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Summary record of the 2893rd meeting

Topic:
Responsibility of international organizations

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that it was unacceptable for a State to use an international organization as a device for circumventing its own international obligations.

41. The issue covered by draft article 29 undeniably gave rise to controversy, but it seemed inevitably to lead to the conclusion that States were usually not responsible for the wrongful acts of an international organization of which they were members. Otherwise the established principle according to which an international organization had a legal personality separate from that of its members would not be respected, and that in turn would have serious consequences for the organization's management and decision-making and, above all, for its capacity to account for its actions in a transparent manner, which was essential. At the same time, there were obviously circumstances in which the State should be held responsible: the circumstances covered by subparagraphs (a) and (b). Draft article 29 was very clear in setting out the main points raised, which were largely in keeping with practice. He therefore recommended that draft article 29 should be forwarded to the Drafting Committee.

The meeting rose at 12.30 p.m.

2893rd MEETING

Thursday, 13 July 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candiotti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Operti Badan, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.

Responsibility of international organizations (continued) (A/CN.4/560, sect. C, A/CN.4/564 and Add.1–2, A/CN.4/568 and Add.1, A/CN.4/L.687 and Add.1 and Corr.1)

[Agenda item 4]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. KOSKENNIEMI thanked the Special Rapporteur for his carefully nuanced but clear analysis of the key problems posed by the relationship between international organizations and their member States. Draft articles 25 to 29 raised the question of the image of international organizations on the world stage, and the earlier exchange of views between Mr. Brownlie and Mr. Pellet had illustrated how widely perceptions could differ. Mr. Brownlie had conjured up an image of international organizations as transparent bodies, and had denied the existence of any analogy with domestic limited liability companies. On that view, States that were in a powerful position *vis-à-vis*

the international organizations of which they were members would be unable to shelter themselves behind a corporate veil. Mr. Pellet had taken the contrasting view that attempts had been made over a number of decades to develop a law of international organizations that would enable States to combine forces in organizations possessing a separate legal personality, and that that law would give those organizations the status of legal subjects and allow them to assume obligations and the concomitant responsibility. Which of those images of international organizations the Commission chose to retain would determine its attitude towards draft articles 25 to 29.

2. Draft articles 25 to 28 formed a continuum. When a State aided or assisted, directed and controlled or coerced an international organization, or when it tried to use that organization as a facade in order to achieve its own ends and, in so doing, violated its obligations, that matched the image suggested by Mr. Brownlie, in that the main actors were States which were manipulating the organization in some way. In that case, notwithstanding the fact that, formally speaking, the means and procedures of an international organization had been brought into play, responsibility should be attributed to the States in question and not to the organization. Although he agreed with that view, he felt that, in paragraphs 62 and 67 of the report, inordinate stress had been placed on the assumption that it was relatively easy to differentiate between a situation in which a State participated in the normal decision-making process in good faith as a member of the organization in accordance with the latter's rules, and other cases in which a State directed and controlled or coerced the organization. In point of fact, however, it was hard to draw such a distinction, for while a State might pretend to be acting in good faith as a member of the organization and to be following its rules of procedure, it might be obvious to any outside observer that the State concerned was actually directing and controlling or coercing the organization.

3. The Commission was therefore faced with a pair of contrasting concepts: those put forward by the Special Rapporteur in draft articles 25 to 28, which described conduct for which member States, rather than the organization, should incur responsibility and, on the other hand, the situation in which a State acted in good faith as a member of an organization in accordance with its decision-making process. Yet very often a State suspected of having directed and controlled or coerced the organization would deny that it had done so and plead that it had merely followed the rules of procedure. There was no general rule for determining which of the two situations really obtained. Nevertheless he would have liked to see the Special Rapporteur examine more closely the criteria for assessing when a State was no longer acting in good faith as a member of an organization and was instead using its exceptional position of strength and bending the rules of procedure so as to direct, control or coerce the organization.

4. He had no specific objection to draft article 29. Draft articles 25 to 28 corresponded to Mr. Brownlie's realistic conception of a world where States actually controlled international organizations, whereas draft article 29 mirrored Mr. Pellet's image of an international organization capable of independent action, which could

be regarded in the same light as a domestic limited liability corporation. From the latter perspective, member States' responsibility was necessarily deemed to be strictly limited. He applauded the way in which the Special Rapporteur had been able to spell out exceptions to such responsibility, in cases where a member State accepted responsibility for the action of the organization or where a third State had relied on the member State doing so. On the other hand, the arguments advanced by Mr. Sreenivasa Rao and Ms. Escarameia had been persuasive, and some of the considerations underlying draft articles 25 to 28, which led to responsibility being attributed to States, might also apply to draft article 29. Situations might arise in which the disparities between member States' powers were so great as to make it inequitable to hold all member States responsible for an outcome which was the product of a single powerful State's efforts.

5. Although it was very difficult to formulate wording to cover the aforementioned situations, he had endeavoured to draw up a subparagraph (c) to draft article 29, which would enable member States to escape responsibility if they had expressly objected to the conduct that led to the wrongful act. That wording would exempt member States which were powerless within the organization from responsibility for wrongful action pushed through by the dominant members. While he was not entirely happy with the wording he had suggested, something along those lines would nevertheless address the concerns expressed by Mr. Sreenivasa Rao.

6. He doubted whether the Commission would ever be able to draw a clear distinction between what constituted action in good faith by a member State within the confines of the international organization and situations in which a State was acting on its own account under the cloak of the independent personality of the organization.

7. Ms. XUE said that the fourth report on responsibility of international organizations constituted a succinct analysis of a complex topic regarding which established State practice was relatively scarce. It would have been hard not to accept in principle the draft articles 25 to 29 presented in the fourth report and to reject the analogy the Special Rapporteur had drawn, in respect of the rules governing aid or assistance, direction and control or coercion by a State, between the responsibility of States for internationally wrongful acts and the responsibility of international organizations for such acts. She agreed with the Special Rapporteur's assertion in paragraph 58 of his report that it would be difficult to assume that different rules should apply when, for instance, on the one hand, a State assisted another State in the commission of an internationally wrongful act, and, on the other, a State assisted an international organization in doing the same. However, she had some questions relating to the commentaries and policy analyses underlying the draft articles.

8. She questioned the proposition in paragraph 62 of the report that when a State exercised influence which might amount to aid or assistance, direction and control, or coercion, it had to do so as a legal entity that was separate from the organization. In theory, it seemed logical to have a section on aid or assistance, direction

and control or coercion by a State corresponding to the provisions on that subject contained in the draft articles on responsibility of States for internationally wrongful acts,²²⁸ since a State could bring similar influence to bear on an international organization. Some members had held that the participation of a member State in the activities of the international organization, especially in the decision-making process, should not lead to it being singled out irrespective of its voting position and that the action of an international organization should be deemed to be that of the organization as a whole. That might well be true: States should not incur responsibility merely by virtue of their membership of the organization.

9. The criterion of separate legal entity was, however, rather weak and hard to apply in practice, particularly given the terms of draft article 15 in chapter IV. In fact, unless the rules and practice of the international organization were clear on that point, the dividing line between an act of an international organization and an act of a member State often tended to be blurred. When commenting on draft article 15 in the Sixth Committee, the Chinese delegation had pointed out that, to the extent that the decisions and actions of an international organization were under the control or reliant on the support of member States, member States that played an active role in the commission of an internationally wrongful act by an international organization should incur corresponding international responsibility.²²⁹ While that might be true from a policy perspective, it would not be wise to take account of the voting position of each member State, as to do so would discourage members from participating in the decision-making process. Moreover, decisions were often based on political rather than legal considerations.

10. The report did not offer a criterion for determining the issue of separate entity. Suppose, for example, that some Member States of the United Nations were to push through a decision by the Security Council to conduct air operations in part of a country in order to enhance regional security, despite strong opposition from other Member States on the grounds that such operations would not have the desired effect. If, as a result of those operations, the civilian population and hospitals outside the target areas were accidentally bombed, would draft article 15, draft articles 25 and 26, or draft article 29 apply?

11. If draft article 15 applied, it could be argued that, even if the decision was binding on Member States, it did not authorize them to bomb areas outside the target zone or civilians since, although the terms of the decision were very general, the United Nations would clearly never have intended to circumvent its obligations under international humanitarian law. (The issues of excess of authority and contravention of instructions dealt with in draft article 6 should be left aside for the sake of the argument).

12. If it were maintained that draft article 25 or 26 applied, was it possible to say with certainty that Member States were acting in a legal capacity separate to that of the United Nations? In that connection, she cited an

²²⁸ *Ibid.*

²²⁹ *Official Records of the General Assembly, Sixtieth Session, Sixth Committee, 11th meeting (A/C.6/60/SR.11), pp. 9–10, paras. 51–52.*

article by Mr. Brownlie on the responsibility of States for the acts of international organizations, in which he had stated that “[i]n approaching the question of the incidence of the responsibility of member States in relation to third States, the existence or not of separate legal personality would appear to be inconclusive or, on another view, irrelevant”.²³⁰ The military operations might be under the direct control of the Member States, but they had been authorized by a decision of the United Nations Security Council. Was it really possible to draw a distinction between those two situations on the grounds that Member States and the Organization had separate legal personalities?

13. It could further be argued that the intention of the Member States which had carried out the operation was so clear to the injured parties that they were certainly led to believe that those States should be held responsible for the action. Therefore, under draft article 29, those Member States should be held responsible for the injuries caused. If those arguments could be upheld, they would help to solve practical issues. What remained unresolved was the question of how to apply those rules in different situations. The Drafting Committee should examine those considerations in detail and come up with more specific language.

14. Her second difficulty lay with the proposition that a State might not circumvent its responsibility by transferring certain functions to an international organization. She remained unconvinced by the arguments set out in paragraphs 64 to 74 of the report. It was right to assume that an international organization might incur international responsibility on account of the action it required its members to take. It was also true that some acts of a member State, if carried out on behalf of an international organization, would not entail that State’s international responsibility, the typical example being the use of force, but in practice it would be hard, if not impossible, to prove that the transfer had been precisely designed to avoid the member State’s responsibility.

15. Generally speaking, a transfer of functions could result in two types of situation. First, if the relevant treaty obligations became part of the general rules of the organization, they would bind not only the latter, but also all its members. In that case, the member States would be bound by the treaty provisions and by the rules of the organization, but the provisions and rules would nevertheless remain separate, and no transfer would necessarily occur.

16. Second, if treaty obligations did not become part of the organization’s rules, the treaty would operate as it stood and States would remain bound by their treaty obligations regardless of their membership in the organization. In those circumstances, it would be hard to claim that a transfer of obligations had taken place. The three European cases mentioned in paragraphs 69 to 71 of the report largely reflected the integration process of the European Community, where certain governmental

functions operated on two levels, and they did not therefore necessarily represent the normal practice of international organizations. In fact they tended merely to confirm that treaty obligations and the obligations of international organizations were two quite separate matters. The term “transfer of functions” was relevant to the situation in the European Community, but misleading when applied generally to the responsibility of international organizations. Draft article 28 should therefore be revised to address the case in which a State breached its international obligations under a treaty through an act carried out under the rules of the international organization of which it was a member. As the Special Rapporteur had explained in paragraph 73 of his report, “no ‘specific intention of circumventing’ was required” and so no subjective element needed to be included.

17. The examples of the *Westland Helicopters Ltd. v. Arab Organization for Industrialization* case and the cases involving the International Tin Council both related to economic issues of liability rather than responsibility. The particular facts of each case had been crucial for the determination of liability. The passage cited in the letter of the Government of Canada concerning its claim for injuries caused by a helicopter crash was a standard clause for the final settlement of liability claims; it was a saving clause designed to rule out the possibility of any future claims in domestic or international courts and did not necessarily mean that all the parties mentioned might be responsible under international law. The German claim to which reference was made in paragraph 84 was not determinative; on the contrary, the United States had answered for its action in bombing the Chinese embassy in the Federal Republic of Yugoslavia, even though the action had been undertaken in the name of NATO.

18. She trusted that those policy considerations would be taken up by the Drafting Committee.

19. Mr. MOMTAZ, responding to Ms. Xue’s comments regarding the use of force by the member States of an international organization, said that a distinction must be drawn between cases in which military operations were conducted after authorization had been given by the international organization, and those in which the use of force was based on a binding decision of the international organization. To date, every instance of the use of force by Member States of the United Nations had been authorized by the Security Council; in other words, Member States had been free to use force in response to the relevant resolution containing the authorization. In those circumstances, if a breach of international law or international humanitarian law occurred, the full responsibility would lie with the State which, on the basis of the authorization, had used force. That had been the practice followed in the first Gulf War between Iraq and the United States, when violations of international law following inspections of vessels had been attributed to States that had resorted to force on the basis of the aforementioned authorization.

20. On the other hand, if the use of force was based on a binding decision of the Security Council under Chapter VII of the Charter and if there was then a breach of international humanitarian law or international law,

²³⁰ I. Brownlie, “The responsibility of States for the acts of international organizations”, in M. Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter*, Leiden/Boston, Martinus Nijhoff, 2005, p. 357.

responsibility lay with the Organization itself because it had taken a decision with which the Member States were obliged to comply.

21. Ms. XUE said that while she fully agreed with the distinction Mr. Momtaz had drawn between the two types of case involving the use of force, the question was which draft article should apply. Almost all types of situation could be covered by the draft articles if taken in combination. She was, however, uncertain what criteria should be employed to determine when a member State and the international organization were separate legal entities. It was necessary to identify those criteria in order to know which article should apply. She had noted that Mr. Momtaz had differentiated between the use of force based on a binding decision and that resting on an authorization, but that was precisely the difficulty that arose in connection with draft article 15.

22. Mr. GAJA (Special Rapporteur) said that some of the problems raised by Ms. Xue and Mr. Momtaz related to attribution. The question was whether action taken on the basis of a decision or authorization was attributable to the State or to the international organization. He would endorse unhesitatingly Mr. Momtaz's assessment of the importance of that distinction. In the case of authorization, it was a State that acted, the only problem being to decide whether the international organization could also incur responsibility. The question was addressed in draft article 15, which the Commission had considered at its previous session.

23. One of the difficulties was that the Commission was not considering a particular situation in which authorization had been given or a decision made, but rather, how to attribute responsibility to an international organization. Attribution to States had already been analysed in connection with State responsibility. That was where he and Mr. Pellet disagreed, since Mr. Pellet tended to shift towards international organizations what should in fact be attributed to States, or to States and international organizations together.

24. The CHAIRPERSON, speaking as a member of the Commission, noted a distinction between, on the one hand, the practice of international cooperation organizations, whose functions were determined by their constituent acts, so that member States' sovereignty was preserved, and, on the other, that of international integration organizations, whose member States seemed readier to transfer some of their functions to the organization. The differing practice of the European Court of Human Rights and the European Community illustrated that distinction and the differing consequences with respect to the responsibility of member States. The Special Rapporteur should explore the option, referred to in paragraph 72 of the report, of drafting an article addressing the avoidance of compliance with international obligations, taking into account the functional distinction between international cooperation organizations and international integration organizations.

25. Mr. GAJA (Special Rapporteur) said that paragraph 69 concerned not the European Community but the European Space Agency, which was a typical example

of organizations to which States attributed functions. Perhaps the phrase "transfer of functions" was not entirely accurate and its wording might be improved, either in plenary or in the Drafting Committee. *Waite and Kennedy v. Germany* was the key case, and existing practice was not confined to the European Community.

26. Mr. KOLODKIN, referring to the examples discussed by Ms. Xue and Mr. Momtaz, said that to draw a distinction between a decision and an authorization was useful but did not always help to resolve the question of responsibility. Both could be of a very general nature, and the problem was how to interpret them. A decision could be lawful, while the means of implementing it might be wrongful. Hence the need to determine what was wrongful: the decision or authorization, the manner of their implementation, or both. The question of attribution must also be addressed. Only then could the situation with regard to responsibility be determined.

27. Mr. FOMBA congratulated the Special Rapporteur on the part of his fourth report on responsibility of a State in connection with the act of an international organization. The general remarks on the scope of the study and the methodology to be used (paras. 53–56) were on the whole acceptable. In paragraph 57 of the report, the Special Rapporteur rightly raised the questions whether the draft articles should also cover entities other than States or international organizations, and if so, how. However, his reasoning was, if not contradictory, at any rate learnedly subtle, and in the end, the fate to be reserved for entities other than States or international organizations was not specified. Yet if the responsibility of such entities was not to be regarded simply as a theoretical construct, mention should be made of it somewhere in the draft.

28. On paragraphs 58 to 63, he endorsed the argument developed in paragraph 58, namely, that the same rules should apply when a State assisted an international organization in the commission of an internationally wrongful act as applied when it assisted another State in the commission of such an act. The same should be true in the case of coercion by a State of an international organization. He therefore endorsed the Special Rapporteur's conclusion, in paragraph 63, that the present draft articles should closely follow the text of articles 16 to 18 of the draft articles on State responsibility.²³¹ Accordingly, proposed draft articles 25 to 27 posed no problems.

29. Paragraphs 64 to 74 of the report dealt with the questions of whether and to what extent a State could incur international responsibility for requiring an international organization to act in its stead in order to avoid compliance with one of its international obligations. Clearly, the functional and dialectic link between the legal personality of an international organization and that of its member States was the crux of the matter. While it was by no means easy to grasp the functioning of that complex relationship, the Special Rapporteur had exhaustively analysed the views expressed by States in the Sixth Committee, together with the literature and international case law. The conclusions drawn by the Special Rapporteur in paragraphs 64 to 72

²³¹ See footnote 8 above.

of the report were coherent and apposite. In paragraph 73, acknowledging that the use of the verb “circumvent” in draft article 15 had been criticized, the Special Rapporteur suggested that it would be preferable to use a different wording. He himself did not think that was necessary, since the meaning was sufficiently clear.

30. The wording of the proposed draft article 28 raised no real difficulties, and its paragraph 2 added an important qualification. Mr. Pellet had rightly drawn attention to the fact that intention was at the heart of the debate and was not always manifest in the behaviour of States. He himself had no firm views on that point, although he was of the opinion that the scope of the text should be extended to cover international organizations that were members of other international organizations.

31. Turning to paragraphs 75 to 88 of the report, he welcomed the review of international and national case law, reactions of States in the Sixth Committee and positions taken by international organizations and the literature. In general, he agreed with the Special Rapporteur’s conclusions. In paragraph 87, for example, he indicated that it would be difficult to suggest a conclusion for resolving the question of responsibility of member States owing to the variety of treaty provisions envisaging, limiting or ruling out such responsibility. On the basis of his analysis of the literature, the Special Rapporteur indicated in paragraph 88 that member States of an international organization could incur responsibility in exceptional cases. Accordingly, the Special Rapporteur was right to emphasize the position taken by the Institute of International Law in its resolution II/1995 adopted at Lisbon.²³² Interesting ideas were set out in articles 5 (b) and 6 (a) of that resolution, reproduced in paragraph 89 of the report.

32. He agreed with the conclusions set out in paragraph 94 that had led the Special Rapporteur to propose draft article 29, a provision which nevertheless raised a number of important questions. It envisaged two exceptions, but others should perhaps also be included. Was it to be seen as an illustration of abuse of rights? What sort of responsibility was to be incurred by the State: subsidiary, or joint and several? Mr. Pellet had made some stimulating remarks on that subject which must certainly be taken into account. Lastly, referring to paragraph 95, he said it might be advisable to include a reference to the responsibility of an international organization that was a member of another international organization.

33. In conclusion, he said he was in favour of referring draft articles 25 to 29 to the Drafting Committee.

34. Mr. MOMTAZ said that, in paragraphs 53 to 96 of his fourth report, the Special Rapporteur touched on some highly topical issues faced by international organizations. As the debate so far had shown, there were no easy solutions and controversy persisted. The solutions favoured by the Special Rapporteur, which he himself endorsed, were fully in accord with the practice of international organizations. That practice was generally concordant with the theory that international organizations

were subjects of international law and, like all such subjects, endowed with their own legal personality, independent of that of their members. Accordingly, they had rights and corresponding obligations *vis-à-vis* other subjects of international law.

35. The general remarks contained in paragraphs 53 to 57 of the report, on attribution of a wrongful act to an international organization, prompted him to wonder whether criteria for the attribution of a wrongful act of an international organization to one of its officials might also be considered. The question arose in the context of draft article 29, pursuant to which an international organization could be absolved of responsibility insofar as the wrongful act was attributed to an agent or official of the organization, in other words insofar as it was based on the personal fault of that individual.

36. A second question was raised by paragraph 57 of the report, which stated that the current draft could not deal also with the question of responsibility of entities other than States or international organizations. As Mr. Fomba had noted, that was not merely a theoretical construct, and while he agreed entirely with the affirmation, the question remained whether the responsibility of an international organization might be engaged in respect of a non-State entity such as a national liberation movement. Certainly, such entities had no international legal personality and, accordingly, could not take any action on the international plane against an international organization. Nevertheless, the question was worthy of consideration, especially as a certain—albeit limited—number of treaties conferred rights on non-State entities, so that if an international organization with obligations towards such entities failed to fulfil those obligations, then there would be a breach of international law, the victim of which would be the non-State entity.

37. He endorsed the suggestion in paragraph 55 of the report that questions concerning State responsibility in connection with the act of an international organization should be dealt with in a new chapter to be placed in Part One of the draft articles.

38. He was grateful to the Special Rapporteur for having devoted several draft provisions to the fundamental question discussed in paragraphs 58 to 63, namely, aid or assistance, direction and control, and coercion by a State in the commission of an internationally wrongful act of an international organization. As the experience of recent years had shown, that was a very topical subject. Unfortunately, there had been many cases in which an international or regional organization had been manipulated by a member State with a dominant position in the organization which used that position to prevail upon the organization to commit an internationally wrongful act. The draft articles proposed by the Special Rapporteur were modelled on the corresponding provisions in the draft articles on responsibility of States.²³³ He wondered, however, why it should be necessary for such cases to be confined to States alone. As rightly pointed out at the previous meeting, an international organization that was a member of

²³² See footnote 216 above.

²³³ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 27, draft articles 16–19.

an international organization could very well find itself in a dominant position and prevail upon that organization to commit a wrongful act. With that proviso, however, it should be possible to refer draft articles 25 to 27 to the Drafting Committee.

39. Turning to the section on use by a State that is a member of an international organization of the separate personality of that organization, he said he could readily support draft article 28, with the drafting changes to which reference had been made at the previous meeting. The same held for the arguments in support of that provision which the Special Rapporteur provided in paragraphs 64 to 74. However, he wondered whether draft article 28 covered all the possible cases that might arise.

40. Draft article 28, paragraph 1 (a), concerned cases in which a State avoided compliance with or refused to comply with an international obligation relating to certain functions by transferring them to an international organization. Such a case involved a choice on the part of the State concerned, which remained free to comply with those obligations if the international organization to which it had transferred its obligations failed to meet them. He had in mind the case in which a member State was no longer able to comply with its international obligations because it had definitively delegated their implementation to an international organization; an example was the obligations which the States parties to the United Nations Convention on the Law of the Sea had contracted with regard to landlocked States in connection with the exploitation of the biological resources of their exclusive economic zone. As was well known, the member States of the European Union had transferred the rights and obligations in the exclusive economic zone conferred on them by that Convention to the European Union, which was a classic example of an integration organization. If the European Union refused to comply with the rights and obligations which the landlocked States had in the exclusive economic zone by virtue of the Convention, the question arose whether the responsibility of the European Union could be engaged, given that the member States of the European Union would no longer have any way of implementing their obligations under the Convention.

41. The question of the responsibility of members of an international organization when that organization was responsible was treated with great sensitivity in paragraphs 75 to 96 and did not pose any problems. The Special Rapporteur, drawing on the general theory of international organizations, had rightly dismissed all the arguments adduced and solutions proposed by a number of States in the Sixth Committee (para. 85). The Commission should confine itself to the two exceptions contained in draft article 29, subparagraphs (a) and (b). Needless to say, the provision covered not only member States but also non-member States of an international organization. It would be useful to make that point in the commentary. It should also be specified that the provision concerned only those injurious acts of international organizations which resulted from non-compliance with international law.

42. Needless to say, that provision of draft article 29 did not cover damage resulting, for example, from inspections

of nuclear facilities or chemical plants conducted by the International Atomic Energy Agency or the Organization for the Prohibition of Chemical Weapons, unless the damage resulted from a breach of international law. Such damage could be very considerable and have extremely serious consequences.

43. Ms. XUE said that Mr. Momtaz had given an excellent example. She also noted that the Special Rapporteur had referred to several cases based on the practice of European countries. From the standpoint of practice, one problem which often arose for third States concerned the extent to which member States of the European Union that had transferred their competence or functions to the organization could still be held responsible for their own actions. The matter was clear-cut in theory, but complicated in practice. Mr. Momtaz had noted the transfer by member States to the European Union of their rights and obligations in the exclusive economic zone conferred on them by the United Nations Convention on the Law of the Sea. Thus, European Union rules and directives now regulated port operations in the member States. In practice, however, each member State implemented those rules and directives in its own manner. Take the example of customs controls: at the port of one member State, goods which did not meet European Union criteria might be held back, at the port of another they might be returned to the country of origin, and at the port of a third they might be destroyed! When asked for clarification, officials always replied that they were acting in compliance with European Union law. Thus, identical situations could lead to different action, which meant that the consequences were also different. Thus, the factual circumstances of implementation often played an important role in determining responsibility.

44. Her second point had to do with the rule of attribution. An official of a member State was clearly its representative, and the same applied, *mutatis mutandis*, to an official of an international organization. Accordingly, their actions were attributed to the member State or international organization that they represented. In practice, however, despite the attribution rule, there could be a case where neither the member State nor the organization would be held responsible for the action taken. That was the deficient aspect of the rule of attribution under State responsibility when applied to international organizations.

45. Thirdly, it could be argued that the act concerned had been *ultra vires* and that the party had acted without authorization. It was difficult to say whether that was so, either because the directives or instructions were not clear, or because the party had been given considerable leeway. Thus it was not easy to decide who should be held responsible.

46. Mr. CHEE cited the proceedings of the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, in which he had participated in 1994, as a further example of the type of situation to which Ms. Xue had alluded.

47. Mr. MOMTAZ said he was in full agreement with Ms. Xue. However, the example he had given was very specific and concerned the obligations which the member

States of the European Union had contracted by ratifying the United Nations Convention on the Law of the Sea, with regard to the exclusive economic zone. As was well known, the member States had waived the right to establish national exclusive economic zones and had transferred their rights and obligations in that regard to the European Union. The case to which he had referred concerned the obligations contracted *vis-à-vis* third States, and he had cited the example of landlocked States. It was incumbent upon the European Union to comply with those States' obligations. If it did not, he did not see how member States could comply with them, given that they had no exclusive economic zone or any attributions in that regard. In that particular case it could be claimed that the European Union was responsible if it failed to comply with the obligations which its member States had contracted under the United Nations Convention on the Law of the Sea. However, the question of the management of port activities was not so clear-cut.

48. Mr. GAJA (Special Rapporteur), said that the example given was dealt with in Annex IX to the United Nations Convention on the Law of the Sea, which made it clear that an international organization had obligations to the extent that it had competence in accordance with the declarations made to that effect (art. 2). The European Union had made such a declaration, and thus there was no doubt that it had the corresponding obligations. He was not sure that it could be asserted that there was no national exclusive economic zone, even though some of its functions had been transferred to the European Union. Mr. Momtaz had no doubt raised that particular example because he felt that, having transferred those functions to the European Union, member States no longer had any scope for action. Although the wording was perhaps not sufficiently clear, draft article 28 was intended to cover such a case.

49. The CHAIRPERSON, speaking as a member of the Commission, said that the renunciation by the member States of the European Union of the competence which coastal States had with respect to the exclusive economic zone and the transfer of that competence to the European Union could be seen as indicating the emergence of a common European Union policy for all member States. If that were so, in the event of non-compliance, it would be the European Union that was responsible, since the exclusive economic zone fell within the competence of that body's common policy.

50. Mr. BROWNLIE commended the part of the report on responsibility of a State in connection with the act of an international organization and the careful discussion of the doctrinal and other research materials contained therein. He had no special difficulties with draft articles 25 to 28, apart from a few drafting questions. His main concern was with draft article 29, which retained the general principle that an international organization did not have responsibility *vis-à-vis* third States.

51. In the first place, there was a contradiction between draft article 29 and the other draft articles, which the words "Except as provided in the preceding articles" did not dispel. The preceding articles showed that the principle retained in draft article 29 was flawed. Nor did

he think that draft article 29 reflected the content of the sections preceding it, and of paragraph 72 in particular. Moreover, the discussion of the relation between draft article 29 and existing international law was inadequate. That was a major problem with this last section. It was not as though there was no general international law: the Commission had completed the draft articles on responsibility of States for internationally wrongful acts, and even if that had not been the case, most of the principles drafted reflected pre-existing, generally accepted principles of international law. He did not subscribe to the view that a multilateral treaty could be adopted which presented an international legal person to the world and by so doing could completely circumvent the principle that international agreements could not affect third States. Surely it could not be denied that the creation of serious risks for third States, affected those States, because it was assumed that the multilateral treaty, namely the organization's constituent instrument, did not cover the risks which its activities might entail for third States, and no remedies might be available. That aspect of the subject should have been considered at greater length.

52. At the previous meeting, one member had asserted that if a legal personality was created which was recognized in international law, it created a principle of immunity. He personally did not understand that line of reasoning, and when he had raised the difficulty, his objection had not been dealt with by that member, nor had it been addressed by Mr. Fomba or other speakers at the present meeting who agreed with Mr. Pellet's general position.

53. The work of the Institute of International Law had been taken into account, but he had problems with the balance of opinion as set out in the sections being discussed. The fact of the matter was that the content of the Institute's II/1995 resolution was very contradictory, and that much of it involved accepting that there might be responsibility towards third States. He was aware that the general position of the Institute was conservative and that it had adopted the principle of no responsibility. Some of its members had represented NATO in a famous case (*Legality of Use of Force*), just as he had represented the Federal Republic of Yugoslavia. Thus there were vested political and other interests concerning that apparently doctrinal question. The doctrine on the question was summarized in paragraph 88 of the report, and it was very divided. There was no equivalent to Article 38 of the Statute of the ICJ, there was no consensus, and no attempt was made to relate the materials which were marshalled to the criteria for the formation or removal of principles of general international law. The practice, which was summarized in paragraph 90, was very messy, and it did not represent a consensus. It was not at all clear that the bodies cited in paragraph 90 and the preceding paragraphs had been applying public international law. In some instances they had been doing so, but the practice did not represent the sort of consensus that should divert the Commission from taking its own view on matters of principle and policy. The Commission was, after all, allowed to engage in the progressive development of the subjects it had chosen to deal with.

54. The structure of draft article 29 was very odd. It began with the phrase “Except as provided in the preceding articles of this chapter”, in other words, except as provided in most of the report. It then set out two exceptions in subparagraphs (a) and (b), but those exceptions would have existed even if draft article 29 had never been formulated, and were principles that could be derived from existing general international law. Even if draft article 29 was retained because most members seemed to favour it, it would be greatly improved if the words “as such” were inserted after “a State that is a member of an international organization is not responsible”. The exceptions in draft article 29 were not genuine exceptions, and the principle which draft article 29 somewhat gratuitously incorporated was not justified by existing practice.

55. In his opinion, draft article 29 did not add very much and should be treated as redundant. Its elimination would not do any damage to the rest of the report, which on the whole was very good.

56. He conceded that one element of his own position was weak and had not been properly thought through: he insisted that there could not be a rule whereby international organizations had no responsibility *vis-à-vis* third States, and he was reluctant to accept a generalization which embodied such a principle. His position was that, with or without draft article 29, existing principles of State responsibility could be applied in certain situations to identify a residual responsibility of member States of an international organization whose activities created clear risks and damage to non-member States and which had not made any arrangements of their own for the recognition of such responsibility or provided for any remedies if such damage should occur. However—and that was the weakness of his position—no readily identifiable principle existed for establishing attribution in those difficult factual situations. Nevertheless, he did not think that a case had been made for setting forth a flawed and unnecessary generalization in draft article 29.

57. The CHAIRPERSON reiterated his appeal to Mr. Brownlie to consult with the Special Rapporteur with a view to addressing the question he had just raised, in his own view rightly so, on a matter that had perhaps not been well rendered in draft article 29.

The meeting rose at 11.50 a.m.

2894th MEETING

Friday, 14 July 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candiotti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Opertti Badan, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.

Responsibility of international organizations (continued) (A/CN.4/560, sect. C, A/CN.4/564 and Add.1–2, A/CN.4/568 and Add.1, A/CN.4/L.687 and Add.1 and Corr.1)

[Agenda item 4]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. NIEHAUS commended the Special Rapporteur for his thorough analysis of a complex and timely topic of growing importance. Indeed, in order to serve their own interests, some States, particularly the most powerful ones, were increasingly seeking to manipulate international organizations to get them to commit internationally wrongful acts, and a legal response to that phenomenon was called for.

2. Turning first to paragraphs 53 to 74 of the Special Rapporteur’s fourth report, he made the general observation that it had its basis in the principle of international law that held that international organizations had their own legal personality, which gave them rights but also imposed obligations that, if violated, could incur their international responsibility. It was therefore entirely logical for him to have aligned the draft articles on responsibility of international organizations against the draft articles governing State responsibility. He endorsed the general remarks contained in section A. With regard to section B he noted with interest that, according to paragraph 62, “[t]he influence which may amount to aid or assistance, direction and control, or coercion, has to be used by the State as a legal entity that is separate from the organization”. Without that distinction, the freedom of States to act within and as members of an organization would be seriously compromised. As the Special Rapporteur himself noted, there was no reason to draw a distinction between the relationship between a State and an international organization on the one hand and between States on the other, and he thus accepted draft articles 25, 26 and 27 and had no objection to their being referred to the Drafting Committee.

3. The section of the report on use by a State that is a member of an international organization of the separate personality of that organization and article 28 proposed therein were more problematical. He fully subscribed to the Special Rapporteur’s reasoning in paragraphs 64 to 74. In particular, as the representative of Switzerland had noted in the Sixth Committee, “States should not be able to hide behind the conduct of the international organization”²³⁴ and “States should be prevented from creating an artifice with the intention of avoiding consequences which they would have to bear were they to carry out the activity, which they have assigned to the international organization, individually”.²³⁵ An equally important consideration was the criterion of good faith, which was in fact essential to establishing international responsibility, as Mr. Koskenniemi had pointed out at the preceding meeting. While he was not opposed to draft article 28, he thought that in its current form it did

²³⁴ *Official Records of the General Assembly, Sixtieth Session, Sixth Committee*, 13th meeting (A/C.6/60/SR.13), para. 45.

²³⁵ “Réponse de Mr. Karl Zemanek”, *Institute of International Law, Yearbook*, vol. 66, Part I (Preparatory works), Session of Lisbon, 1995, Paris, Pedone, 2000, p. 329.