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Summary record of the 2894th meeting

Topic:
<multiple topics>

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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. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, 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. 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

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[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.

not really succeed in achieving the desired objective. The wording should certainly be revised to avoid any confusion or misinterpretation, but in addition to the drafting problems mentioned by a number of speakers, there was a problem with the actual content of the article. The cases mentioned in the text in which a State's international responsibility in connection with an act of an international organization could be invoked were too restricted.

4. With regard to paragraphs 75 to 96 on the responsibility of members of an international organization when that organization is responsible, he agreed with the Special Rapporteur that a State member of an international organization could not be held responsible for an internationally wrongful act of the organization unless it accepted its own responsibility, as stipulated in draft article 29. That being said, subparagraph (*a*) of that article should perhaps indicate whether such acceptance had to be explicit or whether it could be tacit. Subparagraph (*b*), meanwhile, would be clearer if some indication was given of what was meant by the term "led". Lastly, it would be useful to indicate the kind of responsibility contemplated (joint and several, subsidiary, etc.).

5. Mr. YAMADA said that he had no problem with the contents of paragraphs 53 to 96 of the fourth report on responsibility of international organizations. With regard to the responsibility of States in connection with an act of an international organization, he supported the basic approach taken by the Special Rapporteur, which was to avoid duplicating the draft articles on State responsibility for internationally wrongful acts,[236] to formulate draft articles that covered only those cases not dealt with in those articles and to apply to those cases the same rules as those governing State responsibility. Accordingly, he supported draft articles 25, 26 and 27 as proposed by the Special Rapporteur and had some reservations regarding the suggestion made by Mr. Dugard to delete subparagraph (*b*) from draft articles 25 and 26. If the act was not internationally wrongful if committed by a State, he did not see why that State would have to aid or assist, or direct or control, an international organization in the commission of the act: it could do so by itself. The State might nevertheless choose to go through an international organization, but in the example cited by Mr. Dugard, in which the act of an international organization was internationally wrongful owing to a violation of the organization's internal rules of procedure, the international organization should be solely responsible. In that connection, he wished to stress once again the importance of preserving the integrity of the draft articles on State responsibility, particularly as the General Assembly was scheduled to review them quite soon. Anything that might alter the substance of the draft articles on State responsibility would destabilize the balance that had been achieved in the codification of State responsibility. It was thus important to follow the structure of those draft articles closely.

6. In the cases covered by draft articles 25, 26 and 27, the act was attributable to the State singularly or jointly with the international organization.

7. In the most difficult cases, an act of an international organization could not be attributable *prima facie* to a State. As there was not sufficient evidence to warrant the existence or non-existence of rules of customary international law in that area, rules would have to be formulated as progressive development, using common sense. Draft article 28 concerned a case in which a State used an international organization to shield itself from the consequences of an act that would be internationally wrongful if committed by that State. If no physical or mental force was applied and if the act by the international organization was not normally internationally wrongful, any attempt to attribute responsibility for the act to the State would be useless. However, justice dictated that the Commission should seek a formula for attributing responsibility to the State. The Special Rapporteur had found a brilliant solution by adopting, in paragraph 1 of draft article 28, a fiction that the international organization did not exist, so that the organization's act was directly attributable to the State, and if the act was internationally wrongful when committed by the State, then the State incurred the responsibility. The fact that the international organization's act was not internationally wrongful was the very reason why the State sought to circumvent its obligation; he therefore saw no need for paragraph 2, although he had no problem with its retention.

8. The two exceptions to the principle of the non-responsibility of a State member of an international organization set out in draft article 29 were inadequate and did not do justice to the States that suffered damage as a result of an international organization's wrongful act. It was obvious, as some members of the Commission had noted, that the regime of limited liability could not apply to the States members of an international organization and that the international community would not accept such a regime even if the organization's constituent instrument explicitly provided for such a system. By way of example, he cited the case of a State that had suffered damage from the wrongful act of an international organization and could not obtain compensation from the organization because the organization did not have the necessary financial resources as its members had not approved its budget, which was based on their contributions. The only recourse left to that State was to go directly to the member States. He hoped that the Special Rapporteur would give further thought to that question and come back to the Commission with some proposals. Meanwhile, he supported the referral of draft articles 25 to 28 to the Drafting Committee.

9. Mr. DUGARD said that he could understand Mr. Yamada's doubts regarding his proposal to delete subparagraph (*b*) from draft articles 25 and 26. He reminded him that his proposal had been made in the context of the existing general situation, in which States, especially the most powerful States, sought to manipulate international organizations to serve their own purposes, a situation that ought to lead the Commission to define their responsibility in stricter terms.

10. Mr. KEMICHA said that insofar as the responsibility of a State in connection with an act of an international organization was concerned, the Commission was

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

endeavouring, as the Special Rapporteur had said and article 57 of the draft articles on State responsibility confirmed, to fill a gap that had been deliberately left in the earlier set of draft articles. It was therefore logical that the Special Rapporteur should proceed in an analogous fashion, as he had explained in paragraph 59 of his fourth report, in formulating draft articles 25, 26 and 27, which he was introducing in that report. All members who had already spoken on the topic had in fact endorsed that approach and had rightly recommended, almost unanimously, that the draft articles in question should be transmitted to the Drafting Committee. It remained to be seen whether the analogy should be extended to cover the escape clause contained in article 19 of the draft articles on State responsibility,[237] and as he had no clear-cut views on that point, he would leave the matter in the hands of the Special Rapporteur.

11. Draft article 28 was likewise acceptable. The situation it contemplated, in which a State made improper use of the separate personality of an international organization of which it was a member in order to commit wrongful acts or evade its international obligations, had actually become quite common. Without wishing to prejudge the work of the Drafting Committee, he endorsed the reservations expressed by some members regarding the wording of draft article 28, and he was not convinced by the reasons given by the Special Rapporteur in paragraph 73 for dropping the verb "to circumvent", which actually reflected the situation quite well and was far more explicit and consistent with legal terminology than the phrase "if it avoids compliance with an … obligation", proposed in paragraph 1 (*a*) of draft article 28. More generally, he thought that Mr. Pellet's suggestion to use the language of draft article 15 there seemed sensible.

12. As for the critical question of the responsibility of members of an international organization when that organization was responsible, which was covered in paragraphs 75 to 96 of the report, no one disagreed that international organizations had come to be considered as subjects of international law having their own legal personality separate from that of their members. On the other hand, there was a substantive disagreement within the Commission as to whether States incurred responsibility when an organization of which they were members committed an internationally wrongful act, although a clear majority of members supported the approach taken by the Special Rapporteur. He himself had been partial to the arguments, largely those of a minority thus far, set out by Mr. Brownlie at a previous meeting and in an article he had circulated to members of the Commission. How in fact was it possible that the States members of an international organization be given immunity protecting them from any remedy awarded in connection with wrongful acts they might have committed collectively while they were simultaneously members of a single organization? The constituent instrument of the organization in question could not, according to Mr. Brownlie, be used to delimit the scope of the responsibility of member States or do away with it entirely because it could not be enforced in respect of third parties. Mr. Brownlie had concluded that the principle of the non-responsibility of States members of an organization was, to say the least, inconsistent with international law and contrary to the principle of equity.

13. It was certainly hard to generalize about a principle whose application varied from one organization to another, depending on an individual organization's constituent act and whether the organization had a universal or regional character. The Chairperson of the Commission had been quite right to have recalled the fundamental distinction that existed between an integration organization and a cooperation organization. Mr. Momtaz, meanwhile, had rightly drawn the Commission's attention to the difference between assessing the responsibility of the organization and that of its members in situations involving the use of force, depending on whether the act was based on an authorization conferring capacity to act or on a binding decision of the organization in question.

14. Having followed the debate on the topic with interest, and after having read paragraphs 75 to 96 of the Special Rapporteur's report, he was convinced that draft article 29 as proposed by the Special Rapporteur was, all in all, a clever compromise. It established a general principle whereby States members of an international organization were exempted from any responsibility for an internationally wrongful act and made that principle less general and rigid by attaching two exceptions. Accordingly, referring the draft article back to the Drafting Committee posed no problem. The text did, however, need serious reworking, and it might be helpful if Mr. Brownlie participated in that effort, since notwithstanding his principled reluctance, he could help to limit the scope of a principle that was fairly permissive where the States members of an international organization were concerned.

15. Mr. BROWNLIE pointed out that, to his way of thinking, draft article 29 suffered from two basic flaws. First, it was superfluous, particularly as no explanation was given for its presence in the draft articles, and, secondly, it contradicted the fundamental principles of general international law and thus modified the law. Such a modification required many more justifications than had been given.

16. Mr. KOLODKIN noted that in paragraph 54 of his report the Special Rapporteur said that not all the questions that might affect the responsibility of a State in connection with the conduct of an international organization should be examined in the context of articles on responsibility of international organizations; for instance, questions relating to attribution of conduct to a State had already been covered in the draft articles on State responsibility. Thus, neither the draft articles under consideration nor draft article 57 of the articles on State responsibility precluded the application of the draft articles on State responsibility to questions relating to the responsibility of a State for an internationally wrongful act by an international organization.[238] Moreover, the draft articles on State responsibility were a major part of the context in which the draft articles on the responsibility of States

[237] *Ibid.*, p. 27.

[238] *Ibid.*, p. 30.

for an internationally wrongful act of an international organization would be applied. Consequently the provisions of draft articles 5, 7 and 8 on the responsibility of States with regard to the conduct of a person or entity exercising the prerogatives of public power and conduct under the direction or control of a State were applicable also to relations between a State and an international organization.

17. He agreed with the Special Rapporteur when he stated in paragraph 58 of his report that it would be difficult to find reasons for ruling out that a State might direct, control or coerce an international organization in the same way that it might another State. Accordingly, the draft articles should contain articles similar to those contained in chapter IV of the draft articles on State responsibility.[239] In that regard, Mr. Pellet had already called attention to the absence, in the draft articles, of a provision that would be analogous to article 19 of the draft articles on State responsibility. Paragraph 63 of the report contained a simple reference to the fact that it was not necessary to replicate that article in the current draft articles. Perhaps the Special Rapporteur felt that that was obvious, but it would be better if he could offer some explanation as to how he had reached that decision when he summarized the discussion.

18. As had already been pointed out, paragraph 62 of the report was important to an understanding of draft articles 25 to 27. One had to agree that the conduct in question could not consist merely of participation in an organization's decision-making process and that the State that coerced an organization might or might not be a member of that organization. That was a fact. It was extremely difficult, however, to distinguish between the conduct of a State member of the organization in its capacity as a member in one case and its conduct as a separate legal entity in another. If, for example, a State that was a member of an organization proposed taking a certain decision and then said that if the decision was adopted it would not participate in the financing of any requirements the organization might have, one would have to ask whether the State was acting as a member of the organization or as a separate legal entity. In other words, it must be determined whether draft article 27 applied if the decision proposed by the State, once adopted, made it possible to invoke that State's responsibility.

19. That being said, he believed that draft articles 25 to 27 had to be sent back to the Drafting Committee. However, the advisability of the condition stipulated in subparagraph (*b*) shared by draft articles 25 and 26 had been questioned by the Sixth Committee. Those provisions had already, in the case of other draft articles, given rise to a number of doubts in his own mind, and he would be grateful if the Special Rapporteur could provide him with some explanations, which might also be of value to States.

20. He endorsed the idea of draft article 28. However, he was not convinced that the argument developed in paragraphs 66 to 68—that draft article 28 was the reverse of the case contemplated in article 15—was correct. The two cases bore only a slight resemblance to each other. Like other Commission members, he felt that the proposed wording in draft article 28 gave rise to some doubts. In paragraph 1 (*a*), it was hard to see the need for any mention of a case of a State that avoided compliance with an international obligation relating to certain functions by transferring those functions to that organization. In his view, when the State transferred those functions to the organization, and even afterwards, it could be acting in good faith without intentionally seeking to avoid compliance with an international obligation. The problem of non-compliance with the obligation arose later. It would seem that in order to resolve the question of responsibility in that particular case, there would have to be an intent to avoid compliance with obligations at the time a function was delegated to an international organization. As for paragraph 1 (*b*), it was difficult to see how it was a question of an act that "would have implied" non-compliance with the obligation. As he saw it, paragraph 1 of draft article 28 must be interpreted in the following manner: the State member of an international organization bore international responsibility if it transferred to the international organization a function (power) required for compliance with an international obligation, and the international organization committed an act that, had it been committed by that State, would have constituted a violation of the international obligation in question. In that connection, he agreed with Mr. Matheson, who had pointed out that States could endow an international organization with functions that they themselves did not have. Moreover, they could do so in good faith, with no intention of avoiding compliance with international obligations.

21. Draft article 29 undoubtedly raised the greatest number of problems, even if draft article 28 was no less important. In any event, draft article 29 had to be considered in the context of the draft articles before the Commission, the articles on State responsibility for internationally wrongful acts and other provisions of general international law, particularly questions of international organizations law. The Special Rapporteur's general policy considerations underlying the article were set out in paragraphs 93 and 94 of the report. However, they did not fully reflect the balance of interests that must underlie draft article 29 in that they sought only to protect the organization's integrity and its internal decision-making process, thereby exempting its members from any responsibility, at least in many cases. There was no balance there. It seemed to him that the balance of interests discussed by Mrs. Higgins in her statement prior to the adoption of resolution II/1995 of the Institute of International Law was much more objective and adequate: "[t]he relevant policy factors are, on the one hand, the efficient and independent functioning of international organizations, and second, the protection of third parties from undue exposure to loss and damage, not of their own cause, in relationships with such organizations".[240] It was precisely that balance that draft article 29 ought to reflect.

[239] *Ibid.*, p. 27, draft articles 16–19.

[240] "Preliminary exposé and draft questionnaire", Institute of International Law, *Yearbook*, vol. 66, Part I (Preparatory works), Session of Lisbon, 1995, Paris, Pedone, 2000, p. 288.

22. In paragraphs 75 to 82, the Special Rapporteur offered a detailed analysis of two well-known examples in which the question of the material responsibility of international organizations and their members had been submitted to arbitration (*Westland Helicopters Ltd.* v. *Arab Organization for Industrialization* and *International Tin Council*). Those examples did not greatly impress him. In both cases, the question of material responsibility arose as a result of a violation of contractual obligations. In both cases, the contracts had been subject to domestic law and had been considered chiefly from that perspective. In both cases, the international organizations had acted as subjects of private civil law and not of public international law. According to legal theory in the area of responsibility of international organizations, a distinction should be drawn as a general rule between situations in which international organizations acted as private entities and those in which they acted as public-law entities. In other words, a distinction must be drawn between situations in which the international organization was financially responsible—for failure to meet financial obligations—and other cases.

23. Naturally, attention should be paid to the position taken by States in both cases. In paragraph 90 of his report, the Special Rapporteur stated that over 25 States that had been sued in the two cases had shared the view that no presumption could be made to the effect that the States members of an international organization incurred responsibility. The position of those States in those cases was understandable. Again in paragraph 90, the Special Rapporteur drew the more general conclusion that the same view was shared by the great majority of States. However, that statement seemed too categorical. The 25 States in question, the few other States that had commented on the topic in the Sixth Committee and still others that had expressed themselves in the ICJ during consideration of the *Legality of Use of Force* cases could hardly be considered to constitute an absolute majority, even if they did form the majority of those who had spoken on the question.

24. He wished to challenge the view that draft article 29 was unnecessary and that reliance on general international law on State responsibility was sufficient. That approach did not reflect the interests of third parties in their relations with international organizations. If one confined oneself to the principle of State responsibility, one still had to solve the problem of attributing the wrongful conduct. That was not easy to do in situations where not only States but also international organizations acted. However, draft article 29—and that was very important—solved the problem of the responsibility of a State that was a member of an organization without any need to attribute the conduct in question to that State.

25. Furthermore, the draft did not contain just two exceptions but many more. He wondered why everyone always spoke only of those two exceptions, i.e. the ones set out in subparagraphs (*a*) and (*b*). Draft article 29 began by stating that a State that was a member of an international organization was responsible in the cases covered by the preceding articles and only then did it add the two exceptions set out in subparagraphs (*a*) and (*b*).

26. He did not subscribe to the notion that draft article 29 created a situation of non-responsibility. The fact that international organizations enjoyed immunity from prosecution or that they could not participate in the consideration of cases heard by the ICJ was a problem relating to the implementation of responsibility but not a question of the existence or non-existence of responsibility *per se*. In addition, it was often difficult to implement responsibility in relations between States, especially if a judicial settlement was not possible. The problem was not merely one of responsibility in terms of the conduct of international organizations or of States that were members of international organizations.

27. In legal theory, views on the applicability of an organization's international legal personality to third parties diverged widely. Still, it seemed that the logic of the draft text under consideration ultimately recognized that applicability, thereby solving the problem of responsibility of member States for acts committed by the organization. Draft article 2 provided a definition of international organization for the purposes of the draft articles which stipulated that the organization must have international legal personality. The draft articles did not apply to other organizations. What was more, the international legal personality of organizations, to judge by draft article 2, did not depend on the recognition of third parties.

28. At first glance, draft article 29 was fundamentally unlike articles 5 and 6 of resolution II/1995 of the Institute of International Law.[241] However, if one considered it in conjunction with the articles that preceded it, particularly draft article 28, and if one did not exclude the possibility that the rules for attribution of State conduct could also apply to such situations, the differences did not seem so great. That was why he thought that the Commission should, as Mr. Dugard had proposed, base itself on the articles of resolution II/1995 when finalizing article 29, an article he considered to be necessary. Mr. Brownlie's proposal to add the words "as such" at the beginning of the article was interesting.

29. Thus while draft article 29 was far from crystal clear, he did not in principle object to its being referred to the Drafting Committee. In any event, the draft articles under consideration did not completely cover all the questions they addressed. Rather, they provided a framework about which a legal settlement of the question of the responsibility of an organization or of its members, or the organization and its members, could be articulated, taking into account other legal norms and the facts of each individual case.

30. Mr. MOMTAZ said that he had been struck by the distinction drawn by Mr. Kolodkin between the activities of the international organization when it acted as a subject of domestic law and when it acted as a subject of international law. He would like Mr. Kolodkin to develop that distinction and tell what consequences it might have in terms of responsibility, bearing in mind the immunity international organizations enjoyed on the

[241] *Ibid.*, Part II, p. 445.

territory of their member States and even of States that were not members.

31. Mr. KOLODKIN said that the distinction existed in practice and that international organizations that were solely subjects of domestic law were not covered by the draft articles. That distinction could, however, be of significance for the applicable law and the responsibility of international organizations and their member States.

32. Mr. PELLET said that he found the position taken by Mr. Kolodkin disturbing; the position was not a new one, since it dated back to the Soviet era: the Soviet authorities had hotly defended it during the 1940s in the *Reparation for Injuries* case. He was amazed that anyone should refuse to accept that international organizations had international legal personality that was not only subjective but also objective. While the ICJ had based itself on rather unconvincing logic to establish the objective character of the United Nations, Judge Krylov had, in his dissenting opinion, explained the objective character of the legal personality of the United Nations correctly: the Organization existed because it existed. The premise cited by Mr. Kolodkin was unacceptable, and while the Commission did not have to solve the problem within the specific context of the draft articles on responsibility of international organizations, it was still necessary to be very clear on that point. If one followed Mr. Kolodkin's thinking, things would change radically, not only with regard to draft article 29 but with regard to other aspects of the draft as well.

33. Mr. KOLODKIN said that the opinion he had mentioned was not held exclusively by legal scholars from the former Soviet Union or the Russian Federation, for other authors from other countries also defended it.

34. Moreover, article 2 of the current draft gave the definition of an international organization for the purposes of the draft articles, and he was basing himself on that definition.

35. The CHAIRPERSON, speaking as a member of the Commission, said that, like Mr. Pellet, he was disturbed by Mr. Kolodkin's statement regarding the legal personality of an organization. He was reminded in that connection of something Professor Reuter had said: States created international organizations to serve them, but when international organizations began to work, the States that created them were the first to try to stop them from acting in the direction they themselves had wanted to go. That was one of the paradoxical aspects of the international legal personality of international organizations.

36. International organizations, equipped by their international legal personality, concluded agreements, particularly headquarters agreements, the implementation of which resulted in the conclusion of other legal acts that did not always fall within the purview of international law insofar as any disputes to which they might give rise were concerned but rather of domestic law. He wondered whether that aspect of the question should be considered in the context of the current topic.

37. Mr. BROWNLIE said that the Chairperson's mention of headquarters agreements had reminded him of something obvious: the immunities of international organizations were always explicitly spelled out, either in headquarters agreements or in the constituent act or bilateral agreements. What was striking about the responsibility of international organizations *vis-à-vis* third States was in fact the absence of any immunity, yet the Commission was trying with draft article 29 as currently worded to create an immunity for States that were members of international organizations. Such automatic immunity did not exist in general international law, and it was for that reason that the words "as such" should be added after the word "responsible" in draft article 29.

38. Mr. GAJA (Special Rapporteur) pointed out that the question of the immunity of international organizations in all its aspects was not part of the topic under consideration. He, too, had been somewhat disconcerted by Mr. Kolodkin's statement that the case law cited in his report was irrelevant because it concerned domestic law. The cases in question, which were the only ones he knew that dealt with the topic and which he had analysed in paragraphs 76 to 82 of his report, did not, of course, provide a solution as to what constituted international customary law, but they at least gave an indication and could not be ignored.

39. Mr. ECONOMIDES said that he endorsed draft articles 25, 26 and 27 proposed by the Special Rapporteur, which were modelled on the corresponding provisions of the draft articles on State responsibility for internationally wrongful acts.[242] It had been necessary to proceed that way in the present case, whereas it had been neither necessary nor desirable for certain circumstances excluding the wrongfulness of situations that were in fact no longer under study. Nevertheless, it would be useful to hear the Special Rapporteur's response to Mr. Dugard's suggestions regarding those articles, which were fairly interesting.

40. He also fully endorsed the substance of draft article 28, for he agreed with the view held by legal scholars, cited in paragraph 72 of the Special Rapporteur's report, that the responsibility of member States should be invoked when they made improper use of the organization's separate personality to commit wrongful acts or evade their legal obligations. In such cases the State was clearly acting in bad faith or fraudulently, an aspect that had not been sufficiently emphasized and which was an aggravating factor where responsibility was concerned. Still, the wording of draft article 28 was unusual, not to say surprisingly sophisticated, for a text dealing with responsibility that ought to be worded somewhat like a criminal text, in as clear and direct a manner as possible. The word "avoids" in paragraph 1 (*a*) seemed to punish an intention and not a specific unlawful act. On that point he agreed with Mr. Pellet and other members of the Commission. Secondly, one might well ask, as Mr. Kolodkin had, whether the phrase "would have implied non-compliance with that obligation" in paragraph 1 (*b*) was sufficient to engage a State's international responsibility. The link

[242] See footnote 233 above.

between paragraphs 1 (*a*) and 1 (*b*) should be considerably strengthened, and it would surely be preferable to say "if it does not comply with an international obligation it has assumed" in paragraph 1 (*a*) rather than "if it avoids compliance with an international obligation". In fact, the entire article needed to be completely reworded.

41. Draft article 29, meanwhile, was a tricky provision. Practice in that area was inconsistent and controversial, and the only authoritative text available was resolution II/1995 of the Institute of International Law, which, as Mr. Kolodkin had said, ought to have inspired the Special Rapporteur more. He accepted in principle the notion of the sole responsibility of an international organization for its internationally unlawful act, unless the rules or even the practice of the organization provided for another system of responsibility. States could be forbidden to set up a different system of responsibility, such as a system of joint, subsidiary or other responsibility, for example. That exception was a critical one, but provision also had to be made for two others, as the Special Rapporteur had proposed; those were specific exceptions that would apply to injured third parties. Under the first exception, a State member of an international organization would incur international responsibility if it had expressly accepted such responsibility, while under the second, it would do so if it had accepted such responsibility implicitly but unambiguously. Both cases involved acceptance of responsibility.

42. Lastly, after hearing Mr. Yamada's statement, he wondered whether provision ought not to be made for a third exception, for cases in which an international organization was insolvent and could not make compensation to injured third parties. Perhaps in such cases third parties could be given an opportunity to apply to the member States. In any event, the question should be considered.

43. Draft articles 25 to 29 could be sent to the Drafting Committee, but draft article 29 required considerable revision insofar as substance was concerned.

44. Mr. PELLET said that the question raised by Mr. Yamada and again by Mr. Economides was extremely interesting: if international organizations caused significant damage, they often lacked the means to provide compensation. That was a fact. However, the solution did not lie in making that situation into another exception. Draft article 29 must set out the principle of responsibility of an organization because the organization existed. The only solution was to solve the problem in terms of reparation. If the organization's responsibility was incurred and if the organization did not have the means to address the consequences of its responsibility, it was reasonable, in the context of the progressive development of international law, to stipulate that the member States would assist the organization by bearing the consequences of the responsibility themselves. One might logically suppose that by joining the organization they felt themselves to be implicitly responsible in the sense of being "liable" or "accountable", rather than "responsible". The responsibility incurred, however, was that of the organization. At the reparation stage, the normal consequences of responsibility would certainly have to be made more flexible. It would be unfortunate, however, to confuse problems of compensation with problems of incurring responsibility.

45. The CHAIRPERSON, speaking as a member of the Commission, said that he supported the idea of solving the problem at the compensation level. He himself had considered two possibilities. The first involved making the situation into a third exception, but that was the solution that Mr. Pellet had ruled out. The second involved making the existing text into a "paragraph 1 followed by a paragraph 2" devoted to the situation of an international organization that was unable to address its responsibility *vis-à-vis* third parties, supplementing that idea by the fact that such responsibility would be borne jointly by the member States. It might be the right moment to set out the principle underlying that situation, even if it meant spelling out at the level of consequences, as Mr. Pellet had suggested, the joint and residual responsibility of all the member States.

46. Mr. PELLET said that he disagreed with that way of describing things. The structure of the draft articles consisted of a first part, which included draft article 29, on how responsibility was incurred for an internationally wrongful act of the organization. The Commission would subsequently see what the consequences of the act were, chief among which was reparation. To add something to draft article 29 would amount to confusing the question of how responsibility was incurred with the question of consequences. If it was really necessary, the Commission could consider a "without prejudice" clause, a second paragraph that would establish that the principle set out in the first paragraph applied without prejudice to the modalities of reparation. That, however, would be a big step, and it would be better to hold that option in reserve until the Commission debated the question. It was important that the problem had been raised, but it would be premature to solve it at the present stage.

47. The CHAIRPERSON welcomed the idea of a "without prejudice" clause but said that he would leave it to the Special Rapporteur to deal with the various proposals put forward.

48. Mr. CHEE noted that, in paragraph 57 of his report, the Special Rapporteur contemplated expanding his work to cover members of an international organization that were not States but other international organizations and to include the relevant provisions in chapter IV, entitled "Responsibility of an international organization in connection with the act of a State or another international organization".

49. Paragraphs 58 to 63 of the report dealt with "aid or assistance, direction or control, and coercion by a State in the commission of an internationally wrongful act of an international organization". It was thus logical that a State that acted in that manner should incur responsibility. Draft article 26 brought to mind a powerful State that might direct or control an international organization for its own political ends. However, an international organization that committed an act with prior knowledge of the circumstances was still responsible.

50. Paragraphs 64 to 74 dealt with the use by a State member of an international organization of the separate personality of that organization. In paragraph 66 the Special Rapporteur described the case of a State that was a party to a treaty that forbade the development of certain weapons and that indirectly acquired control of such weapons by making use of an international organization that was not bound by the treaty. An example of that situation would be welcome.

51. He endorsed draft article 28 proposed by the Special Rapporteur.

52. Lastly, paragraphs 75 to 96 dealt with the negative side of the responsibility of international organizations, i.e. cases in which organizations were actually responsible. The Special Rapporteur concluded that only in exceptional cases could a State that was a member of an international organization incur responsibility for the internationally wrongful act of the organization. That notion was reflected in draft article 29. In that context it might be relevant to note that international law granted certain immunity to the acts of international organizations, exempting them from the application of both domestic and international law. However, as C. F. Amerasinghe had stated, the United Nations generally accepted responsibility for any illegal acts committed by the armed forces of Member States acting under the aegis of the Organization.[243]

53. He endorsed draft articles 25 to 29 and suggested that they should be referred to the Drafting Committee.

54. Mr. MELESCANU said that his year-long absence had enabled him to take a particularly objective look at the considerable progress made in the Commission's work on the responsibility of international organizations. He had been struck by the divergence of views expressed during the debate but he did not think that meant that consideration of the topic had reached an impasse.

55. If one proceeded from the fundamental principle that an international organization had a separate legal personality from that of its members, one had to accept that that meant that the organization bore international responsibility for wrongful acts, as responsibility was one element of its legal personality. The cases in which responsibility for acts committed by an international organization could be attributed to a State still had to be determined. He thought that the solution was to be found not in draft article 29 but in chapter II, on attribution of conduct to an international organization. It was thus in that chapter that the Commission could, if necessary, address that question.

56. One of the Commission's main concerns was to prevent States from using an international organization for their own ends. The idea was an interesting one from a political and practical standpoint, for many current examples justifying that concern could be cited, but it was not workable from a legal standpoint. Since rules governing the attribution of an act to an international organization—those set out in chapter II—did exist, it was extremely difficult to define special rules. To whom should the act be attributed if not the organization? It could be attributed to a State that had taken the initiative of a draft resolution, for example. Most frequently, however, the States in question were above suspicion and put forward a resolution without any hidden motives. It was therefore quite difficult from a legal standpoint to create a system that would prevent certain States from using international organizations for their own ends.

57. The capacity of international organizations to make reparation for damage caused by their activities was another area of concern. In reality, it was in no one's interest for international organizations to be responsible, for their responsibility was somewhat similar to that of limited liability companies, which responded to their acts only within the limits of their budgets. Like Mr. Pellet, he believed that it was necessary to distinguish between the question of incurring responsibility and the question of consequences, which would be dealt with in another chapter. That chapter would be all the more difficult to draft in that consequences often took the form of reparation, and financial reparation at that.

58. He concluded by endorsing the referral of draft articles 25 to 28 to the Drafting Committee. Draft article 29 had a definite place in the draft, subject to a number of improvements. In that connection, Mr. Matheson's proposal to say that a State was not responsible "as such" was welcome, as was Mr. Koskenniemi's proposal to add a subparagraph (*c*) to cover cases in which a State denounced the act of the international organization, the proposal of Mr. Economides to specify that a State accepted its responsibility "implicitly but unambiguously" and that of Mr. Pellet to add a "without prejudice" clause.

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

[Agenda item 1]

59. Mr. OPERTTI BADAN drew attention to the programme of work and said that he would have liked to introduce the preliminary document he had prepared on the right to asylum, but that he had been informed by the Secretariat to the Commission that he could not. He wished to express his deep displeasure at that situation, which only served to confirm that there were different categories of countries, representatives and influences within the Commission. The Commission could decide whether it wished to include the right to asylum in its work, but the fact of the matter was that there were refugees and asylum-seekers in all parts of the world.

60. Mr. MIKULKA (Secretary to the Commission) explained that the Secretariat was bound by the programme of work drawn up by the Bureau.

61. The CHAIRPERSON noted that a great many parameters came into play in the organization of the Commission's work, and he assured Mr. Opertti Badan that neither the Bureau nor he himself had ever dreamed of discriminating against him or the group of countries he represented in any way.

The meeting rose at 12.05 p.m.

[243] C. F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd revised edition, Cambridge University Press, 2005, pp. 401–402.

* Resumed from the 2885th meeting.