

Document:-
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Summary record of the 2877th meeting

Topic:
Responsibility of international organizations

Extract from the Yearbook of the International Law Commission:-
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natural events or “an irresistible happening of nature”, he was less happy with the idea, discussed in paragraph 31, that “financial distress”, might constitute an instance of *force majeure*. A failure by member States to pay their financial contributions might well place an international organization in a very difficult position, but a State could not invoke *force majeure* as a circumstance precluding wrongfulness merely because it had failed to receive payments or revenue that were critical to its solvency, and he did not see why an international organization should be any different. At the very least, it would seem unacceptable that an international organization should take on new contractual obligations, in the knowledge that it would be unable to fulfil them because its members were deliberately withholding the necessary contributions. That said, article 20 was satisfactory as drafted.

14. He still had concerns about the idea that States could invoke necessity as a circumstance precluding the wrongfulness of an act which would otherwise be contrary to international law, given the risk of abuse, and in the case of an international organization, the argument was significantly weaker. An international organization could not invoke the necessity of its own survival, but only the preservation or protection of an interest that it existed to protect, in other words an essential interest the protection of which was part of the functions that had been specifically entrusted to it. As draft article 22 reflected that restrictive view, set out in paragraphs 41 to 44 of the report, of the circumstances in which an international organization could invoke the state of necessity, he could go along with it, albeit with some continuing misgivings.

15. Mr. ADDO congratulated the Special Rapporteur on the quality of his fourth report, the content of which he endorsed almost in its entirety. He supported the Special Rapporteur’s approach of following the general pattern adopted in the draft articles on responsibility of States. Commenting on the various draft articles on circumstances precluding the wrongfulness of an act of an international organization, he supported draft article 17 (Consent) and draft article 18 (Self-defence), which were modelled on draft articles 20 and 21 respectively of the draft articles on responsibility of States for internationally wrongful acts.⁹⁸ With regard to countermeasures, he endorsed the idea of leaving the text blank, as envisaged in paragraph 25 of the report. As for *force majeure*, he noted that international law did not impose responsibility where the non-performance of an obligation was due to circumstances entirely beyond the control of the State, and was of the view that the same must apply in the case of international organizations. Draft article 20, which was in conformity with article 23 of the draft articles on responsibility of States,⁹⁹ was therefore acceptable.

16. On distress, he agreed with the Special Rapporteur that there was no reason why different rules should apply to States and to international organizations; draft article 21, which was based on article 24 of the draft articles on responsibility of States, was thus satisfactory. On necessity, he agreed with the Special Rapporteur that there was no reason to depart from the model provided by draft article 25 on responsibility of States, and he

supported the proposed wording for draft article 22. He also endorsed draft articles 23 (Compliance with peremptory norms) and 24 (Consequences of invoking a circumstance precluding wrongfulness), which were modelled on draft articles 26 and 27 of the draft articles on responsibility of States respectively.¹⁰⁰

The meeting rose at 10.45 a.m.

2877th MEETING

Wednesday, 17 May 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. Momtaz, Mr. Operti Badan, 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. MOMTAZ said that, in drafting his fourth report, the Special Rapporteur had—quite rightly, in his view—once again followed the general pattern adopted for the draft articles on the responsibility of States for internationally wrongful acts. That approach did not, however, make the Special Rapporteur’s task any easier; the general remarks prefacing the main body of the report clearly showed the pitfalls he had faced in drawing up draft articles on circumstances precluding wrongfulness. The Commission was particularly indebted to the Special Rapporteur for outlining specific scenarios and situations relating to international organizations in order to justify his retention of the circumstances precluding the wrongfulness of acts of States in the present set of draft articles.

2. Draft articles 17, 19, 20 and 21 did not pose any difficulties. His reading of draft article 18 on self-defence invited the conclusion that the use of force by an international organization in the exercise of its inherent right of self-defence under Article 51 of the Charter of the United Nations would not engage the organization’s responsibility, even if the armed attack was carried out by a non-State entity. In other words, it was not necessary for the attack to have been launched by, or to be imputable to, a State. States and non-State entities were therefore placed

⁹⁸ *Ibid.*, p. 27.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*, p. 28.

on an equal footing. If that reading of draft article 18 was correct, and to judge from paragraphs 17 and 18 of the report, the provision was incontestably based on a broad interpretation of Article 51. In paragraph 17 the Special Rapporteur concluded that, in practice, self-defence on the part of United Nations peacekeeping and peace-enforcement forces constituted a circumstance precluding wrongfulness irrespective of whether an armed attack against them was carried out by a State or a non-State entity.

3. The approach taken in draft article 18 posed no intrinsic problem, because attacks by non-State entities on United Nations facilities, particularly in Iraq, unquestionably confirmed the need to allow international organizations to defend themselves against such attacks. He was, however, concerned about the legal basis for such an approach, given that the whole question of States' recourse to self-defence against armed attacks from non-State entities continued to be highly controversial. In the wake of the tragic events of 11 September 2001 and the adoption of Security Council resolutions 1368 (2001) and 1373 (2001) of 12 and 28 September 2001 respectively, some legal writers held that the Security Council had expanded the possibility of invoking the right of self-defence in response to such attacks.

4. In his own submission, that was not the case; first, because, when the Security Council had wished to adopt counter-terrorism measures under Chapter VII of the Charter, on the basis of the aforementioned resolutions, it had been obliged to establish a link between Afghanistan and Al-Qaida. In other words, the acts of terrorism justifying recourse to self-defence had been imputed, not to a non-State entity, but to a State—Afghanistan.

5. Moreover, the ICJ had always rejected the idea that the right to self-defence could be relied upon after an armed attack conducted by a non-State entity. For example, in paragraph 139 of its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* of 9 July 2004, the Court had found that since Israel did not claim that the attacks against it were imputable to a foreign State, it could not affirm that it was exercising a right of self-defence under Article 51 of the Charter. Hence the Court took the view that, for the right of self-defence to be invoked, the armed attack must be conducted by a State, or must be imputable to a State if carried out by non-State entities. Admittedly that line of reasoning had been challenged by some members of the Court, including Judge Higgins, the current President of the Court, who had stated in paragraph 33 of her separate opinion that “[t]here is ... nothing in the text of Article 51 that *thus* stipulates that self-defence is available only when an armed attack is made by a State” (p. 215 of the opinion). Judge Higgins therefore considered that attacks against a State by non-State actors were covered by Article 51 of the Charter. She further contended that the Court's refusal to extend the inherent right of self-defence to situations where armed attacks were carried out by non-State entities was the result of the Court so determining in its judgment rendered in 1986 in the *Military and Paramilitary Activities in and against Nicaragua* case. It was interesting to note that while Judge Higgins had acknowledged that the interpretation of

Article 51 in that case “is to be regarded as a statement of the law as it now stands” and accepted that conclusion, she also maintained all the reservations as to that proposition that she had expressed elsewhere in writing (*ibid.*).

6. In paragraph 11 of his separate opinion in the *Armed Activities on the Territory of the Congo* case, Judge Simma, too, had taken issue with the restrictive reading of Article 51 of the Charter. He had submitted that Article 51 also covered defensive measures against terrorist groups and had considered that Security Council resolutions 1368 (2001) and 1373 (2001) justified an extensive interpretation of Article 51 (p. 337 of the judgment).

7. While those opinions heralded a new approach to the notion of self-defence, the fact remained that State practice and most legal writers still tended to adhere to a restrictive interpretation of Article 51 of the Charter. He therefore wondered if it would not be wise for the Special Rapporteur to provide additional arguments in support of his thesis, especially as he was proceeding on the basis of the draft articles on responsibility of States. He was not convinced by the Special Rapporteur's reference in paragraph 18 of his report to the Court's reasoning in the *Oil Platforms* case. He personally failed to see how the Court's broadening of the concept of armed attack could warrant an extensive interpretation of Article 51 justifying the exercise of the inherent right of self-defence by an international organization against armed attack by a non-State entity—unless inclusion of that right was considered as falling within the area of progressive development of international law. He had absolutely no objection to adopting that broad interpretation as an exercise in progressive development.

8. He fully supported draft article 22 on necessity, but was puzzled by the explanations and comments in paragraph 37 of the report. In particular, he was troubled by the references in that paragraph to the notions of “operational necessity” and “military necessity” which had nothing to do with the state of necessity with which the Commission was concerned in the context of draft article 22. He wondered if the Special Rapporteur wished to suggest that, in instances in which interference with private property had occurred during military operations conducted by United Nations peacekeeping forces, operational necessity would preclude the wrongfulness of such acts. Such questions, which related to the law of armed conflicts rather than the state of necessity, should not be discussed in the fourth report. United Nations forces engaged in military operations under Chapter VII of the Charter were subject to international humanitarian law, as had been recalled by the Secretary-General in his circular of 6 August 1999.¹⁰¹ Accordingly, although an international organization—in the case in point, the United Nations—was not a party to an armed conflict, it had to abide by international humanitarian law and any violation of that law by its forces would therefore engage the responsibility of the Organization. That question should not be dealt with in the draft articles on circumstances precluding wrongfulness, as it might give rise to misunderstandings.

¹⁰¹ “Observance by United Nations forces of international humanitarian law” (ST/SGB/1999/13).

9. Moreover, the state of necessity as a circumstance precluding wrongfulness was inapplicable to a violation of the law of armed conflicts. The commentary to article 25 of the draft articles on responsibility of States for internationally wrongful acts had made it very clear that international humanitarian law expressly excluded reliance on necessity in the event of armed conflict.¹⁰²

10. Turning to draft article 23 on compliance with peremptory norms, he noted that in paragraph 47 of the report the Special Rapporteur stated that “[i]n principle, peremptory norms bind international organizations in the same way as States. However, the application of certain peremptory norms with regard to international organizations may raise some problems.” He wished to know whether that observation was based on common article 5 of the 1969 Vienna Convention and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter the “1986 Vienna Convention”), which contained an exception in respect of international organizations inasmuch as the Conventions applied without prejudice to any relevant rules of the organization. If the reply was in the affirmative, the Special Rapporteur should take account of that exception in the wording of draft article 23, since that issue was highly controversial and the subject of intense debate among legal writers. The question was whether the reference in common article 5 to the relevant rules of the organization should be seen as authorizing certain international organizations to derogate from the peremptory norms of international law. Was it conceivable that the constituent instrument of an international organization expressly empowered an organ of that organization to derogate from peremptory norms? That was a particularly pertinent question in the case of an organ such as the Security Council which was supposed to represent the international community of States as a whole. If so, the Security Council could be exempted from its obligation to comply with the norms of *jus cogens* when exercising its powers under Chapter VII of the Charter. For example, it might empower a State to have recourse to armed force against other States in the absence of any armed attack, in other words when Article 51 of the Charter did not apply. Such a situation might arise where a State engaged in massive and systematic violations of the human rights of its citizens, in which case the Security Council might well adopt a resolution under Chapter VII of the Charter authorizing States to use force in breach of a peremptory norm of international law in order to assist the population of that country by halting the human rights abuses. Article 16 of the Rome Statute of the International Criminal Court also afforded the Security Council the possibility of requesting the Court to defer the prosecution of persons accused of having committed the crime of genocide. He was personally of the opinion that impeding the trial of persons accused of genocide was also a violation of *jus cogens*. He was sure that the Commission would pay due heed to those issues when considering draft article 23.

11. Mr. GAJA (Special Rapporteur), responding to the statement by Mr. Momtaz, said that the latter had read too much into his report and had raised matters which did not

require the Commission’s consideration, as they did not fall within the scope of the topic. There was nothing in his fourth report to suggest that self-defence should apply with regard to non-State entities, or that the question should be dealt with in the current context. Paragraph 17 merely stated that United Nations practice in relation to self-defence did not make a distinction according to the source of the armed attack. That practice was referred to because it did seem to lend support to the idea that self-defence could apply to international organizations.

12. It was understandable that Mr. Momtaz did not see the connection in paragraph 18 between the *Oil Platforms* case and the question of self-defence, because in that paragraph he had considered not the source of the attack, but what constituted an armed attack and when it was possible to say that an armed attack was sufficient to trigger self-defence. It was not possible to draw a distinction on those lines between international organizations and States. That was the reason why he had referred to Article 51 of the Charter.

13. As for necessity, nowhere in the report had he implied that the provision on necessity should allow any derogation from the obligations imposed by international humanitarian law beyond those permitted on the grounds of military necessity when the latter was applicable. The purpose of his reference in paragraph 37 to practice concerning situations of military necessity which might be covered by international humanitarian law was to show that the concept of necessity was not alien to international organizations, but not that necessity could otherwise justify a breach of international humanitarian law. There was nothing in his report to suggest anything to the contrary, nor was it the Commission’s task to express an opinion in that regard.

14. Lastly, as far as obligations under peremptory norms were concerned, the report said nothing about the possibility of allowing international organizations to derogate from them. That would be a strange proposition, whether based on common article 5 of the 1969 and 1986 Vienna Conventions or on any other provision. The problem he had mentioned arose in the context of the Charter of the United Nations. When it came to the use of force, it might be difficult for international organizations to be placed in the same position as States and to react, for example, in collective self-defence. States might then be justified in using force notwithstanding Article 2, paragraph 4, of the Charter of the United Nations, but would that also hold good for an international organization? It was, however, not necessary for the Commission to express an opinion on that matter. While the Commission should discuss all the issues which were relevant to the preclusion of wrongfulness, it should not concern itself with matters that could not be so regarded even by implication. If some of the comments in the report seemed ambiguous, they could in due course be clarified.

15. Mr. KOLODKIN said that broadly speaking he endorsed the Special Rapporteur’s remarks. Many of the issues raised by Mr. Momtaz were unrelated to the topic under consideration.

¹⁰² *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 80–84.

16. Mr. CHEE, referring to the nature of military activities under United Nations peacekeeping operations, said that in its 1962 advisory opinion in the *Certain Expenses of the United Nations* case, the ICJ had distinguished between peace observation operations, peace enforcement and peacekeeping. It was in the nature of United Nations peacekeeping operations that they were not directed against any State and did not constitute measures within the meaning of Chapter VII of the Charter. The distinction set out in the 1962 advisory opinion had led to peacekeeping operations being described as “Chapter VI and a half” operations by Dag Hammarskjöld.

17. Mr. ECONOMIDES said that although he had been surprised by Mr. Momtaz’s remarks, he agreed with their substance. He did not see how a report on responsibility of international organizations could address such crucial questions as the scope of self-defence, the powers of the Security Council with regard to norms of *jus cogens* or circumstances in which force might be used other than in cases of self-defence. However, the Special Rapporteur had allayed his fears by pointing out that the report had nothing to do with those questions and that if it contained any comments that might be misconstrued and lead to misunderstandings, then they would have to be corrected. He commended the comments by Mr. Momtaz, notably with regard to self-defence, a notion which must always be interpreted in a restrictive manner.

18. Mr. BROWNLIE said that the subject of what he preferred to call “justifications” was a very difficult aspect of the topic under consideration, as indeed it was in the context of responsibility of States. That was relevant, because the Commission had taken the metaphor of responsibility of States as the starting point for its consideration of the topic of responsibility of international organizations, and had given the Special Rapporteur a licence—perhaps even a mandate—to treat the subject on that basis. With hindsight, it was clear that in the context of the draft articles on responsibility of States for internationally wrongful acts, the question of justifications had never been properly worked out. With every new case that came before the ICJ and every new arbitration, it became increasingly clear that the subject was immature, yet the Commission had adopted an “emperor’s new clothes” policy, so that it now had a splendid set of draft articles relating to justifications in the context of responsibility of States, which were very difficult to apply. The Commission had then embarked on another subject on which there was much less practice or support in legal sources and had instructed its intrepid Special Rapporteur to address it. No Special Rapporteur would ever venture to say that there was insufficient evidence to support any norm whatsoever on any given point.

19. Notwithstanding all of the above, the Commission had been provided with a courageous, well-organized and clear exposition of the problems. His only general reservation was that the report was over-succinct. On the important question of whether there was State practice on countermeasures in relation to international organizations, he noted that paragraph 22 contained a reference to the

monograph of Pierre Klein,¹⁰³ but did not explain what support it provided, nor was any information given on practice or opinions. Sometimes more evidence of the building blocks the Special Rapporteur had employed would have been welcome.

20. He had no problems with regard to consent, *force majeure* or peremptory norms, but had considerable difficulties with some of the other categories. The analogue of inter-State relations, which was the basis for the Commission’s work on the topic, was placed under particular strain when the question of justifications arose. Self-defence was the perfect example of that: the political and strategic geography of self-defence in relation to inter-State relations was completely different from its counterpart in the activities of international organizations. The question of peacekeeping illustrated the difficulties. In its paragraph 15, the report used the category of self-defence as such, in terms of Article 51 of the Charter of the United Nations, and stressed that international organizations obviously had such a right. He did not follow that reasoning at all. Admittedly, there must be some analogue, but it did not seem correct to say that it was the same right. As could be seen from paragraph 17, opinions had evolved, and thus a peacekeeping operation could use force in order to protect a mission. That made sense to him. He was not opposed to the idea of having an article covering the situation in which an international organization, acting within its mandate, had the right to use force to implement its purposes or conduct a special, authorized mission—perhaps one outside the normal purposes of the organization, perhaps one conducted by a regional organization or the Security Council. The textbook case was that of the United Nations Operation in the Congo created on 14 July 1960 by Security Council resolution 143: the peacekeeping mandate had included the right of free movement and had permitted the use of force to clear away roadblocks.¹⁰⁴ That had been a lawful action in pursuance of the mission. Thus, self-defence was just one of a spectrum of lawful actions which an international organization might have to take as part of its mandate. The Commission must give further thought to that category; in his view, self-defence was a misnomer.

21. The Special Rapporteur had recognized that countermeasures posed particular difficulties; indeed, in the last sentence of paragraph 23 of his report he suggested that there might be good reasons for deferring the examination of the conditions under which an organization was entitled to resort to countermeasures against another organization. He personally would like to see more detail on the practice of organizations in those matters. Once again, the analogue of inter-State relations did not work well in the context of countermeasures.

22. Draft article 21 on distress seemed to be a subset of necessity. He did not see the need for a separate article, but if it were to be retained, legality should be conditioned by compensation. There was a tendency to deal with

¹⁰³ *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens*, Brussels, Bruylant/Éditions de l’Université de Bruxelles, 1998.

¹⁰⁴ See in particular resolutions 161 (1961) and 169 (1961) of 21 February and 24 November 1961, respectively, in which the Security Council authorizes “the use of force, if necessary, in the last resort”.

compensation by reserving the question, as had been done in the “without prejudice” clause of draft article 24. That put him in mind of the law of tort. Under the doctrine of incomplete privilege in United States case law, if a ship caused damage to a landing place to which it had been forced to moor in a storm, that did not constitute a tort in the ordinary sense, but instead a conditional wrong which could be expunged by the payment of reasonable non-penal compensation for the costs of relieving the distress. Occasionally, municipal law sources were of interest in such matters.

23. The category of necessity was one with which he had never been very happy, although it had received ample recognition in article 25 of the draft articles on responsibility of States¹⁰⁵ and had been recognized, with some caution, by the ICJ in the *Gabčíkovo–Nagyymaros Project* case. If the Commission was to retain necessity, it should place more emphasis on the issue of proportionality, and again the question arose of whether compensation should be dealt with more positively.

24. Mr. ECONOMIDES said he was pleased that Mr. Brownlie had questioned whether countermeasures at the inter-State level could be equated with countermeasures at the level of international organizations. The question raised a problem of substance. Countermeasures had always been an archaic, anachronistic and somewhat primitive practice that disregarded international law—one, moreover, that was based on force and exercised unilaterally. He wondered whether such a practice should be transposed to the law of international organizations. What justification was there for recommending recourse to countermeasures rather than the exhaustion of all avenues open to international law to settle differences peacefully? A more general question of principle was at issue and deserved close consideration.

25. Mr. KOSKENNIEMI said he agreed with Mr. Brownlie about the complex nature of self-defence and countermeasures when applied to international organizations. It would be interesting to have an in-depth discussion on how the inter-State concepts of countermeasures and self-defence would need to be modified in order to be applicable to activities in which international organizations were involved. However, the Commission faced a dilemma: if it wished to hold a substantive debate on self-defence, countermeasures and necessity with regard to international organizations, the report did not provide the necessary information on practice. If it did not wish to enter into that debate, it would have to follow the structure of the draft articles on responsibility of States and merely note that the same “justifications”, as Mr. Brownlie had put it, were applicable, *mutatis mutandis*, to international organizations. On the basis of the available information, he believed that the Commission must take the latter approach, even though to do so might be intellectually unsatisfactory and uninteresting. That seemed to be the approach favoured by the Special Rapporteur, who had noted that the issues raised by Mr. Momtaz, although interesting, were irrelevant. Thus, either members should cite practical problems with regard to international organizations so as to provide substance for a discussion

of how the concepts of self-defence, countermeasures and necessity should be modified, or else the Commission should confine itself to the rather limited proposals which the Special Rapporteur had made.

26. Mr. GAJA (Special Rapporteur) said that the subjects of necessity and self-defence must certainly be addressed. He had tried to glean as much practice as possible, had requested international organizations to provide further practice, and would welcome any relevant information that members could provide. Some questions, such as those raised by Mr. Momtaz, had been deliberately left aside in the work on State responsibility, but should be dealt with in the current context. Countermeasures, on the other hand, should not, in his view, be discussed at the present stage. They would be comprehensively addressed in the context of implementation of international responsibility. He had simply wished to state that, if it were found that countermeasures were allowed, action taken as a countermeasure would not be unlawful.

27. Mr. Sreenivasa RAO said that the discussion had been beneficial in that it clarified once and for all which issues the Special Rapporteur deemed to be irrelevant in the present context. State responsibility and the responsibility of international organizations were parallel but very different cases. States’ inherent right of self-defence under Article 51 of the Charter was one thing; self-defence as a circumstance precluding wrongfulness where international organizations or non-State actors were involved was quite another matter. Arguably, action by States or international organizations against an armed attack by a non-State actor was a circumstance precluding wrongfulness, but such a right was of a lesser order than the right of self-defence under Article 51.

28. Mr. MATHESON said that the Special Rapporteur’s reports on the responsibility of international organizations had been thorough, concise, meticulous in their research and legal analysis and perceptive in their assessment of practical considerations. The fourth report was no exception. In general, due account must be taken of the fact that the competence and responsibilities of international organizations had greatly expanded in recent decades. In many cases, organizations had taken on functions fully comparable to those of States, particularly with regard to the governance of territories under international control. It therefore followed that they should have grounds for preclusion of wrongfulness that were comparable to those of States: otherwise, they might be unable effectively to carry out the duties entrusted to them by the international community, or find themselves incapable of responding to emergency situations or contingencies that could threaten their mission or the lives and well-being of innocent persons. The commentary should make it clear where appropriate that only limited circumstances comparable to those which had given rise to similar provisions in the draft articles on State responsibility were being envisaged.

29. Turning to specific articles, he said the need for draft article 17 on consent was obvious, since consent could preclude wrongfulness in many situations, from the mundane case of permission to use proprietary material to the weightier one of armed entry into the territory of a State. He also thought there was a clear need for draft article 18 on self-defence, since international organizations were

¹⁰⁵ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 28.

now called on to become involved in situations entailing serious risks to life and security. Mr. Momtaz had raised interesting questions about the extent of the right of self-defence, but he himself agreed with the Special Rapporteur that it would be unwise for the Commission, either in the text or in the commentary, to attempt to define the extent of that right or the circumstances that might trigger it. That was a matter to be reserved for consideration by the Security Council, by another authorizing body in the case of a peacekeeping operation or, in the case of collective defence, by a collective security organization or its members. Of course, draft article 18 was without prejudice to the right of the Security Council, under Chapter VII of the Charter, to authorize the use of force by an international organization going beyond the scope of self-defence, and the commentary should perhaps make that clear.

30. With respect to draft article 19, the legitimacy of countermeasures needed to be recognized for international organizations, just as it was for States. Like States, international organizations needed to have lawful options for dealing with unlawful actions by other entities.

31. With respect to *force majeure*, he had no problem with the proposed draft article 20, but like Mr. Mansfield, he had difficulty with the suggestion in paragraph 31 of the report that *force majeure* in the form of insufficient funding could be used as an excuse for the failure of an international organization to comply with its obligations. That would shift the consequences of such financial lapses away from the organization and its members and place them on the shoulders of other parties that had dealt in good faith with the organization. Lack of funding was not an “irresistible force” or “unforeseen event” for the purposes of *force majeure*, but rather a foreseeable and common occurrence. The organization should manage its finances and commitments so that it could deal with such funding shortfalls, rather than simply being relieved of its obligations.

32. With respect to distress, he agreed that international organizations should have the benefit of an exception such as that contained in draft article 21. It might be, however, as Ms. Escarameia had suggested, that the language of paragraph 1 needed adjustment, given that international organizations were now frequently responsible for the lives and safety of many persons in dangerous situations.

33. Draft article 22 on necessity was perhaps the most controversial of all the provisions. Like Mr. Mansfield, he had real doubts about the way that principle had been embodied in the draft articles on the responsibility of States. Nevertheless, if that excuse had been recognized for States, the same should probably be done for international organizations. While such organizations did not, for the most part, have the same interests as States, in some situations they might have comparable “essential” interests that they had a duty to protect. He would therefore not object in principle to draft article 22, but would suggest that it be made clear that it was primarily designed for situations where international organizations were exercising functions comparable to those of States, such as when charged with the governance of a territory and the protection of the lives and welfare of its population.

34. With respect to compliance with peremptory norms, he had no problem with the proposed draft article 23, but

he did have difficulty with paragraph 48 of the report, which seemed to suggest that consent could be given for military intervention only in specific instances and not in advance for a defined category of situations. States, he believed, had the sovereign right to give advance consent to military activities in their territory by other States or by international organizations, and in fact that was often done. The Commission should not attempt, either in the commentary or in the draft articles, to resolve such highly controversial and difficult issues about the substance of peremptory norms or their relationship to other hierarchical principles of international law, a matter being considered under the topic of fragmentation of international law.

35. Lastly, he had no problem with draft article 24, which was logically parallel to the disclaimers in the draft articles on responsibility of States. In conclusion, he said he was in favour of referring of the proposed draft articles to the Drafting Committee.

36. Mr. YAMADA commended the Special Rapporteur’s concise and well-reasoned report, with which he agreed almost in its entirety. It was gratifying to note that international organizations were now demonstrating keen interest in the Commission’s work on the topic.

37. Circumstances precluding wrongfulness was one area where there was no reason to depart from the substantive principles set forth in the provisions on responsibility of States. Those principles were in the process of becoming customary international law and were soon to be reviewed by the General Assembly. The Commission should not create confusion by proposing alterations to those substantive principles. Accordingly, he supported the Special Rapporteur’s proposals, which introduced only necessary textual changes and drafting improvements.

38. He favoured deferring consideration of draft article 19, on countermeasures, until a decision was made on whether the question of countermeasures by an international organization against a State should be addressed in the current draft articles. With the exception of draft article 19, therefore, the provisions proposed in the report should be referred to the Drafting Committee.

The meeting rose at 11.30 a.m.

2878th MEETING

Thursday, 18 May 2006, at 10.05 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. Momtaz, Mr. Opertti Badan, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.
