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Summary record of the 2848th meeting

Topic:
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the ban on that punishment in the American Convention on Human Rights, as well as questions raised by the incompatibility of the ban on life imprisonment, which was established in the constitutions of some States, with the Rome Statute of the International Criminal Court.

34. In closing, she said that the Inter-American Juridical Committee's annual report, Statute and Rules of Procedure, as well as information on the courses on international law that the Committee organized, could be consulted on the OAS website (www.oas.org).

The meeting rose at 11.50 a.m.

2848th MEETING

Friday, 3 June 2005, at 10.05 a.m.

Chairperson: Mr. Djamchid MOMTAZ

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candiotti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Yamada.

Responsibility of international organizations (concluded)* (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]

REPORT OF THE DRAFTING COMMITTEE

1. Mr. MANSFIELD (Chairperson of the Drafting Committee), introducing the titles and texts of the draft articles adopted by the Drafting Committee on 27 May 2005, as contained in document A/CN.4/L.666/Rev.1, said that the Drafting Committee had held four meetings on the topic, on 25, 26 and 27 May 2005. The Drafting Committee had considered draft articles 8 to 16 referred to it by the Commission in plenary at its present session, and had also considered and was recommending a structure for the draft articles so far adopted. He would first introduce the draft articles, before going on to explain the structure.

2. The titles and texts of the draft articles read:

PART ONE

THE INTERNATIONALLY WRONGFUL ACT OF AN INTERNATIONAL ORGANIZATION

CHAPTER I

INTRODUCTION

[Articles 1, 2 and 3¹]

* Resumed from the 2844th meeting.

¹ For the text of these draft articles and the commentaries thereto, provisionally adopted by the Commission, see *Yearbook ... 2003*, vol. II (Part Two), chap. IV, sect. C.2, para. 54.

CHAPTER II

ATTRIBUTION OF CONDUCT TO AN INTERNATIONAL ORGANIZATION

[Articles 4, 5, 6 and 7²]

CHAPTER III

BREACH OF AN INTERNATIONAL OBLIGATION

Article 8

Existence of a breach of an international obligation

1. There is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of its origin and character.

2. Paragraph 1 also applies to the breach of an obligation under international law established by a rule of the international organization.

Article 9

International obligation in force for an international organization

An act of an international organization does not constitute a breach of an international obligation unless the international organization is bound by the obligation in question at the time the act occurs.

Article 10

Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of an international organization not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

2. The breach of an international obligation by an act of an international organization having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.

3. The breach of an international obligation requiring an international organization to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

Article 11

Breach consisting of a composite act

1. The breach of an international obligation by an international organization through a series of actions and omissions defined in aggregate as wrongful, occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

² For the text of these draft articles and the commentaries thereto, provisionally adopted by the Commission, see *Yearbook ... 2004*, vol. II (Part Two), chap. V, sect. C.2, para. 72.

CHAPTER IV

RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION IN CONNECTION WITH THE ACT OF A STATE OR ANOTHER INTERNATIONAL ORGANIZATION

Article 12

Aid or assistance in the commission of an internationally wrongful act

An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if:

- (a) That organization does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) The act would be internationally wrongful if committed by that organization.

Article 13

Direction and control exercised over the commission of an internationally wrongful act

An international organization which directs and controls a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for that act if:

- (a) That organization does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) The act would be internationally wrongful if committed by that organization.

Article 14

Coercion of a State or another international organization

An international organization which coerces a State or another international organization to commit an act is internationally responsible for that act if:

- (a) The act would, but for the coercion, be an internationally wrongful act of the coerced State or international organization; and
- (b) The coercing international organization does so with knowledge of the circumstances of the act.

Article 15 [16]³*Decisions, recommendations and authorizations addressed to member States and international organizations*

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 if committed by the former organization and would circumvent an international obligation of the former organization.

2. An international organization incurs international responsibility if:

- (a) It authorizes a member State or international organization to commit an act that would be internationally wrongful if committed by the former organization and would circumvent an international obligation of the former organization, or recommends that a member State or international organization commit such an act; and
- (b) That State or international organization commits the act in question in reliance on that authorization or recommendation.

³ The square bracket refers to the corresponding article in the third report of the Special Rapporteur (A/CN.4/553).

3. Paragraphs 1 and 2 apply whether or not the act in question is internationally wrongful for the member State or international organization to which the decision, authorization or recommendation is directed.

Article 16 [15]⁴*Effect of this chapter*

This chapter is without prejudice to the international responsibility of the State or international organization which commits the act in question, or of any other State or international organization.

3. Mr. MANSFIELD (Chairperson of the Drafting Committee), introducing the report of the Drafting Committee, said that draft articles 8 to 15, as proposed by the Special Rapporteur, corresponded to draft articles 12 to 19 in chapters III and IV of the draft articles on responsibility of States for internationally wrongful acts.⁵ As noted by the Special Rapporteur, the issues involved in the breach of an international obligation on the part of an international organization and in responsibility of an international organization in connection with an act of a State or another international organization were for the most part identical to those in State responsibility and there was no reason for the Commission to take a different approach. The Special Rapporteur had identified two issues which were specific to international organizations and needed to be addressed in draft article 8, paragraph 2, and draft article 16. The plenary had agreed with the Special Rapporteur that to the extent that the issues were the same the corresponding articles on responsibility of States should be retained with only minimal changes; that approach was necessary to avoid conflicting interpretations in the future. The two exceptions which had led to a substantial debate in plenary session had been referred to a Working Group and the texts proposed by that Group for draft article 18, paragraph 2, and draft article 16 had also been discussed by the Drafting Committee.

4. Draft article 8 corresponded to draft article 12 on responsibility of States, dealing with the existence of a breach of an international obligation; in paragraph 1 the word "State" had been replaced with "international organization". The paragraph provided that there was a breach of an international obligation by an international organization when an act of that organization was not in conformity with what was required of it by that obligation, regardless of its origin and character. The paragraph had been acceptable to the plenary and the Drafting Committee had made no changes to the text.

5. Paragraph 2 had led to considerable discussions in plenary on whether such a paragraph was needed. The Working Group established by the Commission in plenary session had recommended retention of the paragraph and proposed a text for it, which had been accepted by the plenary and referred to the Drafting Committee, which had debated it extensively. Some members had reserved their position on it but the Drafting Committee had finally agreed to propose the present text for paragraph 2, which was very little changed from that recommended by the Working Group.

⁴ *Ibid.*

⁵ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 26, para. 76.

6. The difficulty identified by some members of the Drafting Committee with regard to paragraph 2 was that in their view it did not add anything to what was already said in paragraph 1 but instead created an unnecessary ambiguity about the nature of the rules of an international organization. The paragraph stated that some rules of the organization might give rise to international responsibility without providing any criteria or indications as to which rules had that potential. For other members the difficulty was in identifying the law that applied in the context of paragraph 2; for example, it was unclear whether it was the rules of the organization that gave their breach the character of an internationally wrongful act or whether it was general international law that provided that violation of certain rules of the organization was internationally wrongful. Furthermore, in their view it was uncertain which law applied in terms of determining the consequences of such an internationally wrongful act—again, whether it was general international law or the rules of the organization. Concern had also been expressed that the uncertainty in paragraph 2 could lead international organizations to themselves select which rules of the organization fell within the scope of paragraph 2, a situation which was not desirable.

7. The majority of the Drafting Committee was of the view that paragraph 2, although broadly covered by paragraph 1, added value to the latter by specifically stating that the breach of certain rules of the organization could be an internationally wrongful act. Paragraph 2 flagged an important point in the context of the responsibility of international organizations and although the matter could have been addressed in the commentary to paragraph 1, it was deemed useful to highlight it in the text of the article itself. The commentary to the draft article would explain the reasons for the inclusion of the provision and make it clear that it was not attempting to make a definitive statement about which rules of the organization were international law.

8. In terms of drafting, the Drafting Committee had agreed that the words “in principle” did not provide the clarity necessary for a normative text. It had also decided that instead of referring to an “international obligation”, as used in paragraph 1 and other draft articles, the construct “breach of obligation under international law” would be used. That was intended to highlight the point that the obligation referred to was one that arose under international law; the commentary would explain that that construct meant the same as “international obligation”.

9. The title of draft article 8 was the same as the title of draft article 12 on responsibility of States.

10. Draft articles 9 to 14 were identical to articles 13 to 18 on responsibility of States; they had not posed any problem in plenary and the Drafting Committee had recommended only minimal changes.

11. Draft article 15 corresponded to draft article 16 as proposed by the Special Rapporteur. The draft article was new and had no equivalent in the articles on responsibility of States; it dealt with incidents in which an international organization used decisions, recommendations and authorizations directed at its members to evade its own

obligations. The draft article had been extensively debated in plenary and in the Drafting Committee. The Working Group established by the Commission had introduced a revised text for the draft article which the Drafting Committee had taken as the basis for its work.

12. While draft articles 12 to 14 dealt with attribution of responsibility to an international organization for the conduct of any State or international organization, draft article 15 dealt with that responsibility in connection with the conduct of a State or international organization that was a member of the international organization in question. The difficulty with drafting that article had been the lack of empirical reference; while the possibility of such incidents theoretically existed, there were no clear examples in practice to assist in formulating the draft article. The other difficulty had been with the broad category of decisions, recommendations and authorizations, which encompassed a wide range of statements and utterances made in and by international organizations and their various organs which had different normative and authoritative values as well as different purposes. Moreover, the steps taken at the stage of compliance or implementation could be of significant relevance in the context of the draft article.

13. The Drafting Committee, following the approach taken by the Working Group, had made a distinction between “binding” decisions and “non-binding” acts. Non-binding acts included, but were not limited to, recommendations and authorizations. Such acts could be made under other titles, but it was the non-binding character of the acts and the fact that they directed the membership toward certain behaviour which counted.

14. Draft article 15, paragraph 1, was based on the text proposed by the Working Group and dealt with binding decisions of international organizations. The Working Group had suggested a text that would provide for responsibility of an international organization if the organization adopted a decision binding a member State or organization to commit an act that would be internationally wrongful for the former organization. The Drafting Committee had seen difficulties with the latter part of the paragraph, specifying that the act must be one that would have been wrongful if committed by the organization itself. In practice, international organizations adopted binding decisions to enable their membership to do certain things that they themselves could not do: for example, they might adopt a binding decision requiring a State or an international organization to investigate and prosecute war crimes or crimes against humanity, as the organization itself did not have such capacity. The purpose of the paragraph had been to address situations in which the organization used decisions that were binding on its members to circumvent an international obligation of its own. The Drafting Committee had accordingly added to the latter part of the paragraph the notion of circumvention of the obligation by the international organization. As now drafted, the paragraph referred to a binding decision to commit an act that would not only be wrongful if committed by the international organization but would also circumvent an international obligation of that organization. The commentary would further clarify the meaning of the notion of an act that

would be internationally wrongful if committed by the international organization itself.

15. Paragraph 1 of draft article 15 did not require the commission of the act in question. That was a matter that had been extensively discussed in plenary session. The Special Rapporteur's proposal had required the commission of the act as a precondition for entailing responsibility, but the Working Group's recommendation did not include that requirement, and that was the basis on which the provision had been referred to the Drafting Committee. The logic underlying that approach had been that the adoption of a binding decision of that nature should suffice to entail the responsibility of the organization. It had been considered that, in that situation, responsibility stemmed from the decision to place members in that quandary, rather than being dependent upon whether members carried out the act concerned. In addition, if the commission of the act were to be a requirement for wrongfulness, a potentially injured State or international organization might not have the opportunity to request preventive measures before the act was committed.

16. Draft article 15, paragraph 2, dealt with non-binding resolutions, which were referred to as recommendations and authorizations. Paragraph 2 was identical to paragraph 1 with one exception: the act in question must have been committed, a requirement that was contained in subparagraph (b). The logic was that the member State or international organization was not compelled to comply with the recommendation or authorization. The responsibility of the international organization therefore arose only if the member State or international organization not only committed the act but did so in reliance on that recommendation or authorization. The purpose was to signify the crucial role played by such a recommendation or authorization.

17. Some members of the Drafting Committee had been concerned that, in view of the large number of non-binding resolutions adopted by international organizations, some safeguards must be put in place to preclude the possibility that responsibility might arise for the organization where member States or international organizations abused a non-binding resolution or used it unreasonably. The paragraph was not intended to cover situations such as one in which an outdated recommendation or authorization had been relied upon for the commission of an act. Nor did it include situations in which a member State or international organization relied on a recommendation or authorization in a context in which it had not been intended to apply or when the circumstances had changed substantially since the adoption of the recommendation or authorization. Reliance on the authorization or recommendation in such situations would be unreasonable. The notions of "reasonableness" and "good faith" were both relevant in the application of that paragraph, and the commentary would elaborate on those issues.

18. During the consideration of draft article 15, paragraphs 1 and 2, questions had been raised as to whether they overlapped with draft articles 13 and 14, which dealt with direction and control and coercion in the commission of a wrongful act. The point was whether taking binding decisions or making recommendations or authorizations

could fall within the scope of any of the other articles. It had been agreed that an overlap was possible, at least with draft articles 12 and 13, whereas an overlap with draft article 14 was more uncertain, because coercion, at least in the context of State responsibility, was intended to be more factual and have the character of *force majeure*. It was unlikely that even binding decisions of an international organization would necessarily meet that high threshold. Those were matters that would have to be determined in the context of specific cases. However, the Drafting Committee had seen no particular problem with overlap between those articles and article 15, paragraphs 1 and 2.

19. Draft article 15, paragraph 3, provided further clarification with respect to paragraphs 1 and 2 and was based on the text proposed by the Special Rapporteur, with some drafting adjustments. It provided that the responsibility of the international organization in question was incurred under paragraphs 1 and 2 even if the act in question was not wrongful for the member State or organization to which the decision, recommendation or authorization was addressed.

20. Draft article 15 was entitled "Decisions, recommendations and authorizations addressed to member States and international organizations".

21. Draft article 16 had been proposed by the Special Rapporteur as draft article 15, and had been based on article 19 of the draft on responsibility of States, with slight changes. The discussions in plenary session had indicated support for the draft article, with some questions as to whether its application should be limited to draft articles 12 to 14, as the Special Rapporteur had proposed in his third report (A/CN.4/553), given that paragraph 3 of the Special Rapporteur's draft article 16 had contained a specific "without prejudice" clause that also covered responsibility. The Drafting Committee had preferred draft article 16 to take the form of a general "without prejudice" clause. According to the text, the responsibility of the State or international organization that had committed the wrongful act with aid and assistance, under direction and control or subject to coercion of the international organization remained intact, whether the responsibility arose under the provisions of the draft articles or under any other rule of international law. The draft article did not affect the responsibility of any other State or international organization.

22. The difference between article 19 of the draft on responsibility of States and draft article 16 was the scope of the "without prejudice" clause. In article 19, international responsibility was preserved with regard to any other provisions of the articles on State responsibility. In the present draft article, the "without prejudice" clause was more general, preserving the international responsibility that might be established not only in accordance with the draft articles but also under any other rule of international law. It had been necessary to use broad language because the provisions on State responsibility were also relevant to the attribution of responsibility to a State.

23. The draft article was now placed after draft article 15 and the opening clause had been replaced with

the words “This chapter is without prejudice ...”. That change had been made because the Drafting Committee had agreed that the draft article was relevant not only to draft articles 12 to 14 but also to draft article 15, all of which were now placed in a single chapter. The title of the draft article had also been changed and was now identical to that of draft article 19 on responsibility of States.

24. Having introduced draft articles 8 to 16, he drew members’ attention to the structure that the Drafting Committee proposed for the articles so far adopted by the Commission. Some members had suggested in plenary session that it would be helpful to divide the draft articles into parts and chapters. That had also been the view of the Drafting Committee, which therefore proposed that draft articles 1 to 16 be divided into four chapters. There again, it had followed the structure of the articles on responsibility of States to the extent that that was relevant to the draft articles on responsibility of international organizations. Draft articles 1 to 16 belonged to what had been referred to as Part One in the articles on responsibility of States, defining the general conditions necessary for responsibility to arise. The title for Part One for the draft on responsibility of international organizations was the same as that for responsibility of States, with one necessary adaptation, namely, replacing the words “a State” with “an international organization”.

25. Chapter I comprised draft articles 1 to 3. Chapter I of the draft on responsibility of States had been entitled “General principles”. In the context of the current topic, those rules were set forth in draft article 3. Draft articles 1 and 2 dealt not with general principles but with the scope and use of terms. For that reason, the Drafting Committee had decided to entitle Chapter I “Introduction”.

26. Chapter II comprised draft articles 4 to 7. As in the draft on responsibility of States, they defined the conditions under which conduct was attributable. The Drafting Committee therefore recommended retaining the same title as in those articles, with one necessary adjustment to the title of chapter II, which read “Attribution of conduct to an international organization”.

27. Chapter III comprised draft articles 8 to 11 and, again as in the case of responsibility of States, spelled out in general terms the conditions under which a conduct amounted to a breach of an international obligation. The Drafting Committee had therefore retained the same title, which read “Breach of an international obligation”.

28. Chapter IV comprised draft articles 12 to 16 and dealt, as in the case of responsibility of States, with certain exceptional cases where an international organization might be responsible for the conduct of a State or another

international organization. The title of the chapter was the same as in the case of responsibility of States, with appropriate adjustment, and read “Responsibility of an international organization in connection with the act of a State or another international organization”.

29. The CHAIRPERSON invited the Commission to adopt the titles and texts of draft articles 8 to 16 submitted by the Drafting Committee.

The titles and texts of draft articles 8 to 16 were adopted.

30. The CHAIRPERSON said that if he heard no objection, he would take it that the Commission wished to adopt the report of the Drafting Committee on responsibility of international organizations as a whole, together with the chapter structure proposed by the Drafting Committee for draft articles 1 to 16 of Part One.

It was so decided.

Organization of work of the session (continued)*

[Agenda item 1]

31. The CHAIRPERSON announced that the Commission had received an invitation from the Secretary-General of the Asian–African Legal Consultative Organization to be represented at its forty-fourth session, to be held in Nairobi from 27 June to 1 July 2005. He was willing to represent the Commission on that occasion.

It was so agreed.

32. The CHAIRPERSON announced that the Commission had received an invitation from the Director of the Secretariat of the Assembly of States Parties to the Rome Statute of the International Criminal Court to be represented at the Assembly’s fourth session, to be held at The Hague from 28 November to 3 December 2005. Mr. Dugard had expressed his willingness to represent the Commission on that occasion.

It was so agreed.

33. The CHAIRPERSON announced that the Commission had concluded the first part of its fifty-seventh session.

The meeting rose at 10.50 a.m.

* Resumed from the 2844th meeting.