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Summary record of the 3000th meeting

Topic:
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obligations that might flow from the rules of the organization. That matter, too, might be better dealt with in the commentary to the draft article. If, on the other hand, members felt that a special paragraph was necessary, then the existing text ought to be retained.

61. Draft article 15 appeared to raise many difficult issues, beginning with the terminology it employed: “a decision binding a member State”, “authorization”, “recommendation” and “act”. Like others, he was not convinced that the suggestion to replace the phrase “in reliance on” in paragraph 2 (b) with “as a result of” solved the problem. The matter would have to be referred to the Drafting Committee.

62. On a more fundamental level, he wondered why an international organization should be responsible for merely making a recommendation to a State that the State subsequently decided of its own volition to follow. As far as he was aware, there was nothing in the provisions of the draft articles on responsibility of States that attributed responsibility to a State for recommending to another State that it should perform an act that was illegal. He favoured deleting the references to “recommendation” in draft article 15 where it referred to incurring the responsibility of the international organization. The references to “authorization”, on the other hand, which included, *inter alia*, authorizations by the Security Council under Chapter VII of the Charter of the United Nations obviously concerned very serious matters. In terms of their consequences, such matters were on a level with binding decisions. But in that case as well, he was somewhat hesitant to endorse draft article 15 in its existing form, and felt that it warranted further consideration before the Commission’s second reading or during the second reading, if necessary.

63. He had been ready to support the deletion of article 18 on self-defence but had reconsidered his position after hearing some of the reasons given by members for its retention. If it was retained, he wondered whether the phrase “in conformity with the principles of international law embodied in the Charter of the United Nations” was necessary, or even appropriate, given that those words had been taken from the provision in the Vienna Convention on the Law of Treaties (hereinafter the “1969 Vienna Convention”) that dealt with the threat or use of force.

64. He would prefer to delete draft article 22 (Necessity) and would even have preferred deleting it from the provisions of the draft articles on State responsibility. It seemed particularly unlikely that an organization would rely on the possibility of invoking necessity as a ground for precluding wrongfulness.

65. Lastly, he supported Mr. Nolte’s comments regarding draft article 28 and agreed that the Commission needed to analyse the text of that article very carefully.

Organization of the work of the session (continued)

[Agenda item 1]

66. Mr. VÁZQUEZ-BERMÚDEZ (Chairperson of the Drafting Committee) said that the Drafting Committee on the topic of reservations to treaties would be composed

of 11 members: Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. McRae, Mr. Melescanu, Mr. Nolte, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue and Ms. Jacobsson (*ex officio*), including the Special Rapporteur, Mr. Pellet.

The meeting rose at 11.35 a.m.

3000th MEETING

Wednesday, 6 May 2009, at 10.10 a.m.

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Al-Marri, Mr. Cafilisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Kemicha, Mr. McRae, Mr. Melescanu, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vascianie, Mr. Vázquez-Bermúdez, Sir Michael Wood, Ms. Xue.

Responsibility of international organizations (continued) (A/CN.4/606 and Add.1, sect. D, A/CN.4/609, A/CN.4/610, A/CN.4/L.743 and Add.1)

[Agenda item 4]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. The CHAIRPERSON invited the members of the Commission to continue their consideration of the seventh report on responsibility of international organizations (A/CN.4/610).

2. Mr. McRAE said that the meeting with the legal advisers of organizations of the United Nations system would be useful for the Commission’s work on the topic. It would also be desirable to meet with the legal advisers of organizations outside the United Nations system, such as the European Commission, which had actively commented on the draft articles, and the WTO, whose practice was often cited.

3. Notwithstanding Mr. Pellet’s views, the approach proposed by the Special Rapporteur was not tantamount to pre-emptively engaging in a second reading, which should be the time to deal with the comments of States on the draft articles as a whole. Mr. Pellet did, however, raise an important point. What in fact was the best way for the Commission to incorporate in its work the views expressed in response to specific questions? Either the comments could be taken into account each year as they were received, or they could be analysed cumulatively towards the end of the first reading, as the Special Rapporteur recommended; either approach was appropriate.

4. On the other hand, Mr. Pellet was right to insist that the question of the invocation by an international organization of the international responsibility of a State should be included in the draft articles: the Commission could not

finish its work on the topic without addressing the issue. At the very least, it should say how the matter should be dealt with, for example by saying that the draft articles on responsibility of States for internationally wrongful acts¹⁸ applied *mutatis mutandis*.

5. He endorsed the Special Rapporteur's proposed restructuring of the draft articles. However, he shared the view of Ms. Escameia and Sir Michael Wood that the new wording of draft article 4, paragraph 2, did not provide greater clarity. The Special Rapporteur had attempted to include the decisive factor of attribution established in the advisory opinion of the ICJ on *Reparation for Injuries*, namely the fact that an individual or an entity had been charged by the organization with carrying out one of its functions. The problem lay in the insertion of those words after the existing wording and, more particularly, in the phrase "through whom the organization acts", which in his view should be deleted. Paragraph 2 would thus be clearer and would read: "For the purposes of paragraph 1, the term 'agent' includes officials and other persons or entities who have been charged by an organ of an organization with carrying out, or helping to carry out, one of its functions."

6. With regard to draft article 8 (Existence of a breach of an international obligation), he welcomed the change made to paragraph 2. As originally worded, the paragraph had created a dichotomy between obligations under international law in general and obligations under international law established by a rule of an international organization. Paragraph 2 had initially provided that obligations established under a rule of an international organization were also covered by paragraph 1, as if they were a separate category, whereas the new wording included them under all international obligations. Yet while that change dispelled the initial ambiguity, it created another with the use of the words "in principle". The Special Rapporteur had chosen to say that the breach of an international obligation by an international organization included the breach of an obligation under the rules of an organization only "in principle" in an effort to accommodate the concern that not all rules of international organizations created obligations. Some rules of an international organization did create binding obligations on States, whereas others did not, and a case-by-case evaluation of the rules was required to distinguish which of them did and which did not. To say that the rules of the organization were in principle part of international law added to the confusion rather than dispelling it. It would suffice to say that "the breach of an international obligation by an international organization includes the breach of an obligation under the rules of an international organization", with the words "in principle" deleted; the reference, then, would not be to all the rules of an international organization but only to those that created an obligation. If there was any concern that a misunderstanding might persist, the matter could be dealt with in the commentary.

7. With regard to the responsibility of an international organization in connection with the act of a State arising out of a recommendation or other non-binding formulation by the international organization, the Special

Rapporteur suggested that the wording in draft article 15, paragraph 2 (b), should be changed to read that an international organization incurred international responsibility if the State committed the act in question "as a result of", rather than "in reliance on", a recommendation. That introduced a more objective criterion by establishing a causal link between the organization's recommendation and the act of the State. However, he was not certain whether that causality was adequate—for example, if the recommendation was only one of the factors motivating the act. At issue was an international organization's responsibility for an act committed by a State, and it was therefore necessary to have an idea of the degree of causation required to engage such responsibility. Sir Michael Wood had suggested the deletion of the provision because of the many recommendations made by international organizations, but that very variety was reason for keeping the paragraph. Some recommendations could be worded in a way that seriously encouraged action and should thus incur responsibility if States acted on them. The solution might be to reverse the order of the sentence to indicate that an international organization incurred international responsibility for the act of a State to which it had given an authorization or recommendation if "that authorization or recommendation was the principal or predominant cause for the State to commit the act in question".

8. Turning to the chapter on circumstances precluding wrongfulness, he said he favoured retaining draft article 18 because the fact that the question of self-defence was unlikely to arise for international organizations was not a reason for totally excluding that possibility in the future. The objective of draft article 19, paragraph 2, was to restrict the use of countermeasures against a member State or a member international organization if the rules of the organization provided an alternative means of redress. He was not certain that a sufficient distinction was drawn between the resort to countermeasures in general and the resort to countermeasures against a member State or member international organization. The paragraph should establish a specific rule and not simply make explicit something that was more generally implicit in paragraph 1. It might then read: "An international organization is not entitled to take countermeasures against a responsible member State or international organization if means are available under the rules of the organization for ensuring compliance with the obligations of the responsible State ...". That would, of course, narrow the scope of the article, whereas other members of the Commission wanted to broaden it.

9. Mr. SABOIA said that the Special Rapporteur's revision and restructuring of the draft articles provisionally adopted by the Commission had been most useful as it provided a view of the whole before the first reading was completed. The Special Rapporteur had also been quite selective in his use of the comments by States.

10. The proposal by Mr. Pellet to include provisions regarding the invocation by an international organization of the responsibility of a State in order to fill the lacunae left in the draft articles on responsibility of States for internationally wrongful acts¹⁹ seemed justified. The question

¹⁸ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 26, para. 76.

¹⁹ *Ibid.*

was not, however, an easy one. Perhaps the Commission could propose to the General Assembly a draft decision to enable the Commission to broaden the scope of its mandate to that end.

11. The chapter on attribution of conduct dealt with very delicate issues, such as whether a particular wrongful act should be attributed to the international organization or to the State, depending on the nature and effectiveness of the control exercised over the conduct. For example, military action taken by NATO in Kosovo and by the “coalition of the willing” in Iraq had been legally questionable, whatever the reasons invoked. The Commission must therefore be careful, both in the draft articles and in the commentary, not to give the impression that international organizations could lawfully use force outside the legal framework foreseen in the Charter of the United Nations. He supported the Special Rapporteur’s position on the decisions of the European Court of Human Rights in the *Behrami and Saramati* case and his reasons for preferring the retention of the current wording of draft article 5. The original language of draft article 4, paragraph 2 was also better because with the new wording, as UNESCO had pointed out, there was a risk that the organization might attempt to rule out its own responsibility while subcontracting to an agent a task that might give rise to a wrongful act.

12. In the chapter on breach of an international obligation, the words “in principle” in draft article 8, paragraph 2, should be replaced with more precise language. With regard to circumstances precluding wrongfulness, he had initially been inclined to favour the deletion of draft article 18 (Self-defence), but the debate had convinced him of the need to retain it, mainly because of the role that international organizations might assume in administering territories under United Nations mandate. Lastly, he endorsed Mr. Nolte’s proposal to use the words “reasonable procedure” in paragraph 2 of draft article 19 (Countermeasures).

13. Ms. XUE expressed appreciation to the Special Rapporteur for submitting his report in due time and took note of his remarks about the delayed translation of the report into other working languages. She also shared the concerns voiced about the long-standing issue of honoraria, which special rapporteurs needed for their research. It was her understanding that the Secretariat was working on the issue.

14. She shared the Special Rapporteur’s analysis of the relationship of the draft articles under consideration to the draft articles on State responsibility as regarded their scope, use of terms and general principles. As to the responsibility of a State *vis-à-vis* an international organization, the question should be dealt with under the rules of State responsibility rather than under the current draft articles. The definition of the term “international organization” contained in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter the “1986 Vienna Convention”) was clear and appropriate to the topic. Even though non-State entities could become members of international organizations, the nature of such organizations remained the same. In

her view, however, either the word “intergovernmental” should be inserted before “organization” in the first sentence of draft article 2 or the point should be emphasized in the commentary.

15. On the question of recognition, she agreed with the Special Rapporteur that the issue did not need to be settled for the purposes of the current draft. That said, the recognition of an international organization was a unilateral act which had a direct legal bearing on the bilateral relations of the relevant parties. If a State did not recognize an international organization, could it invoke its responsibility? If so, did such invocation constitute recognition? In any case, the Commission could assume, for the purposes of the draft articles, that the international organization had an objective personality.

16. With regard to the term “rules of the organization”, she agreed with the Special Rapporteur that the phrase “other acts taken by the organization in accordance with those instruments” should be retained, on the understanding that the commentary would provide a restrictive interpretation of it, indicating that such acts were those that had legally binding effects. On the other hand, she had doubts about the sweeping statement in paragraph 20 that the responsibility of an international organization could not be invoked by non-members. The matter very much depended on the identity of the party to whom an international obligation created by the rules of the organization was owed.

17. As to attribution of conduct, she agreed with the Special Rapporteur’s proposal with regard to the term “agent”, because the performance of functions of the international organization was decisive and should be explicitly stated in the draft article. With regard to the criterion of “effective or factual control” in draft article 5, it was interesting to note the differing conceptions of the European Court of Human Rights and the Secretary-General of the United Nations on that point. She could accept the wording proposed by the Special Rapporteur as secondary rules, but she doubted whether the draft articles could achieve the goal of determining the responsible party. She shared the view on draft article 6 that the rules on excessive acts which applied to States should apply also to international organizations, provided it was clear that the organ or agent of the organization was acting in that capacity.

18. Concerning breach of an international obligation, she was in favour of including a separate provision in draft article 8 that made special reference to the rules of the international organization because that would emphasize the nature of the obligations arising from such rules. However, she did not feel that the wording proposed by the Special Rapporteur in his seventh report was any better or clearer than the original text. The Drafting Committee should look into the matter further.

19. Draft article 15 posed more complicated questions. Apparently, paragraph 2 was intended to distinguish between two situations: one in which there was a clear authorization, such as a decision of the United Nations Security Council under Chapter VII of the Charter of the United Nations, and one in which the parties concerned could exercise some discretion. The proposed wording

still did not seem adequately to address the concerns expressed with regard to the latter situation. Substituting “as a result of” for “in reliance on” represented an attempt at improvement, but the underlying concern went unaddressed. Like the subject of effective control, the current question was linked to the nature of the decision and the operations concerned. The commentary should clarify what the article was meant to cover.

20. With regard to circumstances precluding wrongfulness, she agreed with some other members that draft article 18 (Self-defence) should be deleted. The current wording was problematic, particularly the reference to the provisions of the Charter of the United Nations. However, the argument put forward in paragraph 59 in favour of its deletion was not entirely convincing. If, as suggested, such a right was recognized in draft article 62, in the section on general provisions, she did not see why it could not be clearly stated in that part. Moreover, given the rule relating to attribution of conduct, if it was assumed that the act of an agent of an international organization must be attributed to the organization, it would be odd if the agent could not exercise self-defence in certain circumstances. Concerns about that term relating to possible abuse of right in a situation where an international organization resorted to the use of force should also be addressed. That was also a matter for the Drafting Committee.

21. She continued to have a general reservation about countermeasures. It was difficult to see why a countermeasure was qualified as “lawful” in draft article 19, as the Special Rapporteur proposed in paragraph 66 of the report. If countermeasures were accepted, that meant that they were lawful under international law, whereas a reference to “lawful countermeasures” suggested that there were also unlawful ones. If the intention was to say that countermeasures must fulfil the conditions set out in the following part, a cross-reference would suffice. Moreover, the phrase “in accordance with the rules of the [international] organization” in paragraph 2 was somewhat restrictive. Perhaps the wording of draft article 19 could be improved in the Drafting Committee.

22. To a large extent, the new draft articles in the section on general provisions followed the same pattern as the rules of State responsibility. Given the variety of international organizations and their practice, draft article 61 (*Lex specialis*) would constitute a major escape clause. She was not suggesting the deletion of the draft article at the current stage of work, but she believed that the Commission should re-examine its relevance in the light of the general practice of international organizations when it had completed its consideration of the draft articles. Although she was not in full agreement with the Special Rapporteur’s general approach, she understood why he had taken it. The theory of State responsibility was having a noticeable impact on international practice, even though the legal status of the draft articles on responsibility of States had not yet become established law. The Commission’s current work on international organizations would also help clarify the regime of international responsibility under international law. Given the great variety of international organizations, the Commission should proceed cautiously to ensure that the rules that it developed would be applicable in practice. In that connection, she commended

the Special Rapporteur for having taken the comments of States fully into account.

23. Mr. AL-MARRI commended the Special Rapporteur for the high quality of his report. The most important change that the Special Rapporteur had proposed was the deletion of draft article 18 (Self-defence). In his own view, self-defence was a “natural” right of States when exercised in accordance with international law. It was unfortunate that the Special Rapporteur had not examined the controversial idea that the rules governing international organizations should apply also to the United Nations, particularly in the context of peacekeeping operations. Lastly, draft article 15 (Decisions, recommendations and authorizations addressed to member States and international organizations) needed to be made clearer, particularly with regard to the invocation of the responsibility of an international organization.

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

[Agenda item 1]

24. Mr. VÁZQUEZ-BERMÚDEZ (Chairperson of the Drafting Committee) said that the Drafting Committee on the topic “expulsion of aliens” would be composed of Ms. Escameia, Mr. Gaja, Mr. McRae, Mr. Niehaus, Mr. Perera, Mr. Saboia, Mr. Vasciannie, Sir Michael Wood and Ms. Xue.

The meeting rose at 11 a.m.

3001st MEETING

Thursday, 7 May 2009, at 10.05 a.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Al-Marri, Mr. Cafilisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Ms. Jacobsson, Mr. Kamto, Mr. Kemicha, Mr. McRae, Mr. Melescanu, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Perera, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue.

Responsibility of international organizations (*continued*) (A/CN.4/606 and Add.1, sect. D, A/CN.4/609, A/CN.4/610, A/CN.4/L.743 and Add.1)

[Agenda item 4]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. FOMBA said that he wished to make some general comments on the seventh report on responsibility of international organizations (A/CN.4/610). An unusual approach had been taken by the Special Rapporteur, one which contrasted sharply with the normal split between