

Document:-  
**A/CN.4/2999**

**Summary record of the 2999th meeting**

Topic:  
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once and for all, irrespective of whether such activities incurred the responsibility of an organization or that of States. Like the States who intervened during the Sixth Committee cited in the second footnote to paragraph 8 of the report, he continued to think that the draft should also cover the invocation by an international organization of the international responsibility of a State. The Special Rapporteur's reply was not really a reply at all since he maintained that the matter lay outside the scope as defined in article 1. Yet it was precisely that definition that needed changing, and he regretted the fact that the opportunity offered by the "first reading *bis*" to revise the draft had been missed once again.

29. Moreover, it was entirely unrealistic to proceed as the Special Rapporteur proposed to do in paragraph 8 of his report, in which he wrote: "Various articles of Part Three on State responsibility, such as articles 42, 43, 45 to 50, 52 and 54, could conceivably be extended to cover also the invocation of responsibility by international organizations." At the present stage, it was wrong to think that the draft articles on responsibility of States could be rewritten. The next two years should be used to complete the current draft without trying to "play ping-pong" with the draft articles on State responsibility. It would be more reasonable, then, to amend article 1, paragraph 2, of the text under consideration to read: "The present draft articles apply also to the international responsibility of a State for a wrongful act by an international organization or against an international organization." Since the Commission was still at the first reading stage, even if it was a first reading *bis*, that was a formal proposal that should obviously be discussed, not by the Drafting Committee but by the Commission in plenary meeting. Of course, if it was adopted, then either the Special Rapporteur should be asked to prepare a number of additional draft articles to expand the topic accordingly, or a working group should be established for that purpose. The texts in question included, but were not limited to, article 16 and, in particular, the explanation given by the Special Rapporteur in paragraph 45 of his report. Otherwise, he had no profound disagreements with the Special Rapporteur; at a subsequent meeting he would merely raise a few minor points.

*The meeting rose at 6 p.m.*

## 2999th MEETING

*Tuesday, 5 May 2009, at 10 a.m.*

*Chairperson:* Mr. Nugroho WISNUMURTI

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

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

[Agenda item 4]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

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

2. Mr. PELLET recalled that at the previous meeting he had voiced general criticisms both of the Special Rapporteur's methodology and of what seemed to him an unduly narrow conception of the topic, and he had put forward a formal proposal to amend article 1. With the exception of the extremely perplexing article 19, he was generally in favour of all the other draft articles and wished only to touch on a number of details.

3. First, although he was a firm believer in the objective personality of international organizations, for which recognition of an organization was not a precondition, he also saw the rules of an organization as flowing from the legal order of organizations, which itself fell within the realm of international law, *pace* the judgement of the Court of Justice of the European Communities in the *Costa v. ENEL* case. Thus, the inclusion in article 2 of a definition of the "rules of the organization" was not problematic for him, nor was the proposed reorganization of the articles. If, however, article 3 was placed by itself in a new Part Two, to be entitled "General principles", then he wondered what the title of the article would become. Perhaps the Special Rapporteur could explain whether he wished to send the draft articles back to the Drafting Committee or to have the plenary ratify his thinking.

4. As to the contents of article 3, unlike the Special Rapporteur, he did not disagree with the argument by the International Monetary Fund (IMF) set out in the footnote to paragraph 20 of the report. The responsibility of international organizations came into play in different ways, depending on whether a member State or a third State was implicated in an allegedly wrongful act. If the organization was acting in compliance with its constituent agreement, it could not incur responsibility in respect of one of its members: it was covered in advance by that agreement. On the other hand, it might incur responsibility in relation to non-member States even while complying with its constituent agreement. The issues raised by IMF thus deserved to be considered in greater depth, and perhaps an article 3 *bis* setting out the relevant principles could be included in the draft.

5. On a related point, he said that he did not agree with the new approach to attribution of conduct elaborated by the Special Rapporteur in paragraph 18—the idea that an international organization that coerced another international organization or a State to commit an internationally wrongful act incurred responsibility even if the conduct was not attributable to it. That seemed odd to him, since if the organization bore responsibility without having committed the act, it was precisely because the act was or became attributable to it. The very definition of

attribution was an intellectual exercise through which responsibility was ascribed to an entity for an act that it had not committed.

6. In paragraph 53 of his report, the Special Rapporteur proposed a new draft article 15 *bis* that in his own view ought to become a new article 3 *ter* in Part Two or an article 2 *bis* in Part One. The proposed text concerned the regime of responsibility applicable to an international organization that was a member of another international organization. However, its scope was circumscribed by the phrase “under the conditions set out in articles 28 and 29” of the draft. He did not see why the principle should be limited; it would be preferable to state once and for all, at the beginning of the draft articles, that they applied both to States and to international organizations that were members of other international organizations.

7. In paragraph 23 of his report, the Special Rapporteur proposed a minor drafting change to draft article 4 which in itself posed no particular problem but sparked a question: why did the draft articles contain no provision paralleling draft article 9, on the responsibility of official authorities, in the draft articles on responsibility of States for internationally wrongful acts?<sup>11</sup> A reference to an official authority or *de facto* agent of the international organization would not be out of place, especially as more and increasingly varied public service missions were carried out by international organizations. Consideration should be given, perhaps at the current session or on second reading, to the inclusion of an article on the subject.

8. Article 5 raised some thorny issues. The European Court of Human Rights had sought to resolve them in its own fashion, while the Court of Justice of the European Communities and the Special Rapporteur espoused a differing view. He himself had nothing against the criterion of effective control as used by the ICJ in the case concerning *Military and Paramilitary Activities in and against Nicaragua* and in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, although the Court’s argument about effective control had not been particularly persuasive and he was not keen on simply repeating it. There were in fact too many points both for and against that criterion for him to begrudge its retention in the draft. However, he did not agree with the explanation given in paragraph 30 of the report for the criticism of the decision by the European Court of Human Rights in *Behrami and Saramati*. States were responsible for the *ultra vires* acts of their officials, and he did not see why international organizations should not bear the same responsibility.

9. Nor was he convinced by the final sentences of paragraph 33: while it was true that conduct implementing an act of an international organization should not necessarily be attributed to that organization, the argument based on article 4 of the draft articles on State responsibility for internationally wrongful acts seemed unfounded, since article 57 of that draft adduced the responsibility of a State for the conduct of an international organization.<sup>12</sup>

That left the Commission free to adopt a specific solution in its draft articles on responsibility of international organizations. Thus the Special Rapporteur’s dubious argument that the Commission must not depart from article 4 of the draft on State responsibility was contradicted by article 57 of the same draft. The Special Rapporteur was bouncing between the two texts, but he himself did not wish to take part in such a ping-pong game, for what mattered was covering all eventualities.

10. As for the contention that the problems raised by wrongful conduct were identical for States and for international organizations, he had serious doubts. A State could engage in wrongful conduct because, according to the 1949 advisory opinion of the ICJ in the *Reparation for Injuries* case, it had all the competences recognized by international law. That was not true of international organizations, whose action was limited by their specificity. While that situation did not justify the redrafting of article 7, it did call for something more than the simple assertion at the end of paragraph 36 of the report that it seemed preferable to “keep the same wording that was used in article 7 of the draft on State responsibility”.<sup>13</sup> The Special Rapporteur was right to hew to that draft where there was no cause for departing from it, but where there were good reasons to do so, he should. Such reasons existed in connection with article 7, since a State and an international organization did not have the same type of competence, a State not being constrained by the principle of speciality.

11. He was not opposed to the amending of article 8, paragraph 2, as proposed in paragraph 42 of the report, but would prefer a more straightforward formulation than “includes in principle”, the French version of which, “*s’entend en principe de*”, was far from felicitous. If an obligation existed, then its breach entailed responsibility, and he saw no reason for the timorous “*en principe*”: the phrase should simply read “includes” (“*inclut*”) or—to soften the wording slightly—“includes where appropriate” (“*inclut, le cas échéant,*”).

12. The new wording for article 15, paragraph 2 (*b*), proposed by the Special Rapporteur in paragraph 51 of the report was not ideal. Although he agreed with the underlying concept of the rephrased text, he would prefer to stick to the original wording, which was stronger and more precise. However, if the new version was retained, he would prefer to replace the words “as the result of” (“*comme suite à*”) by “on the basis of” (“*sur le fondement de*”).

13. He agreed with the proposal to recast article 28, paragraph 1, as indicated in paragraph 83 of the report. He also agreed, in that instance at least, with the Special Rapporteur’s justification for doing so. With regard to article 29, paragraph 1, he noted that paragraph 88 of the report seemed to reject the comment made by Greece that a State had to accept responsibility for an internationally wrongful act *vis-à-vis* the victim of the act. He himself thought the comment was well founded and that any ambiguity would be removed if paragraph 1 (*a*) was reworded as suggested in paragraph 88, with the replacement of the words “*vis-à-vis*” in the French text by “*en faveur de*”.

<sup>11</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 49.

<sup>12</sup> *Ibid.*, pp. 40–42 and 141–142, respectively.

<sup>13</sup> *Ibid.*, p. 45–47.

14. Lastly, on circumstances precluding wrongfulness he wished to say only two things. First, it was surprising that the issue of self-defence was not addressed. That issue pertained to the Charter of the United Nations, not to international responsibility, and it had been included—wrongly, in his view—in the draft articles on State responsibility for internationally wrongful acts, although he had never succeeded in convincing anyone of the veracity of his argument. Rightly or wrongly, then, the Commission had deemed self-defence to be a circumstance precluding wrongfulness *par excellence* and as such had included it in the draft on State responsibility. He therefore saw no reason why the Commission should not do likewise in the draft on responsibility of international organizations. The existence of the North Atlantic Treaty Organization (NATO) and the bodies working to consolidate regional non-nuclear-weapon zones made it all the more strange to exclude self-defence from the draft.

15. Turning to article 19, he said he would refrain from drawing attention once again to the absurdity inherent in pronouncing countermeasures to be circumstances precluding wrongfulness when they were in fact a response to a wrongful act. Still, there was something that astounded him in paragraph 2 of the new draft article 19. The Special Rapporteur refused, wrongly, to include in the draft the subject of responsibility of States *vis-à-vis* international organizations, yet paragraph 2 did precisely that. He himself welcomed that inclusion with open arms, suggesting only that the new text should be placed, not in article 19, but in the section on countermeasures. It was an excellent provision and he hoped it would be retained, even though it had no place in the draft as the Special Rapporteur had conceived it. In fact, it anticipated what he himself had proposed the day before in his amendment to article 1, a development for which he was infinitely obliged to the Special Rapporteur.

16. Mr. GAJA (Special Rapporteur) said that, as the Commission's consideration of the draft articles on first reading drew to a close, Mr. Pellet seemed to be trying to torpedo it. Although the best response would be to take evasive action, he preferred not to. Mr. Pellet had made a formal proposal to extend the scope of the draft to cover cases in which an international organization could invoke the responsibility of a State. That point of view had been prominently reflected in the Commission's report on the work of its sixtieth session,<sup>14</sup> and certain States in the Sixth Committee had agreed with it. He had referred to that fact in the second footnote to paragraph 8 of his seventh report, while his own views had been expressed in paragraphs 8 and 9.

17. Mr. Pellet had addressed only part of the argument, namely that, according to the definition of the scope of the topic provisionally adopted by the Commission in 2003,<sup>15</sup> the draft articles applied to the international responsibility of an international organization for acts that were wrongful under international law and also to the international responsibility of a State for the internationally wrongful act of an international organization. In his report he had also

urged that the responsibility that a State might acquire towards an international organization was essentially covered by the draft articles on State responsibility, although in dealing with such issues as invocation, circumstances precluding wrongfulness and content of responsibility, those articles referred only to inter-State relations. In paragraph 9 of his seventh report, he showed how the text of article 20 on State responsibility might read if a reference to international organizations was incorporated in it. Furthermore, article 57 of the draft articles on State responsibility provided that “[t]hese articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization”<sup>16</sup> One way to address Mr. Pellet's criticism, then, would be to argue that international organizations were included in the draft articles on State responsibility by analogy and that it was thus not necessary to mention them, although if those draft articles were ever examined by a conference of States, it would be preferable to insert a reference to international organizations.

18. If one followed Mr. Pellet's suggestion, the alternative would be either to propose the insertion of additional articles to the draft articles on State responsibility for internationally wrongful acts, amending the 2001 text, or to enlarge the scope of the draft articles under consideration. Either way, the Commission would in substance be suggesting amendments to the draft articles on State responsibility. In his opinion, that was unnecessary and, pending an examination of the final status of the draft articles on State responsibility, unwise. James Crawford, with whom he had discussed the question, agreed and also thought that the argument of analogy would be sufficient.

19. Ms. ESCARAMEIA commended the Special Rapporteur for the clear structure of his report and for the survey of the provisionally adopted articles with commentaries by States and international organizations. She did not think that the incorporation of such comments needed to be left until the second reading, for the point of chapter III of the Commission's annual report to the General Assembly was in fact to solicit the opinions of States in advance.

20. On a general matter, she said that the current draft articles followed those on State responsibility for internationally wrongful acts too closely and did not make the necessary exceptions for international organizations.

21. With regard to the scope of the draft articles, she recalled that at the previous meeting Mr. Pellet had noted that no provision had been made for addressing the implementation by an injured international organization of the responsibility of a wrongdoing State, since the draft articles on State responsibility dealt only with inter-State relationships, while the current draft dealt only with the relationship between States or international organizations and wrongdoing international organizations. There was thus a lacuna in the draft that was evident in many places—for example, where the draft articles dealt with the questions of invocation, countermeasures and implementation of responsibility. Those lacunae needed to be

<sup>14</sup> *Yearbook ... 2008*, vol. II (Part Two), para. 147.

<sup>15</sup> *Yearbook ... 2003*, vol. II (Part Two), pp. 18–19, draft article 1 and the commentary thereto.

<sup>16</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 141.

addressed, but it was difficult, in a topic on the responsibility of international organizations, to address the responsibility of a State that was not directly connected to the act of an international organization.

22. The question also arose as to whether the Commission was exceeding its mandate. At the previous meeting, Mr. Pellet had said that he did not think so, because when the topic had been proposed, it had been understood that it would also cover the possibility of international organizations invoking and implementing the responsibility of States. However, that did not appear to be the Special Rapporteur's position. Mr. Pellet's proposal to insert the phrase "or in relation to an international organization" at the end of draft article 1, paragraph 2, while ingenious, would not entirely solve the problem. It might be possible to include the issue in the current draft articles, although the right place would have been in the draft articles on State responsibility for internationally wrongful acts. The Commission could recommend to the Sixth Committee that it should be included in the draft articles on State responsibility or that those draft articles should be amended to that effect; alternatively, it could deal with the matter through extensive commentaries to article 1, paragraph 2, of the draft articles on responsibility of international organizations and it could entrust the Special Rapporteur with making the relevant changes in several other draft articles. In any event, she continued to believe that General Assembly approval for any such change was needed and might not be difficult to obtain. The easiest way would be to include the question in the current draft articles with the help of extensive commentaries and with a decision explaining to the Sixth Committee why the Commission had proceeded as it had.

23. Her question with regard to the invocation of the responsibility of an international organization had to do with the possibility of entities other than States and international organizations invoking the wrongful act of an international organization. Actually, international organizations had caused many more injuries to individuals than to other international organizations or to States, a fact that had clearly emerged in the Special Rapporteur's sixth report,<sup>17</sup> where all the examples given had been of injuries to individuals rather than to other international organizations or States. Individuals had been victims of very serious crimes committed by agents of international organizations, including rape and other forms of abuse perpetrated by members of United Nations forces. It thus seemed strange to exclude from the scope of the current draft articles the most common situation involving wrongdoing by an international organization. At her insistence, the Special Rapporteur had agreed to include a "without prejudice" clause in draft article 53, but that was not sufficient. Moreover, it was not only individuals who were affected, but also other international bodies that did not fit the definition of international organization contained in the draft articles, for example, non-governmental organizations (NGOs). The draft articles specified that an injury could affect not just one entity, but the international community as a whole. Some NGOs might be the guardians of the international community's interests, such as the environment or human rights. The Commission should

therefore extend the possibility of invoking the responsibility of an international organization not only to States and individuals but also to much larger entities, such as NGOs.

24. As to the reorganization of the draft articles, she did not object to the Special Rapporteur's suggestion to include draft articles 1 and 2 in a short Part One under the heading "Introduction" or to add a draft article 2, paragraph 2, on the rules of the organization. She also agreed with his suggestions in paragraph 21 of the seventh report on structure and placement.

25. Turning to draft article 4 (General rule on attribution of conduct to an international organization), she said that she did not see the need to add anything new to the previous definition of "agent", but was not opposed to the new version of paragraph 2 of that article.

26. She agreed with the Special Rapporteur on the need to retain draft article 5 (Conduct of organs or agents placed at the disposal of an international organization by a State or another international organization). The criterion of the exercise of effective control was preferable to the criterion of "ultimate authority and control" applied by the European Court of Human Rights in the *Behrami and Saramati* decision. The arguments put forward by the Special Rapporteur were very persuasive; if an international organization did not have the capacity to change behaviour, she did not see how delegation could work. Capacity must be effective.

27. On draft article 6 (Excess of authority or contravention of instructions), she was in favour of introducing a clarification along the lines of the proposal by Malaysia reflected in paragraph 34 of the report, because the current wording was unclear.

28. With regard to draft article 8 (Existence of a breach of an international obligation), she said that she would prefer to retain the original version of paragraph 2. Far from clarifying the issue, the words "in principle" in the proposed new version actually confused matters, and might even suggest that responsibility arose mainly from breaches of the rules of an international organization and not from other sources of international law, whereas in reality it usually arose from the latter.

29. As to the responsibility of an international organization in connection with the act of a State or another international organization (paras. 45–54 of the report), she supported the proposal in paragraphs 53 and 54 concerning draft article 15, paragraph 2 (*b*), and a new draft article 15 *bis*.

30. Although it was not popular among States and had been the subject of considerable criticism, she was nevertheless in favour of retaining draft article 18 (Self-defence) because it reflected the reality of territories under United Nations administration. An attack on such a territory was not an attack on the administering State (such a State might not even exist) or on States whose nationals were in the United Nations forces: it was an attack on the United Nations or any other international organization administering the territory.

<sup>17</sup> *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/597.

31. She did not like the phrase “in accordance with the rules of the organization” in paragraph 2 of draft article 19 (Countermeasures) because such rules generally referred to internal means for dispute settlement and only rarely to external ones, such as courts or tribunals. If courts had jurisdiction in such cases, countermeasures should not be allowed. In her opinion, the phrase “in accordance with the rules of the organization” should be deleted.

32. In draft article 28 (International responsibility in case of provision of competence to an international organization), she found the Special Rapporteur’s proposed new wording for draft paragraph 1 (para. 83 of the report) to be an improvement. It should therefore be retained.

33. Mr. NOLTE commended the Special Rapporteur on his comprehensive, thorough and subtle report. By and large, he agreed with its content and had relatively few comments on it.

34. He wished to refer first to the Special Rapporteur’s somewhat unusual approach of revisiting the draft articles before the formal second reading. Like Mr. Pellet, he believed that the distinction between a first and a second reading served an important purpose and should, as a general rule, be maintained. However, the special nature of a law of responsibility of international organizations warranted an exception from that rule, as it concerned an area which so far was based on very little practice and yet had begun to develop rapidly during the course of its consideration by the Commission, as the decision in the *Behrami and Saramati* cases showed.

35. Turning to the second issue raised by Mr. Pellet at the previous meeting, he said that it would be unfortunate if the Commission, after completing its work on the responsibility of international organizations, should leave a lacuna in the law of international responsibility where the responsibility of States *vis-à-vis* international organizations was concerned. At the same time, he also understood the Special Rapporteur’s concern for keeping the responsibility of States outside the scope of draft article 1. If Mr. Pellet’s proposal was adopted, it would be tantamount to adding a paragraph to a law on apples stating that the law also applied to oranges. Such an additional paragraph would then also require that the “law on apples” should be renamed the “law on apples and oranges”. He wondered whether a different compromise could not be struck between the Special Rapporteur’s and Mr. Pellet’s positions. Perhaps a working group could find a way to meet Mr. Pellet’s legitimate concern not to leave a lacuna in the law of international responsibility and the formal concern of the Special Rapporteur to avoid a misleading title of the draft articles. One way might be for the Commission to draft a separate related statement on issues of State responsibility with respect to international organizations.

36. He had several comments to make on individual draft articles. He endorsed the Special Rapporteur’s proposal in paragraph 10 of the report to move the definition of the “rules of the organization” from draft article 4, paragraph 4, to draft article 2 and to make it more general.

37. As to the definition of the term “international organization” in draft article 2, he believed that the commentary

to article 2 should make it clear that, while such international organizations must not necessarily be exclusively composed of States, they should at least be predominantly composed of or influenced by States and/or predominantly serve State functions.

38. With regard to the words “established practice”, discussed in paragraphs 14 to 16, he said that while the draft articles should clearly contain a reference to the “practice” of the organization, the word “established” implied a usage over a longer time, which was not necessarily required. On the other hand, the expression “generally recognized practice”, which had been suggested by the European Commission (in the footnote whose reference is located in paragraph 16 of the report, after “established practice”), implied that specific acts of recognition must have occurred, which was not necessarily the case either. In his view, the Commission should consider using the words “relevant practice” in order to accommodate the diversity of international organizations; the matter could probably be dealt with in the Drafting Committee.

39. Paragraph 13 of the report considered the question of whether an international organization could be held responsible only by a State that had recognized its separate legal personality, and he wondered whether that raised a real issue. The fact that a State invoked the responsibility of an international organization typically implied that the State recognized that organization’s separate legal personality—except, of course, if the contrary had been made clear and the invoking State did not adopt a contradictory position.

40. It followed from all the remarks he had made that he agreed with all the changes proposed by the Special Rapporteur in paragraph 21 of the report.

41. Turning to the question of attribution of conduct (paras. 22–38), he agreed with the Special Rapporteur’s proposal to rephrase draft article 4, paragraph 2, in order to specify as the decisive factor that a person or entity had been charged by an organ of the international organization with carrying out, or helping to carry out, one of the functions of that organization (para. 23 of the report).

42. The most important issue concerned draft article 5 (Conduct of organs or agents placed at the disposal of an international organization by a State or another international organization) and the interpretation given to it by the European Court of Human Rights in *Behrami and Saramati*. The Special Rapporteur criticized the reasoning of the Court on legal and policy grounds and thus defended what he regarded as the original approach taken by the Commission, finding confirmation of his position in a number of statements by States and academics as well as by the Secretary-General of the United Nations. While the Special Rapporteur’s point of departure was correct, he could not follow him in all his conclusions.

43. He shared the Special Rapporteur’s view that the criterion of “effective control” stipulated in draft article 5 was the correct one in cases where a State or an international organization put an organ at the disposal of another international organization. He also agreed that the European Court of Human Rights had incorrectly or too broadly

interpreted article 5 in the joined cases of *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway* when it had attributed the conduct of a State to the United Nations in a case in which the Organization had not in fact exercised the degree of control required under draft article 5. In his view, however, the Court's determination did not warrant the conclusion that the Court had taken the wrong decision from either a legal or policy standpoint. After all, the Special Rapporteur had himself agreed that the United Nations Security Council could modify the general rules for the attribution of conduct, and he had acknowledged as much in paragraphs 120 to 124 of his report, where he had proposed a new draft article on *lex specialis*. From his own perspective, the question was whether the Security Council, in its resolution 1244 (1999) of 10 June 1999, had implicitly modified the rules of attribution. If it had, the European Court of Human Rights should have indicated as much. The fact that the Secretary-General had rejected the Organization's responsibility in cases like *Behrami and Saramati* was not a convincing argument to the contrary, since the Secretary-General might well have had in mind different United Nations interests than did the Security Council and its members.

44. If there was general agreement that the European Court of Human Rights had misinterpreted article 5 but might nevertheless have ultimately taken the correct decision, the Commission should perhaps limit itself to reaffirming, as a general rule, the wording and the strict interpretation of draft article 5. It should also make clear, as the Special Rapporteur had suggested in paragraph 30 of his report, that the overly broad interpretation of the criterion of "effective control" in the *Behrami and Saramati* decision could not be "applied as a potentially universal rule". The Commission should not, however, criticize the policy aspect of the Court's decision and should leave open the possibility that the decision might be justified on the basis of the *lex specialis* exception—without, however, taking a definite stand on the matter.

45. The *lex specialis* provision was also helpful in determining whether the implementation of a binding act of an international organization by a State, acting *de facto* as an organ of that organization, warranted a different rule of attribution. If the Commission accepted that it did, then the suggestion of the European Commission and the position of the World Trade Organization (WTO) panel, on the one hand, and the judgements of the European Court of Human Rights in the *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland* case and the European Court of Justice in the *Yassin Abdullah Kadi and Al Barakat International Foundation v. Council of the European Union and Commission of the European Communities* cases on the other, were not necessarily contradictory. It was entirely possible that the implementation by a State of a binding act of an international organization had to be attributed to the State where its human rights aspects were concerned but to the international organization where its trade aspects were concerned. It should also be recalled that the European Courts derived their positions on attribution chiefly from the primary norms at issue.

46. With regard to draft article 6, he supported Ms. Escarameia's suggestion to include the term "clearly", which better conveyed what the Special Rapporteur himself had

intended. As to the issue of the breach of an international obligation, he agreed with the Special Rapporteur's suggestion that article 8, paragraph 2, should be reworded to indicate more clearly that the rules of organizations were, in principle, part of international law, a situation that left room for certain exceptions. However, he questioned whether the proposed wording expressed that idea clearly enough.

47. He wished to make two comments with regard to the chapter of the report on responsibility of an international organization in connection with the act of a State or another international organization (paras. 45–54). First, while he agreed with the rule contained in draft article 12, he would welcome a statement in the commentary to the effect that responsibility for merely making a recommendation could be established only if the conditions of the special rule contained in draft article 15 were met. Without such a provision, responsibility for aiding and assisting was too broad. Secondly, he supported the Special Rapporteur's view, expressed in paragraph 51 of his report, that draft article 15, paragraph 2, should emphasize the role played by the authorization or the recommendation in causing the member to cooperate with the act committed by the international organization. He wondered, however, whether the proposed wording had successfully done so; he would prefer to retain the original text.

48. On the question of circumstances precluding wrongfulness (paras. 55–72), he said that he could not support the Special Rapporteur's suggestion to delete draft article 18 on self-defence, given the risk that States and other interpreters of the articles might conclude that the Commission did not recognize a right of self-defence for international organizations at all, despite subtle indications to the contrary in the commentary. He suggested that reference should be made in draft article 18 to the special situation of international organizations with regard to the right of self-defence by inserting the word "appropriately" before "constitutes". That would address the concerns expressed by States and international organizations while preserving the right of self-defence, which was a general principle of law and which international organizations might in certain circumstances—such as administering territories, for example—legitimately have to invoke.

49. On the issue of countermeasures as circumstances precluding wrongfulness, he fully agreed with the Special Rapporteur's statement in paragraph 65 of his report that the principle of cooperation that restricted recourse to countermeasures in relations between an international organization and its members appeared to be relevant, not only in the case of countermeasures taken by an international organization against its members (the situation covered in draft article 19), but also in the case of countermeasures taken by a member State against an international organization (the situation covered in draft article 55).

50. Nevertheless, it seemed to him that the restriction necessitated by the principle of cooperation was not conveyed strongly enough in draft article 19, paragraph 2, and draft article 55, according to which countermeasures were not allowed if, under the rules of the organization, reasonable means were available for ensuring compliance with the obligations of the responsible State or international organization concerning cessation of the breach

and reparation. While international organizations had procedures through which pressure could be exerted on recalcitrant member States, most did not possess the “means” to “ensure” that their members complied with their obligations. The proposed wording therefore had the effect of a residual rule: if the rules of the organization did not provide otherwise, and in the event of doubt, countermeasures could be applied in relations between an international organization and its member States.

51. As he had indicated at the previous session, the main reason there should not be a residual rule allowing a member State to take countermeasures against an international organization, or *vice versa*, was that international organizations were typically governed by special regimes and had renounced, at least implicitly, taking the law into their own hands. In setting up international organizations, States had created the mutual expectation that the application of the rules of the organization would ultimately lead to the settlement of any dispute that might arise. Yet even if they did not, the existence and operation of the organization should not be jeopardized by unilateral countermeasures. That was true not only for organizations such as the European Community, which had a system of judicial remedies, but also for the United Nations and its specialized agencies. The Charter of the United Nations had, after all, established the organized international community of States and had created a legal framework and procedures that risked being undermined if secondary rules which, while making sense in the context of the responsibility of reciprocally sovereign States, were formally imposed on relations between an international organization and its members. Accordingly, he proposed replacing the word “means” with “procedures” and replacing the word “ensuring” with “seeking” in both draft article 19, paragraph 2, and draft article 55.

52. Turning to the chapter of the report on responsibility of a State in connection with the act of an international organization (paras. 73–92), he endorsed the Special Rapporteur’s attempt to restrict the responsibility of the States members of an international organization under draft article 28 if they used an international organization to circumvent their own obligations. He was not satisfied, however, that that restriction was adequately conveyed by the wording proposed by the Special Rapporteur in paragraph 83 of his report. The expressions “purports to avoid compliance” and “by availing itself of the fact” were too abstract and left open the possibility that, contrary to the Special Rapporteur’s intentions, draft article 28 might be interpreted more broadly. In his own opinion, the original term “circumvention” better conveyed the stated objective of the draft article.

53. Lastly, he wished to note his agreement with the Special Rapporteur’s reasoning regarding the issue of the content of international responsibility, as well as with the suggested new general provisions contained in draft articles 61 to 64.

54. Sir Michael WOOD thanked the members of the Commission for the welcome they had shown him in the past few days and cautioned that, as he was new to the Commission, his comments on the increasingly important topic of the responsibility of international organizations would be very tentative.

55. It was obvious that, unlike States, international organizations were legally different from one another: there was no principle of the equality, much less sovereign equality, of international organizations. Thus when considering the proposal for an article on *lex specialis*, the Commission should examine whether the current draft article was sufficient to capture the idea that each organization was different and that the rules in question must therefore be, in his view, residual ones.

56. Like other members, he tended to agree with Mr. Pellet’s proposal that the draft articles under consideration ought to cover the invocation by an international organization of the responsibility of a State. Failure to do so would leave a curious gap between the two sets of draft articles, which future readers would tend to read together. At the very least, then, the Commission ought to give full consideration to Mr. Pellet’s suggestion. While it might not go so far as to draft new texts so as not to delay completion of the first-reading draft at the current session, it could agree to study the matter with a view to preparing a proposal for submission to the Sixth Committee.

57. The definition of an international organization contained in draft article 2 did not include the term “intergovernmental”, which nevertheless appeared in other instruments drawn up on the basis of the Commission’s work. It was only by implication from the second sentence of draft article 2 that one understood that the international organizations in question were composed of States. He therefore proposed, in the first sentence, to insert the word “intergovernmental” before the second occurrence of “organization”. The second sentence would then make it clear that such an organization might also include other entities.

58. As far as the commentary to draft article 2 was concerned, the Commission should examine very carefully any examples that it decided to include. It was not entirely clear to him, for instance, that the Organization for Security and Co-operation in Europe, despite its name, was an organization, or that the United Nations Conference on Trade and Development was an organization separate from the United Nations itself.

59. The addition proposed by the Special Rapporteur to draft article 4, paragraph 2, which contained a definition of the term “agent”, must also be given careful consideration. He wondered whether the effect of that addition might be too restrictive since, if an organization acted beyond its functions, it might well bear international responsibility. He shared the doubts expressed by Ms. Escameia as to the desirability of the proposed amendment; perhaps the idea embodied in it could be reflected in the commentary and the existing text of the draft article retained.

60. He also shared the doubts of other members as to whether the insertion of the words “in principle” in draft article 8, paragraph 2, offered additional clarity. For that matter, he wondered whether paragraph 2 was necessary at all, since paragraph 1 referred in completely general terms to an act that was not in conformity with what was required of an international organization under its international obligations, regardless of their origin. He consequently saw no need to add a special paragraph to address



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

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

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

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

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

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

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

[Agenda item 1]

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

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

*The meeting rose at 11.35 a.m.*

### **3000th MEETING**

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

*Chairperson:* Mr. Nugroho WISNUMURTI

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

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

[Agenda item 4]

##### **SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (continued)**

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

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

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

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