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Summary record of the 2878th meeting

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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.

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. KEMICHA commended the Special Rapporteur for the quality of his work. He noted that in an effort to ensure consistency with the draft articles on State responsibility for internationally wrongful acts, the Special Rapporteur had avoided, apparently without much conviction, circumstances precluding wrongfulness that were not so characterized, a case in point being that of an international organization acting under coercion, which he cited in paragraph 8 of the report.

2. On the question of consent, he said that the example of election-monitoring missions was entirely relevant and draft article 17 did not pose any difficulty. Self-defence, on the other hand, might provide an opportunity for determining how far it was possible to go in transposing the draft articles on State responsibility into articles on the responsibility of international organizations, a transposition that was usually justified. As in draft article 21 on State responsibility,¹⁰⁶ draft article 18 required that the measure of self-defence must be “lawful” and must be “taken in conformity with the Charter of the United Nations”. He endorsed Ms. Escameia’s proposal not to refer solely to the Charter, but to international law in general. The Special Rapporteur had himself argued in paragraph 18 of his report that the invocability of self-defence should not be limited to the United Nations.

3. On countermeasures, he noted that the Special Rapporteur had considered whether to provide for an article along the lines of draft article 22 on State responsibility¹⁰⁷ without knowing whether the question of countermeasures taken by an organization against a State would eventually be addressed. He personally preferred to include a proper article 19 provisionally rather than leave a blank in the text.

4. *Force majeure*, which the Special Rapporteur addressed in draft article 20, was clearly a circumstance precluding wrongfulness. As to distress, he did not subscribe to the Special Rapporteur’s proposal in paragraph 31 of the report that financial distress might constitute an instance of *force majeure* that the organization concerned could invoke in order to exclude wrongfulness of its failure to comply with an international obligation. He understood the feeling of helplessness and frustration that some parties might have when States abdicated their financial obligations and their duty to show solidarity, but as Mr. Mansfield had pointed out, financial distress could on no account be regarded as *force majeure*, since those entrusted with running international organizations had an obligation of diligence and caution, and situations of financial distress seldom arose without warning. The situation of distress contemplated in draft

article 21 was of a completely different nature, and had to do with saving the life of the author or of other persons entrusted to the author’s care. In paragraph 33 the Special Rapporteur noted that practice did not offer examples of the invocation of distress by an international organization in a similar situation, and it was therefore unclear why he had proposed a provision modelled on draft article 24 on State responsibility.¹⁰⁸

5. With regard to necessity, he agreed with the Special Rapporteur’s comment in paragraph 35 of the report that when the ICJ had said that the state of necessity was a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation, it had only considered relations between States, and that an international organization could not invoke necessity as an excuse for non-compliance as a matter of general international law (*Gabčíkovo–Nagyymaros Project*, para. 51). He endorsed the idea of providing stricter conditions for international organizations than those applying to States in order to avoid any risk of abuse and shared the view that the criterion of safeguarding “an essential interest against a grave and imminent peril”, which draft article 25 on State responsibility¹⁰⁹ required as a ground for invoking necessity, must be understood in the case of international organizations as being “an interest that the organization has the function to protect”.

6. Whereas draft article 23 on compliance with peremptory norms did not pose any difficulty, draft article 24, which dealt with the consequences of invoking a circumstance precluding wrongfulness and reproduced the text of draft article 27 on State responsibility,¹¹⁰ could have afforded an opportunity, as the Special Rapporteur himself suggested in paragraph 52 of the report, to make a worthwhile and innovative improvement to the wording of subparagraph (a) by referring more generally to all the elements of the circumstance and not only to the temporal element. The question of compensation, which the draft articles on State responsibility did not cover, should also have been addressed more thoroughly. Such caution on the part of the Special Rapporteur was not, however, surprising, since the Commission had asked him to follow the draft articles on State responsibility closely, and he wished to thank the Special Rapporteur once again for his admirable efforts.

7. Mr. Sreenivasa RAO congratulated the Special Rapporteur on his fourth report, which, like its predecessors, was rich and well thought out, yet concise and logically structured.

8. Aligning the draft articles on responsibility of international organizations with the draft articles on State responsibility for internationally wrongful acts had some advantages but also some disadvantages, to which he would revert later.

9. As noted in the report, an interesting debate that had taken place during consideration of the draft articles on

¹⁰⁶ *Ibid.*, p. 27.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*, p. 28.

¹¹⁰ *Ibid.*

State responsibility was also relevant to the responsibility of international organizations, the question being whether the exceptions listed constituted a justification precluding wrongfulness in a given case or whether they were simply factors having the effect of limiting the scope of wrongfulness while the act was being committed. The Special Rapporteur invited the Commission to adopt the view that it had espoused in the context of State responsibility, which was not to consider such exceptions as justifications and to specify that, even if the wrongfulness was suspended, the obligation to compensate remained. If a given act was lawful, the question of compensation did not arise. If it was unlawful, however, but the unlawfulness had been temporarily suspended, compensation remained a possibility. It would, however, be useful if the Special Rapporteur could share his thinking more fully with the Commission.

10. With regard to consent, he wondered whether the example given in the report, namely that of election-monitoring missions, was sufficiently relevant to settle the question of consent once and for all. Further information on the mandate of the Aceh Monitoring Mission in Indonesia, mentioned in paragraph 13 of the report, would be welcome, and other examples drawn from practice would be even better.

11. The expression “defence of the mission”, which appeared in paragraph 17 of the report to explain the term “self-defence” when applied to the mandates of peacekeeping and peace-enforcement forces, was far too broad and gave too much weight to the possible use of force in such circumstances, going far beyond the situation contemplated in Chapter VII of the Charter of the United Nations. It was thus out of place in the present text. The comments in paragraph 18 of the report concerning self-defence as a circumstance precluding wrongfulness were most pertinent, but it should be emphasized that the “inherent right of self-defence” mentioned by the ICJ was an inherent right of States, not of international organizations. Even if, as the Special Rapporteur maintained, the Commission should not address the question of the extent to which an international organization might resort to force, that distinction should be borne in mind, particularly when the Drafting Committee considered draft article 18. It was just one of several examples that showed—if there were any need to do so—that the draft articles on State responsibility could not simply be copied and applied to international organizations.

12. The question of countermeasures was one that seemed to get more complicated the more closely it was examined, as had been the case with State responsibility. For that reason, there was much to be said for Mr. Yamada’s suggestion at the previous meeting that the provision should be omitted. Clearly, though, the Special Rapporteur was best placed to choose a solution that would save the Commission from going around in circles, as it had in the past.

13. With regard to peremptory norms, he would prefer to avoid the expression “political integration”, which was used in paragraph 48 of the report, as it did not seem appropriate in the context. Moreover, as in the case of

self-defence, the Special Rapporteur would have made his point more clearly if, in considering peremptory norms, he had clearly distinguished between such bodies as the United Nations, NATO and peacekeeping forces, for example.

14. In summation, he recommended that draft articles 17 to 23 on responsibility of international organizations should be referred to the Drafting Committee.

15. Mr. BROWNLIE said that in his remarks at the previous meeting he had not been referring to self-defence and that he had had no intention of suggesting that the concept should be defined. The section on self-defence did, however, contain quite serious inconsistencies; a much clearer indication of what was intended was needed. First, draft article 18 was somewhat surprising, since it did not really reflect the content of paragraphs 15 to 17 of the report, especially the quotation from the report of the High-level Panel on Threats, Challenges and Change, according to which “the right to use force in self-defence ... is widely understood to extend to ‘defence of the mission’”.¹¹¹ It was abundantly clear from the context that the quotation related not to self-defence but to the lawful use of force in reasonable implementation of the purposes of a given mission. Draft article 18, however, appeared to be restricted to self-defence as it was used in Article 51 of the Charter of the United Nations; indeed, the draft article gave the impression that it referred only to the United Nations, whereas in fact the Commission was certainly not seeking to restrict the application of the provisions to a single organization. The other problem was that when the Commission was engaged in the progressive development of the law, it should say so. The draft article on self-defence seemed to contain elements of progressive development, yet it also relied on the Charter, even if it did not explicitly mention Article 51, which was generally understood to be a “without prejudice” clause incorporating customary international law relating to self-defence. The result was confusing, since no one had ever suggested that customary law referred in any way to the activities of international organizations. It was therefore an unnecessary precaution to refer to Article 51, even indirectly. It would be preferable not to give the impression either that an international organization could lawfully resort to force only in self-defence and not in any other circumstances to implement its mission or, on the other hand, that the Charter was applicable, since that was not, in fact, a possibility. Some of the problems that he had mentioned could be dealt with without any major change to the text, and the result would be more in keeping with the Special Rapporteur’s intentions.

16. Mr. GAJA (Special Rapporteur) said that he wished to make it clear that the references to the practice relating to United Nations peacekeeping or peace-enforcement forces and to financial distress, mentioned by the INTERPOL, had been made simply in order to reflect all practices and all the points of view that had been expressed on the subject. It had certainly not been his intention to pronounce definitively on whether a United Nations peacekeeping force could resort to force or the extent to

¹¹¹ *A More Secure World: Our Shared Responsibility*, A/59/565, para. 213.

which it could do so under the Charter, since that naturally depended on the force's mandate and the interpretation put on that mandate. The High-level Panel on Threats, Challenges and Change had clearly described what the practice was, namely that it was generally understood that the right to use force extended to "defence of the mission". That, however, did not amount to self-defence, and in any case it was not the kind of self-defence that was regarded as a circumstance precluding wrongfulness. He ought perhaps to have added a more explicit commentary to that effect. Paragraph 18 specifically stated that "[t]he invocability of self-defence should not be limited to the United Nations", but that did not mean that paragraphs 17 and 18 should be read as forming a continuous argument. The content of paragraph 17 was not what was covered by draft article 18.

17. The CHAIRPERSON said that the topic gave rise to a problem of methodology. The Commission was at one on the general principles and supported the Special Rapporteur's alignment of the draft articles with the draft articles on responsibility of States for internationally wrongful acts. However, that alignment was impossible in the case of circumstances precluding wrongfulness for the simple reason that the nature of international organizations as subjects of international law differed from that of States. Accordingly, the Commission ought, as had been recommended in every comment made, to consider whether it was possible to retain the approach adopted in the case of State responsibility or whether adjustments needed to be made.

18. Speaking as a member of the Commission, he said that it might be appropriate to go back to the advisory opinion on *Reparation for Injuries* issued by the ICJ in 1949, since the issue before the Commission was the interests, missions and purposes of an international organization, all of which related to the enjoyment by a subject of international law of a range of prerogatives and rights recognized by international law. The enjoyment of such prerogatives was accompanied by international responsibility, but in its management of that responsibility, an international organization was not a State or even a super-State. Secondly, the Commission was anxious to find examples of practice, and the report did not provide enough such examples. Some of the leading regional organizations in Africa had had some interesting experiences in that respect over the past few years, particularly when one international economic integration organization had unexpectedly found itself having to undertake peacekeeping missions in the territory of one of its member States. When a security problem had arisen in Liberia, a contingent of armed forces had been provided by Nigeria, which had used its dominant position within ECOWAS to justify its military presence in Liberia. The mission had been called an ECOWAS mission, but it had in fact been undertaken by Nigeria alone. That raised the question of whether an organization whose purpose was economic integration but which acted on a given occasion in pursuance of a mission or a mandate not its own would have to take responsibility for the consequences of such a change in its nature. In the case of confrontations on the ground, the question was whether the organization was justified, if responsibility was incurred, in invoking self-defence or any other circumstance precluding

wrongfulness. Other examples of practice could be found. In the case of Darfur, for instance, the African Union had announced an intention—to restore peace and install democracy—that was beyond its capacity to realize, with the result that it had been forced to call on the European Union, NATO and the United Nations for help. When the issue of responsibility arising from the participation of third international organizations in African Union missions or activities arose, it had to be determined whether the wrongfulness could, if necessary, be covered by the "host" or the "participating" international organization. Examples of practice could surely be found somewhere, since they certainly existed. The Commission should request the Special Rapporteur to look more closely into practice and to provide further information at the next session on the question of circumstances precluding wrongfulness, although it should not call into question the draft articles as a whole.

19. Mr. Sreenivasa RAO said that he had not meant that the Special Rapporteur ought to have considered existing practice and had failed to do so, but that no such practice existed. He fully supported the methodology adopted by the Special Rapporteur, who could not be faulted for not mentioning practice if none existed. That being the case, if members of the Commission could obtain relevant material to which the Special Rapporteur did not have access, it would be helpful if they made it available to him.

20. Mr. GAJA (Special Rapporteur) said that neither he, as Special Rapporteur, nor the Commission was mandated to pass judgement on specific cases or to determine whether, for instance, there had been consent or what the consequences might have been. However, if examples of practice did exist in the form of positions adopted by States or international organizations that had not been published, but of which members of the Commission were aware, he would be very glad to refer to them. Perhaps Commission members could use their personal contacts to get international organizations to communicate to them—and thus make available—relevant material, in which case the Commission could still reconsider the issues concerned on second reading. However, it would not be sensible to suspend the Commission's work in the hope of ultimately obtaining materials. Experience showed that States and international organizations were rather reluctant to transmit to the Commission material that was not published elsewhere. It was to be hoped, however, that the Commission's work would alert States and international organizations to what it needed, so that the Commission could revise its current activities in the light of further knowledge.

21. The CHAIRPERSON said that he would attempt to obtain material from Addis Ababa and Lagos, which he would immediately pass on to the Special Rapporteur.

22. Mr. ECONOMIDES likewise noted that the debate had demonstrated the impossibility of always following the general pattern of the draft articles on State responsibility; it was in fact the first time that there had been an acknowledgement that the situations involved could be completely different rather than identical. As several members of the Commission had rightly observed, practice was non-existent, which explained

why, despite the Special Rapporteur's endeavours, the report remained somewhat insubstantial. The absence of practice had two consequences: first, codification was impossible, since there was nothing to codify—as United Nations law was a *lex specialis* relating solely to the United Nations and the Charter, it could not be applied to all international organizations, even those with military functions; secondly, progressive development was impossible because it presupposed a knowledge of the issues and the existence of a modicum of practice. It was not even possible to draw analogies between States and international organizations, because the concerns were not the same. Some notions, like state of necessity, were already extremely difficult, if not impossible, to apply to States, and it was therefore obvious that they could not be applied blindly to international organizations in the absence of any practice.

23. In conclusion, he believed that the Commission must make a choice: either it copied a text in an artificial manner, which entailed certain risks, or it innovated by not always following the draft articles on State responsibility relating to circumstances precluding wrongfulness. He would endeavour to return to that point at a later stage.

24. Mr. RODRÍGUEZ CEDEÑO commended the Special Rapporteur on his full and well-structured fourth report on responsibility of international organizations, which was based on some particularly pertinent examples. The dearth of such examples, however, complicated the Commission's task. The draft articles proposed in the report were based on the corresponding draft articles on State responsibility of which the General Assembly took note in resolution 56/83 of 12 December 2001; that reference was necessary, even though the draft articles on State responsibility could not be applied *mutatis mutandis* to the responsibility of international organizations but had to be adapted, since two different subjects of international law were involved. Indeed, whereas the competence of an international organization was predicated on basic documents and the rules governing the organization, in other words on the organization's constituent instrument and the relevant regulations and resolutions of its various organs, a State's powers derived from the sovereignty implicit in the very definition of a State. Furthermore, given the diverse structure, purposes and competence of international organizations, any standards that were formulated would have to be of a very general nature that could cover all situations, for the draft articles could not apply exclusively to the United Nations. Moreover, the topic was more closely related to the progressive development of law than to codification, which was why the Commission should be extremely cautious when taking decisions. The practice mentioned by the Special Rapporteur was not sufficient to codify the rules governing circumstances precluding wrongfulness or, as others termed them, justifications. In any case, progressive development did not require repeated or constant practice, but simply the existence of sufficient material for the elaboration of standards or rules in that area. It was thus the evolution of international law, more than the existence of practice, that would permit the progressive development of that body of law.

25. Self-defence was a natural right constituting a customary exception to the use of force, which was prohibited by international law, in particular by Article 2, paragraph 4, of the Charter of the United Nations. That circumstance or justification, which was applicable in the context of relations between States, was acceptable in the context of the responsibility of international organizations, provided that two essential elements were borne in mind: necessity and proportionality. Naturally, preventive self-defence exercised under the theory of an imminent threat, which had been largely rejected by the international community, must be ruled out. The right of self-defence had been confirmed in several international texts, including the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. That was why he supported Ms. Escarameia's proposal to replace, in draft article 18, the words "Charter of the United Nations" with "international law", for the Charter did not cover certain aspects of the law on the use of force, including necessity and proportionality. In that context, he recalled the judgment of the ICJ in the *Military and Paramilitary Activities in and against Nicaragua* case of 1986, in which the Court had not upheld the argument that there was complete identity between the rules of customary international law on the lawfulness of the use of force and the provisions of the Charter (para. 176 of the judgment). In any event, he agreed with the Special Rapporteur that there were enough arguments in favour of including a provision of that nature in the draft text, and he agreed that draft article 18, together with the suggestions and comments as to how to improve it, should be referred to the Drafting Committee.

26. *Force majeure*, which might in some cases constitute a circumstance precluding wrongfulness, was an exception that was capable of being raised in international law, as the Permanent Court of Arbitration had found in the context of inter-State relations, and was transferable to the context of responsibility of international organizations. It was an external event comparable to an unforeseen occurrence that was beyond the control of the subject in question—in the case at hand, an organization—and prevented it from honouring an international obligation or complying with international law. The conditions governing situations of *force majeure* must be as clear and precise as they were in cases involving States.

27. The issue of whether an international organization's financial difficulties could be deemed a justification or circumstance precluding wrongfulness was a sensitive one. He did not believe that it was always possible to claim that the financial situation of an organization that was dependent on States' contributions justified the organization's failure to honour its international obligations. As the question was more closely related to the responsibility of States *vis-à-vis* the international organization, the two issues should be studied in tandem in due course.

28. As the Special Rapporteur stated in his report, necessity was one of the most controversial circumstances precluding wrongfulness. The state of necessity was not brought about intentionally, but stemmed from a State's

need to protect itself from a grave and imminent peril. The result was a dilemma in which the need to protect essential State interests had to be weighed against the violation of or non-compliance with international obligations. A number of conditions, set forth in article 25 of the draft articles on State responsibility, had to be met in order to invoke necessity in that context. The assessment of the situation could not be prejudged, as the ICJ had found in its 1997 judgment in the *Gabčíkovo–Nagymaros Project* case. That exception, as the Special Rapporteur had noted, was valid in the context of the responsibility of international organizations, even if the expression “essential interests” meant something different. In any event, as the Court had noted in the aforementioned judgment, that ground could be accepted only on an exceptional basis (paras. 51–58 of the judgment).

29. In conclusion, he supported referring the draft articles to the Drafting Committee, whose task would be extremely complicated, since the final wording would have to take account of the nature of international organizations as subjects of international law and would have to be based, to the extent possible, on the relevant provisions of the draft articles on State responsibility.

30. Mr. FOMBA said that the Special Rapporteur had brilliantly elucidated the main issue raised by the topic, namely the similarities and differences between an international organization and a State and the legal consequences that must be drawn therefrom with respect to responsibility. By way of general remarks, he said that he found the analogical approach taken by the Special Rapporteur in his report to be justified and noted that he had not maintained the distinction between causes of justification and excuses that the Commission had drawn in the past in the context of State responsibility. As to the circumstances precluding wrongfulness that had not been incorporated in the draft articles on State responsibility, the Special Rapporteur, advocating coherence, proposed to exclude them in the case of international organizations, substantiating his argument with the example of coercion (para. 8 of the report). Yet that circumstance seemed to be implicitly included in draft article 18 (a) on State responsibility,¹¹² and the Special Rapporteur’s reasoning thus appeared to be a contradiction in terms. The viewpoints expressed on the matter by Belarus and the Russian Federation¹¹³ were not without interest. He nevertheless believed that, in the absence of an in-depth review of the question, one could accept the Special Rapporteur’s argument.

31. On the matter of consent, the Special Rapporteur rightly concluded that there was no reason to adopt differing approaches for States and international organizations insofar as the conditions under which consent represented a circumstance precluding wrongfulness were concerned, and he endorsed that view.

32. As to self-defence, he could accept the Special Rapporteur’s argument that the invocability of

self-defence should not be limited to the United Nations and that the sole conditions for engaging in the measure of self-defence were that it should be lawful and taken in conformity with the Charter of the United Nations. He endorsed the draft article to that effect proposed by the Special Rapporteur. He also agreed with the Special Rapporteur that the invocability of self-defence by an international organization in case of an armed attack against one of its members should not be completely ignored and that it should be mentioned in the commentary at least. He had no strong opinions on countermeasures as mentioned in draft article 19, although it would seem that the Commission was in a position to move in the direction of alternative B, suggested by the Special Rapporteur in paragraph 25 of the report.

33. The Special Rapporteur’s argument in favour of the invocation by an international organization of *force majeure* as a circumstance precluding wrongfulness presented no particular difficulty either in terms of justification, even if it was not always obvious, or in terms of coherence. According to the Special Rapporteur, “financial distress” could constitute an instance of *force majeure*, and the fact that it could be due to the conduct of the organization’s member States did not prevent the organization, as a separate entity, from availing itself of that situation. The Special Rapporteur rested his argument on the principle that the personality of the international organization was superimposed upon that of its member States, and not upon the principle of subrogation. He had no real difficulty with the draft article proposed in paragraph 20 of the report, which was modelled on draft article 23 of the text on State responsibility.¹¹⁴

34. Turning to distress, he said that unless practice on the matter was clarified, there might be some reluctance to support the Special Rapporteur’s proposal, as the hypothetical example given by Klein and mentioned in a footnote to paragraph 33 might lead some to urge caution. On the question of necessity, the Special Rapporteur reached the conclusion that there was no reason for departing from the model provided by draft article 25 on State responsibility.¹¹⁵ Absent an in-depth consideration of practice, if any existed, the Special Rapporteur’s argument, which seemed driven by a particular interpretation of the functional and legal nature of international organizations, might furnish a good working hypothesis.

35. With regard to compliance with peremptory norms, he regretted that the Special Rapporteur did not explain why the attribution to a regional organization of certain powers of military intervention could be viewed as contravening a peremptory norm. Nevertheless, he fully endorsed the idea put forward by the Special Rapporteur that the situation might be different for regional organizations that were given the power to use force if that power represented an element of political integration among the member States. In a footnote to paragraph 48, the Special Rapporteur rightly cited the relevant provisions of article 4 (h) of the Constitutive Act of the African Union, which provided, *inter alia*, for the “right

¹¹² *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 27, and pp. 69–70 for the commentary thereto.

¹¹³ *Official Records of the General Assembly, Sixtieth Session, Sixth Committee*, 12th meeting (A/C.6/60/SR.12), paras. 50 and 70, respectively.

¹¹⁴ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 27, and pp. 76–78 for the commentary thereto.

¹¹⁵ *Ibid.*, p. 28, and pp. 80–84 for the commentary thereto.

... to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely, war crimes, genocide and crimes against humanity". One might also cite in that context the relevant provisions in articles 2, 6 (3) and 52 of the Protocol relating to mutual assistance on defence and articles 1 and 52 of the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security, adopted by ECOWAS on 29 May 1981 and 10 December 1999, respectively. In paragraph 49 of the report, the Special Rapporteur pointed out that the application to international organizations of the "without prejudice" provision in Chapter V of Part One of the draft articles on State responsibility might present some "special features", without specifying what those features were, while indicating that the general statement contained in draft article 26 on State responsibility¹¹⁶ could be reproduced by inserting the term "international organization" instead of "State". In the absence of an in-depth analysis substantiating the existence of such special features, he could accept the practical solution envisaged by the Special Rapporteur. Lastly, he had no special problems with draft article 24 on the consequences of invoking a circumstance precluding wrongfulness. In conclusion, he endorsed the referral of the draft articles to the Drafting Committee.

36. Mr. CHEE commended the Special Rapporteur on his well-researched fourth report on the responsibility of international organizations in relation to circumstances precluding wrongfulness, which paralleled eight corresponding draft articles in the text on State responsibility. His proposed draft article 17 on consent, for example, used the same wording as draft article 20 of the draft on State responsibility,¹¹⁷ and he supported it.

37. Draft article 18 provided that self-defence constituted a circumstance precluding the wrongfulness of an act of an international organization taken in conformity with the Charter of the United Nations. The Special Rapporteur referred to the distinction between peacekeeping and peace enforcement that had been made by the ICJ in its 1962 advisory opinion on *Certain Expenses of the United Nations*, a distinction based on the idea that peacekeeping operations were not directed at anyone in particular but were simply intended to separate the parties to a conflict, whereas peace-enforcement actions fell under Chapter VII of the Charter. Article 51 of the Charter provided that an armed attack against a State was a precondition for the exercise of self-defence. The application to United Nations peacekeeping forces of the Charter's prerequisites for action in self-defence imperilled those forces when they were engaged in a military operation. United Nations peacekeeping forces were thus placed at a disadvantage if the rules of engagement were based on Article 51 of the Charter. According to the Charter, the right of self-defence came into play for the victim only after the armed attack had occurred and it might be too late for the victim to respond. He noted in that connection that while the Charter permitted self-defence, it left the modalities for exercising that right unclear. Moreover, the right of self-defence

could be exercised until the Security Council had taken measures necessary to maintain international peace and security. The time between the action by the Security Council and the act of self-defence by the victim might be too long for the victim to respond to the immediate use of destructive force by the attacking side, especially in view of the destructive nature of modern weaponry. In the light of that consideration, the Commission could perhaps resort to the classical or customary rule of international law dealing with self-defence. One last point to be borne in mind was that under that rule, an act of self-defence must observe the proportionality rule.

38. Regarding countermeasures in respect of an internationally wrongful act, he suggested that alternative B for draft article 19, proposed by the Special Rapporteur in paragraph 25 of his report, reflected the view expounded in paragraph 22 of the report that a substantial body of literature analysing practice relating to the admissibility of countermeasures by international organizations showed that the fact that international organizations could in certain cases take countermeasures was not contested. However, the circumstances in which an organization could resort to countermeasures under the current regime of responsibility of international organizations had yet to be determined. The Special Rapporteur had been wise to defer consideration of that subject until State practice and doctrine were sufficiently developed.

39. On the question of *force majeure*, the Special Rapporteur had reproduced in draft article 20 the wording of article 23 of the draft articles on State responsibility.¹¹⁸ The situation was analogous to the one contemplated in article 61 of the 1969 Vienna Convention, in which non-performance of a treaty obligation could be justified by a situation that made such performance impossible. In article 21, on distress, the Special Rapporteur invoked the wording of article 24 of the draft articles on State responsibility.¹¹⁹

40. Necessity, as the Special Rapporteur noted, had always been considered only in relation to States, but there were several cases, referred to in paragraphs 37 to 41 of the report, in which necessity had been invoked by an international organization as a circumstance precluding wrongfulness. He supported draft article 22, which the Special Rapporteur had proposed on that question. He likewise endorsed draft articles 23 (Compliance with peremptory norms) and 24 (Consequences of invoking a circumstance precluding wrongfulness) and recommended that the entire set of draft articles on responsibility of international organizations should be sent to the Drafting Committee.

41. Mr. KOLODKIN said that he considered the fourth report on responsibility of international organizations to be of high calibre. The Special Rapporteur's work on circumstances precluding wrongfulness was entirely in line with the contemporary state of affairs. Practice in that area was indeed limited, and even though one might wish to see additional examples, they were not to be found. The most appropriate tactic was to follow the pattern of the

¹¹⁶ *Ibid.*, p. 28.

¹¹⁷ *Ibid.*, p. 27.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

draft articles on responsibility of States for internationally wrongful acts.

42. He saw no need to analyse the conditions under which self-defence on the part of an international organization was or was not lawful. It was simply necessary to stipulate that an act could not be considered unlawful if it constituted a measure of self-defence as defined in international law. As for coercion, it was adequately covered by draft article 14 (a), and to devote a separate article to it as a circumstance precluding wrongfulness was unwarranted, as the Special Rapporteur rightly pointed out.

43. The examples given by the Special Rapporteur were not always well chosen. For example, judgment No. 24 of the Administrative Tribunal of the Organization of American States in *Fernando Hernández de Agüero v. Secretary General of the Organization of American States*, cited in paragraph 29 in the context of *force majeure*, concerned a contract that had not given rise to obligations under international law. Similarly, it was difficult to understand the distinction between consent to a specific military intervention and general consent (para. 48). Nor was it easy to understand how the lawfulness of consent to an intervention could be based on the degree of political integration.

44. Nevertheless, he was in favour of referring the entire set of draft articles to the Drafting Committee, with the exception of draft article 19, which ought to be left blank, as the Special Rapporteur proposed in alternative A in paragraph 25 of the report.

**Shared natural resources¹²⁰ (A/CN.4/560,
sect. A, A/CN.4/L.683, A/CN.4/L.688)**

[Agenda item 5]

REPORT OF THE WORKING GROUP

45. Mr. CANDIOTI (Chairperson of the Working Group on Shared natural resources), introducing the report of the Working Group (A/CN.4/L.683), said that the Group had held five meetings in May 2006, during which it had continued its consideration of the draft articles submitted by the Special Rapporteur in his third report.¹²¹ It had also considered the report of the Working Group from the fifty-seventh session¹²² and a working paper prepared by the Special Rapporteur containing revised texts of draft articles 9 to 22. A groundwaters expert from UNESCO had been present at the first three meetings. The Working Group was submitting, in the annex to its report, a revised text of the 19 draft articles which could be referred to the Drafting Committee.

46. As at the previous session, the Working Group had taken the view that it was premature to prejudge the final form of the document, given the differing views expressed

on the subject by States in the Sixth Committee (A/CN.4/560, paras. 42–43). For that reason, draft article 4 as proposed by the Special Rapporteur had been deleted, and draft article 19 had been shortened considerably. The Working Group had also decided not to deal with the final clauses (arts. 22–25).

47. The Working Group had agreed to organize the draft articles in such a way that the general principles would appear in the earlier parts. Accordingly, draft article 3 (Bilateral and regional arrangements) had been shifted to Part V and draft article 10 (Monitoring) to Part III. At the fifty-seventh session the Working Group had discussed whether it would be necessary to distinguish among obligations that applied to all States generally, obligations of aquifer States *vis-à-vis* other aquifer States and obligations of aquifer States *vis-à-vis* third States. At the current session it had decided that some draft articles should impose obligations on third States while others would cover the obligations of aquifer States *vis-à-vis* third States. In reaching those conclusions the Working Group had favoured the protection of transboundary aquifers or aquifer systems.

48. The footnotes denoted aspects that might require clarification or elaboration in the commentary. The draft article numbers appearing in square brackets corresponded to those of the draft articles in the Special Rapporteur's third report.

49. Turning to the draft articles themselves, he recalled that he had already introduced the revised texts of draft articles 1 to 8 at the fifty-seventh session.¹²³ Only draft articles 2, 3, 5 and 6 had been amended since then. The definition of “non-recharging aquifer” had been removed from draft article 2, because the Working Group had decided to delete the term from all the draft articles. On the other hand, definitions of the terms “recharge zone” and “discharge zone” had been added. After considering the draft articles as a whole, the Working Group had decided not to change the second sentence of draft article 3, which enunciated the principle that each aquifer State had sovereignty over the portion of a transboundary aquifer or aquifer system located within its territorial jurisdiction. However, that sovereignty was not absolute. Paragraph 2 of draft article 5 (Factors relevant to equitable and reasonable utilization) had been amended to include the idea—previously reflected in draft article 11 in the Special Rapporteur's third report—that special regard should be given to vital human needs in determining which utilizations of a transboundary aquifer or aquifer system were reasonable and equitable. Former draft article 11 had been deleted because it duplicated the new draft articles 4 and 5. In draft article 6 (Obligation not to cause harm to other aquifer States), the controversial phrase “in their territories” had been deleted from paragraph 2, but the commentary would reflect that that article was intended to cover activities undertaken in a State's own territory, although it was unlikely that an aquifer State would cause harm to another State through an aquifer or aquifer system by engaging in activities outside its territory. The Working Group had also decided not to address the issue of compensation in circumstances where harm

¹²⁰ See *Yearbook ... 2005*, vol. II (Part Two), paras. 30–31.

¹²¹ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/551 and Add.1.

¹²² Mimeographed document; available on the Commission's website (A/CN.4/L.681 and Corr.1).

¹²³ *Yearbook ... 2005*, vol. I, 2863rd meeting, paras. 7–17.

resulted despite efforts to eliminate or mitigate such harm, because it considered that the issue was already covered by other areas of international law and did not require special treatment with respect to transboundary aquifers. Accordingly, two footnotes referring to the question had been deleted.

50. Turning to Parts III, IV and V of the draft articles, he said that draft article 9 (Protection and preservation of ecosystems) had been reformulated to clarify its meaning. The Working Group had decided to limit the obligation of States to the taking of “all appropriate measures” for the protection of ecosystems so as to allow States greater flexibility in the implementation of their responsibilities under that provision. There might be instances in which changing an ecosystem in some appreciable way might be justified by other considerations, including the utilization of the aquifer in accordance with the draft articles.

51. On draft article 10, the Working Group had decided to merge the obligations relating to the protection of recharge and discharge zones in a single paragraph because they were similar. It had also considered that the obligation to prevent pollution in the recharge zone would fit better in the context of draft article 11 (former article 14), which dealt specifically with pollution. The Working Group had also decided that the obligation to protect the aquifer should include all States in whose territory a recharge or discharge zone was located, even if they were not aquifer States. Aquifer States were themselves covered by the duty to cooperate in draft article 7.

52. The Working Group’s discussions on draft article 11 (Prevention, reduction and control of pollution) had focused on whether more emphasis should be placed on prevention by having an independent article on the precautionary principle. Given the fragile nature of transboundary aquifers, it had decided to strengthen the obligation by changing the wording from “are encouraged to take a precautionary approach” to “shall take a precautionary approach”.

53. Draft article 12 (Monitoring) had been moved from Part II to Part III, since it related more directly to protection, preservation and management rather than to general principles. It had also been rearranged, so that it set forth the general obligation to monitor transboundary aquifers, jointly if possible, in the first paragraph and the modalities of such monitoring in the second. The modalities remained recommendatory in order to facilitate State compliance.

54. Draft article 13 (Management) was substantially the same as the text proposed by the Special Rapporteur in his third report as draft article 15, except that it now mandated that a joint management mechanism should be established wherever appropriate, given the importance attached to that question by groundwater experts. However, it was recognized that it might not always be possible to establish such a mechanism in practice.

55. Part IV, on activities affecting other States, currently contained only draft article 14 (Planned activities): it consisted of the merged texts of draft articles 16 and 17

proposed by the Special Rapporteur, which had covered the same situation. The Working Group had decided to broaden the scope of draft article 14 substantially by making it apply not only to aquifer States, but to any State that had reasonable grounds for believing that a planned activity in its territory could affect a transboundary aquifer or aquifer system and thereby have a significant adverse impact on another State.

56. Part V was entitled “Miscellaneous Provisions” and contained draft articles 15 to 19. In draft article 15, the Working Group had preferred the word “cooperation” to “assistance”, since it better represented the two-sided process needed to foster sustainable growth in developing countries. The commentary would indicate that the types of cooperation listed in the article were merely examples. States could choose the type of cooperation that they wished to engage in to fulfil the obligation set forth in the first sentence.

57. Draft article 16 dealt with emergency situations. The concept of “emergency” was defined in paragraph 1 as a situation resulting suddenly that posed an imminent threat of causing serious harm to States. The commentary would make clear that the requirement of suddenness would not exclude situations that could be predicted in a weather forecast. Paragraph 2 allowed States to derogate from the provisions of draft articles 4, 5 and 6 when an emergency posed a threat to vital human needs. Paragraph 3 set out the modalities for responding to an emergency that affected a transboundary aquifer.

58. Draft article 17 had not elicited any particular discussions in the Working Group and had not been the subject of any amendments. Draft article 18, on the other hand, had been one of the most contentious draft articles. Some members had had difficulty imagining a situation in which national security issues should take precedence over other provisions of the draft articles. Others had expressed the view that such protection was of the utmost importance to States and would be called for by the Sixth Committee. They had argued that in many circumstances, the draft articles required States to share more information than was strictly necessary for the protection of the aquifers and that the protection of information vital to national security would not interfere with the functioning of the other provisions of the draft articles. In any case, the Working Group had decided that the disagreement on that point would be reflected in the commentary. As there had been differences of opinion with regard to the suggestion to include the protection of industrial secrets and intellectual property in draft article 18, the Working Group had decided that the matter should likewise be dealt with in the commentary.

59. Draft article 19 (Bilateral and regional arrangements) had been considerably shortened so as not to prejudice, as had been noted earlier, the final form of the draft articles. The final two paragraphs had been deleted, because they had not been considered relevant to non-binding instruments. Should the Commission decide to recommend a binding instrument, it might wish to revisit draft article 19 as originally proposed by the Special Rapporteur. The same reasoning applied in the case of draft article 4.

60. Mr. BAENA SOARES commended the Special Rapporteur and the Working Group for their excellent work on a difficult and little-known topic for which a great quantity of information was required. He was in favour of referring the draft articles to the Drafting Committee, because they provided States with a useful set of non-binding guidelines. However, he wished to stress the importance of bilateral and regional arrangements as the best way of regulating the utilization of transboundary aquifers and aquifer systems. Given the considerable diversity of those resources, there could be no single model for their use and protection. That said, the Commission had not finished with the topic of natural resources because there was still the question of oil, to which, it was to be hoped, it would give the same attention as it had groundwaters.

The meeting rose at 1.05 p.m.

2879th MEETING

Friday, 19 May 2006, at 11.10 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. 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. ECONOMIDES said that in his excellent report the Special Rapporteur had, as closely as was possible, skilfully aligned the text on responsibility of international organizations with the draft articles on responsibility of States for internationally wrongful acts.¹²⁴ When it came to the section relating to circumstances precluding wrongfulness, however, that alignment became more problematic, even artificial, and at times positively naïve. There were two main reasons for that, as several other speakers, including Mr. Brownlie, Mr. Sreenivasa Rao and the Chairperson, had already pointed out. The first was the essential difference between States and international organizations, which was so marked that like treatment could not be given to two institutions that were profoundly unlike.

2. The second reason was that there was next to no significant practice relating to circumstances precluding wrongfulness in the case of international organizations. Most of the examples given in the report were, in his view, either irrelevant or extremely weak, as he would hope to show. Clearly, in the absence of significant practice, neither codification nor useful progressive development of international law was possible.

3. That being so, the Commission should not blindly follow the text of the draft articles on responsibility of States. On the contrary, three circumstances precluding wrongfulness in the case of States should be deleted from the draft articles on responsibility of international organizations. Those circumstances were—to take them in reverse order—necessity, distress and countermeasures. Necessity did not merit a place in the draft articles, for a number of reasons. First, as the Special Rapporteur recognized, it was the most controversial circumstance precluding wrongfulness as far as States were concerned, and all the more so in the case of international organizations. Secondly, it had often been used arbitrarily in the past for purely selfish reasons. Thirdly, its purpose was to protect a State's essential interests against serious and imminent peril. International organizations, being essentially functional institutions, did not have essential interests in the same way as States. The provision concerning necessity was in any case almost impossible to implement even in the case of States, because the conditions required for its implementation were extremely difficult to meet. It would therefore be foolhardy to seek to apply it to international organizations. The inclusion of such a provision ran the risk of creating more problems than it solved. Moreover, the examples given in paragraph 42 of the report were not pertinent or convincing. Necessity was a passive concept—a means of defence—rather than an active concept or a means of attack. Nor did paragraph 44 correctly describe the state of necessity. Furthermore, operational or military necessity related, as Mr. Momtaz had said, to the law of armed conflicts and not to the state of necessity as a circumstance precluding wrongfulness.

4. The second circumstance that should be excluded was distress. It had never yet arisen in the case of international organizations, and he saw no reason why that state of affairs should change. The irrelevance of distress to the case of international organizations could be explained in the commentary. If, in the future, distress evolved into a circumstance precluding wrongfulness, the door would be left open for the development of customary law.

5. The third circumstance precluding wrongfulness, and undoubtedly the most important, was that of countermeasures. It should be excluded from the draft articles, for the reasons that he had given at an earlier meeting, namely, that countermeasures constituted an archaic and primitive practice that worked to the advantage of the strong, who took justice into their own hands by adopting unilateral measures. International organizations should not be permitted to go down that road. Countermeasures should be excluded in the interests of the progressive development of international law, which was perfectly able to regulate the settlement of any dispute that might arise between international organizations.

¹²⁴ See footnote 8 above.