴ Like Mr. Sreenivasa Rao, he would have preferred a separate treatment of objections purporting to exclude or to modify the legal effects of the reservation and of those purporting to exclude the application of the treaty as a whole. However, he could accept the text of guideline 2.6.1 as formulated by the Drafting Committee.

The meeting rose at 12.55 p.m.

¹⁴ *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/535 and Add.1, paras. 98–106.