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**Summary record of the 2843rd meeting**

Topic:  
**Responsibility of international organizations**

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## 2843rd MEETING

Tuesday, 24 May 2005, at 10 a.m.

Chairperson: Mr. Djamchid MOMTAZ

*Present:* Mr. Addo, Mr. Al-Baharna, 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. Koskenniemi, Mr. Mansfield, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Ms. Xue, 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 (*concluded*)

1. Mr. RODRÍGUEZ CEDEÑO endorsed the idea of basing the draft articles on the articles on responsibility of States for internationally wrongful acts,<sup>1</sup> although he thought it was necessary to be very careful in doing so. The fact that there were different types of international organizations—cooperation, financial and regional integration organizations—raised questions about the nature and scope of the recommendations or decisions adopted by their organs. Those differences were important, not only in theory but also in terms of their practical effects. The international law of international organizations did not constitute a single body of legal rules, as each organization had its own rules, even though some general principles were common to all organizations. Consequently, the obligations stemming from the acts of organizations were not all of the same nature. Some were best-effort obligations, others were obligations to produce specific results; some took the form of recommendations or authorizations, others of decisions that were binding on member States. The nature of the obligation was thus fundamental to determining whether an act was attributable to an international organization. A distinction should therefore be made between an organization's rules and its acts, even though it was not easy to define the obligation in either case, as had become apparent during the discussion on the powers of the Security Council. In that connection, he recalled that under Article 24 of the Charter of the United Nations the Security Council had primary responsibility for the maintenance of international peace and security. Under Chapter VII of the Charter, it could, where there was a threat to peace, recommend that Member States should take certain measures, or call on them to do so. That was an important point, as the Security Council could commit an internationally wrongful act by omission, with the result that the United Nations would incur responsibility.

<sup>1</sup> See 2838th meeting, footnote 5.

2. It should not be forgotten that the legal personality of an international organization was different from that of the States that constituted it; that point had a bearing on the determination of the responsibility of the organization *per se* and, where necessary, the residual responsibility of its member States. The definition of an international organization adopted by the Commission in 2003 was quite clear in that regard.<sup>2</sup> An organization had the capacity to act, to acquire rights and to incur obligations, and it could thus incur responsibility. It would therefore be solely responsible, under the conditions set out in the draft articles, for the commission of an internationally wrongful act. The responsibility of member States was a far more complex question, however.

3. Turning to the draft articles proposed by the Special Rapporteur, he said that the principle, set out in draft article 8, of the existence of a breach of an international obligation by an international organization, regardless of the origin and character of the breach, could also apply to non-treaty obligations such as unilateral obligations entered into by the organization by means of a unilateral act or a resolution. That raised questions about acts taken by the secretary-general of an organization within the scope of his or her powers, given that organs of the same organization that were made up of member States had different powers. One example of that was the authorization given by the Secretary-General of the United Nations in connection with Operation Turquoise.<sup>3</sup>

4. The issue of the internationally wrongful act of an organization in connection with an act attributable to it did not appear to raise any great difficulties. However, the situation was less clear when an omission was involved. The Rwandan genocide, cited in paragraph 10 of the report, was an interesting example of such a situation, although he did not entirely share the view that the decision-making process could be the source of an omission that might give rise to an internationally wrongful act. An organization might find itself unable to act because of disagreement among its members, in which case it did not necessarily incur responsibility. A distinction should be drawn between the structure of organizations composed of sovereign States and the structure of States themselves, which were made up of separate branches of government. It was true, as stipulated in article 4 of the articles on State responsibility, that the State could incur responsibility for an internationally wrongful act committed by any of its organs, regardless of whether they were decentralized, regional, federal or other organs.<sup>4</sup> It was accepted that an international organization could be responsible for an internationally wrongful act, but it was more difficult to accept that it might be responsible for an omission.

5. As to the question of whether the rules of the organization were part of international law or not, the diversity of international organizations had again to be taken into account. Such rules often concerned the functioning of the organization or established a special legal regime that was not necessarily part of international law. That point should

<sup>2</sup> See *Yearbook ... 2003*, vol. II (Part Two), chap. IV, sect.C.1, para. 53, draft article 2.

<sup>3</sup> See Security Council resolution 929 (1994) of 22 June 1994.

<sup>4</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 40–42.

always be borne in mind. The overall wording of the draft articles was acceptable since it covered all possibilities.

6. Draft article 9, as it stood, was also acceptable.

7. The chapter on the responsibility of an international organization in connection with the act of a State or another organization dealt with a complex and sensitive issue that needed to be considered carefully. Draft article 13 presented no problems. With regard to draft article 16, if an international organization adopted a decision that clearly bound a member State to commit an internationally wrongful act, it incurred responsibility if, according to paragraph 1 (b), “the act in question is committed”. The authorization of an act raised a different question that had to be taken into account in establishing responsibility. In the absence of a binding decision—in other words, when the member State had some room to manoeuvre—the act would not be attributable to the organization, which would therefore not incur responsibility, as the *Bosphorus* case, mentioned in paragraph 32 of the report, made clear. Paragraph 2 should therefore be reworded to clarify that, in the case of an authorization by an organ of the organization, responsibility was in principle transferred to a member State acting of its own volition.

8. In conclusion, he said that the draft articles as a whole could be sent to the Drafting Committee and that a working group should be set up to consider the points on which there was no general agreement.

9. Ms. XUE said that at first sight there might appear to be some similarity between the responsibility of international organizations and that of States with regard to a breach of an international obligation and responsibility in connection with the act of another subject of international law. However, the report raised a number of fundamental questions about international organizations, since the latter differed greatly from sovereign States in their ability to fulfil an international obligation. The differences between them were due not only to the decision-making process involved, but also to the fact that members of international organizations were also subjects of international law. The capacity of international organizations to fulfil an international obligation was affected, if not dictated, by their member States. In most cases, the obligations of international organizations were general and limited, and often implemented indirectly through their member States. Whereas domestic process had no effect on State responsibility at the international level, the internal process of international organizations did have an effect at the international level. In theory, draft articles 8–12 presented few problems; the rules of State responsibility could be applied, by analogy, to international organizations. However, a closer examination of those draft articles raised a number of issues.

10. On the question of whether an omission by an international organization constituted a breach of an international obligation, she believed that the Special Rapporteur had not paid sufficient attention to the response of the General Counsel of the IMF, which was mentioned in paragraph 8 of the report. The example given in paragraph 10 of the report, on the inability of the United Nations to prevent genocide in Rwanda, might seem appropriate

from a human rights standpoint, but was not convincing as an example of a breach of an international obligation, as it was not the United Nations that had failed to act but its Member States. The Special Rapporteur was right to point out that it was difficult to determine what constituted an omission. In the case of the prevention of genocide, for instance, even the definition of an act was not obvious: she wondered whether condemnation by the Secretary-General of the United Nations, the adoption of a resolution condemning the genocide, the imposition of sanctions or the deployment of military forces to stop the killing could be defined as acts. In light of such problems, she would prefer to reserve her position on the inclusion of the concept of “omissions” in the draft articles.

11. Moreover, she found paragraphs 11–13 of the report a bit confusing. The quotation from the European Union in paragraph 12 set out the notion of special rules of attribution of conduct and the notion of special rules of responsibility. The former referred to the attribution of conduct in the implementation of an obligation of the European Union, and the latter determined who bore responsibility for an action carried out at the international level. It might be necessary to make a distinction within the organization between the attribution of conduct and the attribution of responsibility in order to determine whether international responsibility lay with the organization or with its member States; however, as far as the draft articles were concerned, such a distinction was unnecessary insofar as the acts that should be considered as acts of the organization were specified in the organization’s constituent instrument, regardless of who actually performed them. In considering the responsibility of member States, it might be necessary to consider the internal rules of attribution of conduct of international organizations; conceptually, however, they should still be distinguished from the rules of attribution under the international responsibility regime.

12. It was difficult to say whether obligations arising under the rules of the organization were part of international law or not. Some rules of international organizations, such as decisions taken by the Security Council under Chapter VII of the Charter of the United Nations, clearly imposed international obligations; others, such as internal rules on how to implement treaty obligations, might have some effect on determining international obligations; still others, such as staff regulations, were purely internal administrative rules without any external legal effects. The question was how to define the term “rules of the organization”. Perhaps the Special Rapporteur could indicate in the commentary the extent to which obligations imposed by the rules of the organization should be regarded as obligations under international law. The current wording of article 8, paragraph 2, did not adequately address the complexity of the issue.

13. With regard to responsibility in connection with the act of another subject of international law, she noted that the Special Rapporteur was faced with a lack of international practice in the cases contemplated in draft articles 12–16. In theory, such situations were possible but, as the report showed, it was difficult to find empirical support for them at the moment. A large part of that chapter of the report was devoted to the relations between an international organization and its members. She also doubted

whether the direction and control implied by “normative control” (para. 35 of the report) were the same as the direction and control referred to in article 17 of the articles on State responsibility.<sup>5</sup> For one thing, such relations were determined by the constituent instrument established by member States. Moreover, the legal personality of international organizations was a fiction, as their power was exercised primarily through their member States. In short, while one could argue that an international organization was capable of committing an internationally wrongful act, it was difficult to imagine that one might knowingly require member States to commit a certain act in order to “achieve indirectly what was directly prohibited” (para. 36 of the report). Given that an international organization was a subject of international law, it functioned under both the rules of the organization and international law. The requirement of knowledge of circumstances of the wrongfulness of the act was also relevant, since without it there was no circumventing of obligations. In other words, if an international organization requested its members to perform an action that it believed to be in conformity with international law but that eventually turned out to be a wrongful act, the international responsibility of the organization and its members should be determined by the rules of the organization and by the relevant primary rules of international law. As a matter of law, draft article 13 was not necessary.

14. The general content of draft article 16 had a direct bearing on the relations between an organization and its member States, since the extent of the binding force of an international organization’s decision on its members dictated the extent of the organization’s responsibility. In that respect, the element of interest should not be deemed a decisive factor in determining the responsibility of the organization. The example given in paragraph 40 of the report should therefore be reconsidered. While it was true that the Montreal Protocol on Substances that Deplete the Ozone Layer prohibited the supply of freon gas, it was clear that the Security Council Committee established by resolution 661 (1990) concerning the situation between Iraq and Kuwait should not have authorized the supply of the gas to Iraq. Whether or not the United Nations had any interest in the deal did not preclude the wrongfulness of its authorization. Useful as it was, draft article 16 should not be included in that part of the report. As the responsibility of international organizations was different from State responsibility, it should be determined by special rules governing the relations between international organizations and their members in connection with a wrongful act under international law. Decisions, recommendations and authorizations were normal acts of international organizations. The question that constantly arose was how member States implemented them and how responsibility for the acts committed should be allocated between the organization and its members. Given the importance of that issue, she proposed that it should be treated separately as a special legal issue.

15. Mr. DUGARD, returning to the issue of the possible responsibility of the United Nations for human catastrophes such as the genocide in Rwanda, said he was puzzled by Ms. Xue’s argument that in such circumstances only

<sup>5</sup> *Ibid.*, pp. 67–69.

Member States could be held responsible for an omission, and not the United Nations itself. He could understand how, in cases like the one in Srebrenica, where the failure of the peacekeeping forces could clearly be attributed to the Netherlands, the State could be held responsible for what had taken place, as could the United Nations itself. However, the situation in Rwanda was different in that there had been no State present on the ground to which fault could be attributed. If there was fault, it lay with the United Nations for failing to act. In such circumstances, a State could not be expected to act unilaterally, since the Charter of the United Nations prohibited unilateral action. Consequently, in his view, an international organization as such must incur responsibility for its mistakes.

16. Mr. FOMBA said that he would appreciate it if Ms. Xue could clarify her comment that genocide was an inappropriate example because it ought to be dealt with by a rights-based approach that differed from the approach under international law. If that was so, he wished to know what the difference was between human rights and international law and whether or not the Convention on the Prevention and Punishment of the Crime of Genocide was part of international law.

17. Ms. XUE said she was afraid that there had been a misunderstanding. Her intention in citing the Special Rapporteur’s example of the genocide in Rwanda had been to point out that it did not illustrate how an omission could be considered a wrongful act on the part of an international organization. She had not meant to say that the United Nations should not be held responsible for its failure to act in Rwanda. In fact, it was not the United Nations and its Member States that had failed to act effectively, but the international community as a whole. The United Nations could not be accused of failing to act when its Member States had been so reluctant to take action.

18. Human rights were certainly a major concern for every State and for the international community as a whole, but that did not mean that responsibility could automatically be attributed to an international organization. The difficulty lay in the concept of omission; it was therefore necessary to consider what actually constituted responsibility. The consequences and long-term effects of accusing the United Nations of not intervening in Rwanda, in terms of obtaining reparation or ensuring that the same thing did not happen again, would need to be considered. It was not a question of saying that the Organization should not have intervened, but of determining whether there was a link with the questions of legal responsibility and omission on which the Commission had to take a position.

19. The CHAIRPERSON, speaking as a member of the Commission, said that it was too vague to talk of the responsibility of States Members of the United Nations for failing to react to the genocide in Rwanda without specifying how they ought to have reacted. Everyone knew that the Charter of the United Nations prohibited the use of force: the question was what obligation States did have.

20. Ms. XUE said that if the Commission took the very same approach as it had taken to State responsibility, it

would see that the issue at hand was the complex one of the primary rules for international organizations. The fact was that, even in a situation as serious as the genocide in Rwanda, it was very difficult to say that the United Nations bore responsibility.

21. Mr. DUGARD agreed that the issue was a very difficult one but he did not think it could be sidestepped by saying that the international community as a whole was responsible, as the international community did not have legal personality. If an international legal entity was to be held responsible for the events in Rwanda, it must be the United Nations, and compensation might be considered as a form of reparation.

22. Mr. ECONOMIDES said that Ms. Xue had made a distinction between a wrongful action and a wrongful omission, and had said that she found it difficult to accept the idea of the responsibility of an international organization for an omission. Where responsibility was concerned, however, both actions and omissions were universally taken into account, regardless of whether the case concerned States or international organizations. Moreover, the responsibility of the organization was in no way diminished by the fact that an omission on the part of the organization was due to the inability of member States to take a decision or to take a decision in time. One might ask whether the organization had any recourse against the States that had prevented the decision from being taken, but that issue would be addressed towards the end of the Commission's consideration of the draft articles, as had been the case with the articles on the responsibility of States for internationally wrongful acts.

23. Mr. KABATSI said that there were definitely cases where an international organization was expected to do something. The Rwandan genocide, however, was a complex case, especially as the United Nations had already been present on the ground, with forces authorized by the Security Council that had been withdrawn as soon as the genocide began: that was a clear example of an act of omission.

24. Mr. CHEE said that, firstly, the question facing the Commission concerned the attribution of responsibility to an organization or to its member States. As the President of the ICJ had affirmed, a crime was not committed by a State but by individuals. The question of attribution should therefore be considered separately from the question of the crime itself. Secondly, the Security Council had not intervened in Rwanda, yet had done so in Kosovo: the reasons for those different reactions needed to be considered.

25. The CHAIRPERSON, speaking as a member of the Commission, agreed that only the responsibility of individuals, and not the criminal responsibility of States, was addressed in the Rome Statute of the International Criminal Court. However, it was responsibility in general that was being addressed in the topic under consideration, and questions were being raised specifically about the civil responsibility of States.

26. Mr. Sreenivasa RAO said that, with hindsight, paragraph 10 appeared to be the most important one in the

Special Rapporteur's report. That had probably not been his intention, for if it had, he would have provided more facts. The various reactions to the paragraph had been, understandably, very emotional, but it was not in fact unusual for the Security Council to act when it wished to do so and not to act when it did not wish to do so. In citing the case of Rwanda, the Special Rapporteur assumed, firstly, that general international law required States and other entities to prevent genocide "in the same way" as the Convention on the Prevention and Punishment of the Crime of Genocide. He wondered what precisely was meant by "in the same way". The Special Rapporteur's second assumption was that the United Nations had been in a position to prevent genocide. However, it was one thing to be in a position to prevent genocide and quite another to be able to prevent it. Everyone agreed that there had been a moral failure and that, given what had happened in other countries, the United Nations had applied a double standard. However, it was easier to talk about the inability of the United Nations to act as quickly as it should have than it was to talk about its legal responsibility. For many members it was going too far to say that "failure to act would have represented a breach of an international obligation". Moreover, while the debate was undoubtedly useful, most of it went far beyond the scope of the Commission's mandate.

27. Mr. KOLODKIN said that in his earlier statements he had accepted the idea that an international organization could be held legally responsible in cases of omission, but he had also said that the case cited in paragraph 10 of the report was not the best example to illustrate that point. The debate on that question was very interesting but had not changed his mind. In order to determine if an international organization had any responsibility whatsoever, it was necessary to begin by considering its constituent instruments, then its rules, and then any agreement concluded by it. If an obligation to act in a certain way was identified, the organization would be responsible for failing to act. In the case of Rwanda, the United Nations had no clearly expressed obligation to act in a certain way in that kind of situation. As others had stressed, the Security Council had full discretion in that respect, in keeping with the vision of the framers of the Charter. That discretion must be maintained if the United Nations was to retain the possibility of deciding on the best line of conduct to take in any situation of vital importance to the international community. In that respect, he agreed with the proposal by the High-level Panel on Threats, Challenges and Change to define the criteria to be met if the Security Council and the United Nations as a whole should be required to intervene, particularly in order to prevent a humanitarian disaster.<sup>6</sup>

28. Mr. GAJA (Special Rapporteur) assured members that he had no intention of involving the Commission in the project to reform the United Nations, which was being undertaken by other perfectly competent bodies. Draft article 8 mainly concerned agreements concluded by an international organization, and in paragraph 10 of his report he had simply intended to give an example of a breach of an obligation under general international law

<sup>6</sup> *A More Secure World: Our Shared Responsibility*, A/59/565 and Corr.1, part two, chap. IX, sect. B, para. 207.

consisting in an omission. Nevertheless, he disagreed with the idea that only States had an obligation to prevent genocide. In any event, it was not the task of the Commission to resolve that question.

29. Mr. PELLET said that it was too facile to dismiss the problem by criticizing paragraph 10 of the Special Rapporteur's report, especially by attributing responsibility to the international community as a whole, which would only ensure that no one was held responsible. It was also too facile to say that international organizations were responsible when they acted but not when they did not act. As Mr. Kolodkin had said, the only real problem lay in determining whether an organization did or did not have an obligation to act. If it did, it was obvious that it was responsible for failing to act. Moreover, the question was resolved in draft article 3. Matters would be made infinitely more complicated by taking highly emotionally charged examples that posed problems that were more human, moral or political in nature than legal. Besides Rwanda, the case of Srebrenica could be cited, but the prime example was the withdrawal of the emergency international United Nations Force from Sinai just before the second Israeli–Arab war. One could say that the aggressor was Israel or Egypt, or even the Secretary-General, since he had ordered the withdrawal. The question of responsibility had to be addressed; he therefore called on the Commission to stop discussing such cases and to restrict itself to the technical aspects of the subject.

30. Mr. AL-MARRI said that, unlike some of his colleagues, he thought that when responsibility could not be attributed to a State or to individuals, the United Nations would be the international organization most likely to bear responsibility. Criminal acts could not go unpunished, regardless of who was responsible for them; he therefore agreed with Mr. Dugard that it was possible to establish responsibility in the case of Rwanda.

31. Mr. DUGARD observed that Mr. Pellet, after making the point that the withdrawal of United Nations peacekeepers from Sinai was the prime example of the responsibility of international organizations, had then suggested that such "emotional" problems should be avoided in order to focus on technical aspects. He personally believed that the Commission, even though it was more of a technical than a political body, should bear such important issues in mind when dealing with the kind of problem before it.

32. Ms. XUE said that on an emotional level she agreed with Mr. Kabatsi; from a technical viewpoint, however, she had to point out that when peacekeeping forces withdrew from a territory on the eve of a massacre, it was because they had received the order to do so. Thus it was not a question of whether the United Nations had committed an act of omission, but of whether its decision to withdraw its troops had been unlawful or not, which was a question of interpretation. Moreover, the situation with regard to omissions was extremely complex, since it was necessary to consider cases in which the problem fell within the competence of several international organizations, none of which actually took any action. In the case of Rwanda, for example, the United Nations was not solely responsible, since many other international organizations could also be held responsible for not intervening. When

it came to maintaining international peace and security, obviously the United Nations and, in particular, the Security Council had primarily responsibility. However, under Article 51 of the Charter, regional organizations and the States concerned were also responsible, as they could exercise their right to self-defence. Furthermore, the mandates of international organizations often overlapped, so that it was very difficult to find a case in which it could be stated unambiguously that a given organization ought to have acted.

33. Mr. CHEE said that it was very difficult to challenge the decisions taken by the Security Council under the Charter of the United Nations, since under Article 24 Member States conferred on the Security Council primary responsibility for taking action and agreed that the Security Council acted on their behalf. Moreover, Article 25 stipulated that the Members of the United Nations agreed to accept and carry out the decisions of the Security Council in accordance with the Charter. Thus it was not easy to determine whether the Security Council was right or wrong, whether it should intervene or not and what type of intervention Member States could request. Such problems posed a real dilemma with regard to what the Security Council should or should not do, for in cases of omission the question arose as to whether the Council was prepared to be held responsible for the United Nations. Perhaps omissions and actions should be analysed in the light of the due diligence standard set out in general international law, thereby avoiding the requirement under the Charter of the United Nations that the Charter should have priority. The Repertory of Practice of United Nations Organs and the Repertoire of the Practice of the Security Council could be consulted for that purpose. However, he doubted that they would be of much help, and he thought the best solution was still to consider omission in terms of the due diligence standard set out in general international law; on that basis it would be possible to decide if the Security Council was responsible or not.

34. Mr. PELLET said that it might be possible, by taking small examples of problems amenable to practical solutions, to deduce general rules that would be applicable even to extremely sensitive cases in which, in his view, the law did not really have a fundamental role to play. The law could not solve every problem, as it tended to apply to mundane cases rather than to dramatic ones.

35. He recalled that the Commission had already debated the issue of responsibility for action or failure to act by peacekeeping forces in 2004 and that it had been pointed out then that such forces, which could undoubtedly be considered an organ of the organization, were in a double bind.<sup>7</sup> Problems that were specific to responsibility for the action or failure to act of such forces should be dealt with separately from the topic under consideration. As Chairperson of the Working Group on the Long-Term Programme of Work, he wondered if the Commission ought not to consider a proposal on that particular type of responsibility, which was a topic in its own right. Every time examples were sought to illustrate it, the emotional problems referred to earlier surfaced and, since peacekeepers were still subject to their national chain

<sup>7</sup> *Yearbook ... 2004*, vol. I, 2800th–2802nd meetings, *passim*.

of command, specific individual problems arose regarding the attribution of responsibility. As peacekeeping forces were never a good example with which to illustrate the topic under consideration, Commission members should reach a “gentlemen’s agreement” to take up the issue in the Commission’s long-term programme of work so as not to interfere with the topic dealt with by the Special Rapporteur.

36. The CHAIRPERSON said that he had not intended to start a debate on emotional issues, but had simply wished to draw attention to the question of the obligation of United Nations organs, especially the Security Council, to act in a number of specific cases. Mr. Kolodkin had referred to the proposal by the High-level Panel on Threats, Challenges and Change to the effect that, in the specific case of genocide, the Security Council should adopt a “normative” resolution spelling out the conditions under which the Security Council should act and establishing a set of criteria for making action an obligation.<sup>8</sup>

37. Mr. PAMBOU-TCHIVOUNDA said that the two issues into which the topic had been split—the breach of an international obligation by an international organization and the responsibility of an international organization in connection with the act of a State or another organization—were closely linked, as the approach to them was logically and chronologically interdependent in their illustration and application of the general rule on the attribution of an internationally wrongful act to an international organization. However, it was unfortunate that, in endeavouring to lay the foundations for the international responsibility of the international organization, the Commission had tended to overlook the essential point, namely, what constituted a breach of an international obligation, rather than whether such a breach existed. If the Commission agreed to follow the approach suggested by the Special Rapporteur in paragraph 5 of his report and included, either after draft article 4 or after draft article 8, a draft article adapting article 13 of the articles on State responsibility to international organizations, the result, in terms of the organization and adaptation of normative texts, would be to unify the two parts of the report.

38. The Commission should, by means of a draft article, give full effect to the case law in the *Demirel* case. The Commission would thereby accord the phenomenon of regional integration, which was rooted in contemporary international realities, its rightful place as a phenomenon that generated specific, consistent and valuable practice and, as such, practice that was suitable for codification, particularly as it yielded jurisprudence of an indisputably international nature. Although in the draft articles on responsibility of States for internationally wrongful acts the Commission had chosen to overlook the normative development of the distinction between an international regional-integration organization and an international cooperation organization, it ought to give due consideration in the draft articles it was currently preparing to international regional-integration organizations. No one could say whether the joint involvement of the European Union and the African Union, or of the United Nations

and NATO, in the current situation in Darfur could be assessed by the same measure should either of them breach the obligations they had assumed under special arrangements or under their constituent instruments or their own specific rules. In Darfur it was the result that mattered.

39. Accordingly, the breach of an obligation to achieve a certain result should, as indicated, in paragraph 15 of the report, be considered as implying a possible exception to the general principles set out in draft article 3. The Commission should carefully define the concept of the “best endeavours” obligation as the specific basis for the international responsibility of international regional-integration organizations, coupled with the responsibility of their member States. In raising the question in paragraph 16 of the report of whether obligations under the rules of the organization pertained to international law, the Special Rapporteur was pushing against an open door, for no purpose was served by questioning the legal nature of the rules of the international organization, regardless of whether they stemmed from a treaty or an instrument governed by international law or from a subject of international law other than the State. Since the Commission had defined the concept of the rules of the organization in draft article 4, it was difficult to see who might demand an explanation from the ICJ as to why it had not listed the rules of the World Health Organization in its advisory opinion of 20 December 1980.

40. The question of the status of the rules of the organization in the international order had already been settled, so that it would be sufficient to say, if necessary, that the rules of the international organization were an integral part of the international legal order. In any event, draft article 8, paragraph 2, should be deleted. He recommended sending draft article 8, without paragraph 2, and draft articles 12–15 to the Drafting Committee. Draft article 16 would benefit from being reviewed in the light of international practice.

41. Mr. GAJA (Special Rapporteur), summing up the debate, said that he agreed that it was a good idea to divide the draft articles on the responsibility of international organizations into chapters. Once the substantive articles had been drafted, it would be useful to introduce chapter headings corresponding to the divisions made in the articles on the responsibility of States for internationally wrongful acts. However, as some members had expressed reservations about the wisdom of that choice, the Drafting Committee should discuss it. The idea of a final provision referring to the existence of special rules, including those contained in the rules of the organization, could be mentioned in the commentary, although it seemed premature to try to draft the text of such a provision immediately. Concerning the relations between the rules of the organization and other rules of international law, the former would certainly not prevail over the rules governing the relations between the organization and non-member States. Thus it could not be said that the rules of the organization generally prevailed over other rules of international law.

<sup>8</sup> A/59/565, para. 203; see also paras. 207 and 256.

42. The debate had inevitably touched on some questions that were connected with those dealt with in his third report but that were not of immediate concern to the Commission. He admitted that he had perhaps contributed to that situation by citing, in paragraph 12 of his report, the position of the Legal Service of the European Commission on attribution of conduct. He had included that reference to introduce some alternative explanations of the responsibility of the European Union for the conduct of its member States, because it had been argued that the conduct of member States should be attributed to the organization when they acted in areas in which the European Union was considered to have exclusive competence, and also when they implemented Community legislation. There was no need to reopen the debate on that issue, as the Commission had adopted draft articles that were in line with the basic principles expressed in article 4 of the articles on State responsibility to the effect that the conduct of an organ of the State was attributed to the State in question.

43. Various questions raised in the debate concerned the responsibility of member States in relation to the responsibility of an international organization, which would be the subject of his next report. The responsibility of States was not otherwise covered by the draft articles currently before the Commission, but by the articles on State responsibility. The concern that States should not be exonerated from their responsibility when an international organization was held responsible had already been expressed in the commentary adopted in 2004, in which it was stated that: "attribution of a certain conduct to an international organization does not imply that the same conduct cannot be attributed to a State".<sup>9</sup> Similarly, with regard to the attribution of responsibility, draft article 15 and draft article 16, paragraph 3, were consistent with the idea that the question of State responsibility was not prejudiced.

44. The scope of the draft articles as defined in article 1, paragraph 2, did not cover cases in which a State and an international organization could both be held responsible, concurrently or otherwise, for an internationally wrongful act. A question arose as to the relationship between the responsibility of an international organization that assisted a State or another international organization in the commission of an internationally wrongful act and the responsibility of the State or organization that actually committed the wrongful act. That question would have to be answered in the same way as would the case of a State that assisted another State in the commission of an internationally wrongful act, but that question had not been addressed in the articles on State responsibility. His third report, and particularly draft article 16, dealt with situations in which an international organization incurred international responsibility for conduct attributed to one of its member States. That article did not necessarily imply that the member State concerned would also be held responsible. That was made clear in draft article 16, paragraph 3, which specified that when the State was not acting in breach of an international obligation, it could not be held responsible. However, if the member State

was bound by an international obligation and committed an internationally wrongful act, it would also be held responsible. He saw no reason for exonerating a member State that had committed an internationally wrongful act simply because an international organization had asked it to do so or because it had acted under the direction or control of that organization. The only situation in which the State concerned would not be held responsible was one in which such direction or control amounted to coercion.

45. Most members of the Commission had agreed to send draft articles 9–15 to the Drafting Committee, and some had been prepared to send draft article 8, paragraph 1, as well. For that reason, his comments would deal primarily with the most innovative and controversial provisions: draft article 8, paragraph 2, and draft article 16.

46. Most members of the Commission were in favour of retaining draft article 8, paragraph 2, although several had criticized the use of the words "in principle". He was not sure that the solution would be to delete those words from the text of the draft article while explaining in the commentary that there might be exceptions. Nor was he sure that there should be no mention at all of possible exceptions on the grounds that the rules of the organization were necessarily part of international law. The main problem that would arise if that approach was adopted would be that European Union law would be considered as part of international law even though many commentators, as well as the 25 countries concerned, held the opposite view. If the Commission held that Community law was part of international law, it would be out of step with recent developments in international law. Most commentators saw Community law not as *lex specialis*, which would suppose that it was of the same nature as international law, but as a self-contained regime. He was not in favour of including a general clause exempting the European Union from the scope of the draft articles. In many respects, the European Union functioned like other international organizations, particularly in its relations with third States. Moreover, the same scenario could be repeated in the future with other regional organizations of economic integration. If the words "in principle" were to be replaced, he personally would prefer wording that excluded the rules of regional organizations that had given rise to a form of integration entailing a system of law that could no longer be regarded as part of international law. Another solution would be to delete article 8, paragraph 2, altogether and to ignore the whole question of the nature of the rules of the organization. While that was a possible option, the whole chapter would be weakened and would make little contribution to clarifying questions that were important to international organizations.

47. He noted that the principle underlying draft article 16 had been generally well accepted. One objection had been that draft articles 13 and 16 might overlap. However, if draft article 13 was taken as referring not only to the actual control exercised by an organization over its member States but also to normative control in the form of recommendations and authorizations, that risk would exist only in cases where the State breached one of its obligations, since draft article 13 presupposed that the State acting under the control of the international organization

<sup>9</sup> *Yearbook ... 2004*, vol. II (Part Two), chap. V, sect. C.2, para. 72, commentary on the attribution of conduct to an international organization, para. 4.

committed a wrongful act. In any event, there would be no drawback in considering an international organization to be responsible under both draft article 13 and draft article 16.

48. Turning to article 16, paragraph 2, which had aroused most of the criticism, he reiterated that the reason for including that provision was to address cases in which an international organization used a recommendation or authorization directed at a member State to circumvent one of its own obligations. He hoped that some consensus could be reached on ways of restricting the responsibility of the organization to a limited number of cases, including those in which its authorization or recommendation had made a significant contribution to the conduct constituting an internationally wrongful act. It would still have to be decided whether a distinction needed to be made between authorizations and recommendations on the grounds that one category had a greater impact on unlawful conduct than the other.

49. In conclusion, he noted that it was generally accepted that draft articles 9–15 could be sent to the Drafting Committee, while draft articles 8 and 16 should be considered by a working group in order to resolve the outstanding problems.

50. Mr. PELLET said that he really must stress one point that seemed to him fundamental and on which he disagreed profoundly with the Special Rapporteur. No one was claiming that Community law was part of international law—it was a self-contained legal order, as were the rules of every international organization. However, unlike internal rules, Community law was derived from international law, which provided the basis for it. He was categorically opposed to including in the draft articles a specific exception for economic integration organizations since, just as States could not hide behind domestic law to justify a breach of an international obligation, organizations could not fall back on their internal rules to evade international law. The proposal to exclude economic integration organizations would be tantamount to according them the status of super-States, which was unacceptable.

51. Mr. GAJA (Special Rapporteur) replied that he had never suggested that Community law could justify non-compliance with an international obligation. The question was whether the rules of an organization were necessarily an integral part of international law and thus whether a breach of one of those rules amounted to a breach of international law.

52. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to send draft articles 9–15 to the Drafting Committee and draft articles 8 and 16 to an open-ended working group.

*It was so decided.*

*The meeting rose at 1.05 p.m.*

## 2844th MEETING

*Wednesday, 25 May 2005, at 10.05 a.m.*

*Chairperson: Mr. Djamchid MOMTAZ*

*Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Baena Soares, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Ms. Xue, 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]

ORAL REPORT OF THE CHAIRPERSON OF THE WORKING GROUP

1. Mr. GAJA (Special Rapporteur) said that the Open-ended Working Group established to discuss some controversial aspects of draft articles 8 and 16 had met the previous afternoon and, after thorough discussion, had agreed to recommend that revised versions of those two draft articles should be referred to the Drafting Committee. The commentary would reflect the main differences of opinion expressed during the debate in the plenary and in the Working Group.

2. Draft article 8, paragraph 1, remained unchanged. Paragraph 2 had been revised to read: “The preceding paragraph also applies to the breach of an obligation under international law set by a rule of the organization.”

3. The Working Group had considered that it would be useful to point out that obligations under international law were also set by rules of the organization; in the absence of special rules the general rules on international responsibility currently being drafted would therefore also apply to breaches of those obligations. The question whether all the rules of the organization imposed obligations under international law had not been fully settled by the revised text. The Working Group had felt that the matter should be resolved at a later stage, taking into account the comments of Governments and international organizations.

4. Paragraph 3 of draft article 16 remained unchanged. Paragraphs 1 and 2 had been revised to read:

“1. An international organization incurs international responsibility if it adopts a decision binding a member State or international organization to commit an act that would be internationally wrongful for the former organization.

2. An international organization incurs international responsibility if: