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Summary record of the 3001st meeting

Topic:
Responsibility of international organizations

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

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

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

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

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

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

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

[Agenda item 1]

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

The meeting rose at 11 a.m.

3001st MEETING

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

Chairperson: Mr. Ernest PETRIČ

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

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

[Agenda item 4]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

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

a first and second reading. However, the Commission would have to consider States' comments and observations at some point; if the Special Rapporteur believed that their consideration at the current stage would help him to move forward, then the Commission should demonstrate flexibility and not be too conservative.

2. As far as the scope of the draft articles was concerned, it was vital to bear in mind the specific nature of international organizations and to endeavour to devise as full a set of rules as possible. It would therefore be a mistake not to address the issue of the invocation by an international organization of the international responsibility of a State. Since the Special Rapporteur believed that the question should be dealt with in the context of State responsibility, the Commission must consider how best to link the two sets of rules on responsibility. Mr. Saboia's suggestion that the Commission seek the General Assembly's opinion on the matter merited consideration.

3. Turning to the connection between the responsibility of international organizations and their legal personality, he said that, as States were primary subjects of international law having full capacity, no act was necessary in order to confer legal personality upon them, whereas international organizations were only derived subjects of international law, governed by the speciality principle. Only rarely did the constituent instrument of an international organization establish the organization's legal personality. It was therefore legitimate to consider the question of international legal personality in different terms, according to the circumstances.

4. He was in favour of the two ideas put forward by the Special Rapporteur, namely that an international organization could be held responsible only if it possessed legal personality and, above all, that the requirement that legal personality must be recognized would not apply when it could be said that an international organization had objective personality.

5. He also supported the proposal to amend the definition of the term "agent", since it was based on the spirit and letter of the advisory opinion of the ICJ on *Reparation for Injuries*. He likewise approved of the choice of the criterion of "effective control".

6. In draft article 8, paragraph 2, he was inclined to accept the insertion of the phrase "in principle", because it appeared to offer a means of circumventing the controversy surrounding the nature and scope of the rules of an international organization. However, if a majority of members thought that its deletion would make it possible to confine the reference to rules imposing obligations, he could support that opinion.

7. In draft article 15, paragraph 2 (b), he was in agreement with replacing the expression "as a result of" with "on the basis of", as suggested by Mr. Pellet. He had no particular difficulties with draft article 15 *bis*. He was against the deletion of draft article 18 (Self-defence) because it concerned not an abstract concept but an important question which ought to be covered. Noting that the discussion of draft article 19 (Countermeasures) had centred on the terms "lawful" and "reasonable means", he said that if

the word "lawful" was understood to mean the obligation to abide by procedural and substantive conditions, then it would be correct to employ that term. As difficulties apparently arose with the adjective "reasonable", it might be advisable to find another term, such as "appropriate", or quite simply to delete the word "reasonable", which in fact would seem to be the best solution at first sight. The wording of draft article 28, paragraph 1, seemed acceptable. Lastly, he was in broad agreement with the views expressed by the Special Rapporteur in paragraph 86 of his excellent report with regard to the relevance of the rules of an organization to the responsibility of its member States.

8. Mr. WISNUMURTI welcomed the headway made on the topic owing to the Special Rapporteur's efforts to accommodate the comments and observations of Member States and international organizations in amendments to the draft articles provisionally adopted by the Commission. That "first-reading-plus" approach, while unconventional, would facilitate work during the second reading. In the future, however, such a hybrid working method should be adopted only when it was absolutely necessary in order to advance the Commission's work.

9. The new order of the draft articles proposed by the Special Rapporteur in paragraph 21 of his report would make their structure more logical. As for the scope of the draft articles, while he understood the Special Rapporteur's reasons for excluding a provision dealing with the responsibility of States *vis-à-vis* international organizations, namely that it lay outside the ambit of the topic under consideration, he personally felt that the issue should be considered in more detail so as to enable the Commission to decide whether a provision along the lines of that proposed by Mr. Pellet was in fact necessary. Mr. Nolte's suggestion that a working group should be established therefore had merit.

10. He agreed with the Special Rapporteur's proposal in paragraph 23 of his report to rephrase draft article 4, paragraph 2, which would clarify the provisions on attribution of conduct to make them consonant with the advisory opinion of the ICJ on *Reparation for Injuries*. The key element was whether the agent was acting on the basis of authorization given by the international organization concerned. Mr. McRae's suggestion to delete the phrase "through whom the organization acts" would also make the paragraph clearer.

11. Draft article 5, concerning the conduct of organs or agents placed at the disposal of an international organization, by a State or another international organization, specified that the criterion for attribution of conduct was the organization's effective control over that conduct, and had proved to be of relevance to real situations that had formed the subject matter of recent cases heard by the European Court of Human Rights, the British House of Lords and the District Court of The Hague. In the case of *Behrami and Saramati*, however, it was hard to see how the application of the criterion of effective control had led the European Court of Human Rights to attribute acts of forces placed at the disposal of the United Nations (such as the United Nations Interim Administration Mission in Kosovo) or authorized by the United Nations (such as the

International Security Force in Kosovo) to the Organization simply because their presence in Kosovo or the powers they were exercising were based on a Security Council resolution. He understood why the Secretary-General of the United Nations had rejected the attribution of conduct by United Nations Interim Administration Mission in Kosovo and the International Security Force in Kosovo to the Organization, and he agreed with the Special Rapporteur that any conduct must be attributed both to the lending State and to the receiving international organization. He was in favour of retaining the formulation of draft article 5 because decisions on attribution should indeed be based on the criterion of effective control, a notion that should be spelled out in the commentary.

12. With regard to a breach of an international obligation, the subject of draft articles 8 to 11, he agreed with Mr. McRae that the Special Rapporteur's proposal to include the phrase "in principle" in draft article 8, paragraph 2, in an endeavour to clarify the extent to which the rules of an international organization were part of international law did not resolve the problem. He therefore suggested that paragraph 2 should read: "The breach of an international obligation by an international organization could include the breach of an obligation under the rules of that organization."

13. He concurred with the Special Rapporteur that the instances in which self-defence could have relevance for an international organization as a circumstance precluding wrongfulness were limited and sometimes unclear, and he therefore shared the reservations of Member States and the World Health Organization with regard to draft article 18. That article could be deleted, since a general provision in draft article 62, which would not prejudice questions of responsibility not regulated by the draft articles, would adequately compensate for the absence of a specific provision on self-defence.

14. He had no particular comments on the text proposed by the Special Rapporteur in paragraph 66 of his report for draft article 19 on countermeasures, as it reflected a broad consensus among the members of the Commission. The fear of possible abuses of countermeasures had been adequately addressed in paragraph 2 of that article, although he was concerned that the phrase "in accordance with the rules of the [international] organization" might be too restrictive. Other means of ensuring compliance ought to be permissible even if no provision was made for them in the rules of the organization. He therefore supported Mr. McRae's suggestion to delete the phrase in question.

15. Mr. MELESCANU said that he wished to make two general comments. First, the Special Rapporteur had structured his report very cleverly. The reader had the initial impression that it would be possible to comment on the amended draft articles after simply perusing the conclusions and proposals at the end of each section, whereas in fact it was necessary to study the Special Rapporteur's preceding analysis, the positions expressed by States in the General Assembly and the Commission's previous reports in order to see how the draft articles had evolved. Thus the Special Rapporteur had made the Commission's work easier while at the same time encouraging members to probe more deeply into the topic.

16. His second comment concerned the Commission's approach to the topic. The Commission had accepted two working hypotheses. The first was that it would be easy to draw up articles on the responsibility of international organizations because draft articles on the responsibility of States for internationally wrongful acts²⁰ already existed; all that would have to be done was to replace the word "State" with "international organization" and to make a few cosmetic changes. In fact, things had turned out somewhat differently, because the situations of international organizations and of States as subjects of international law differed in many aspects, including that of responsibility. Some of the difficulties encountered in the Commission's debates and in the formulation of draft articles had arisen because of that assumption.

17. The second erroneous assumption that had complicated the debate had been the belief that it was possible to refer in general terms to the responsibility of international organizations in the same way as to the responsibility of States, whereas in reality the generic term "international organization", which had been accepted from the outset, covered a multiplicity of organizations, making it hard to define the term. Given the vast differences that existed even among intergovernmental organizations, the insertion of the adjective "intergovernmental" would be futile. He was in favour of taking a very general approach in the hope that the Commission would be able to find a formula covering the wide variety of international organizations in existence.

18. Despite those difficulties, remarkable progress had been made, and the Commission should be able to present the General Assembly later in the year with a set of draft articles that took into account the observations of Member States and international organizations. To that end, the Drafting Committee or a special working group should concentrate on finalizing a set of draft articles for adoption on first reading at the current session. He realized that the approach taken by the Special Rapporteur, which had led the Commission to the stage of a "first reading *bis*", was a departure from normal procedure, but the comments of Member States and international organizations could not be ignored. The most intelligent solution would be to try to reconcile those comments with the Commission's viewpoint to the extent possible.

19. Turning to the main issues under consideration, he expressed support for the Special Rapporteur's proposals in paragraph 21 of his report concerning the scope of the draft articles and endorsed the proposed revision of draft article 28. He also endorsed Mr. Pellet's formal proposal to include provisions on the responsibility of States for assistance provided to an international organization in the commission of an internationally wrongful act, an area not covered in the draft on State responsibility. Such responsibility should come into play for the direction, control or coercion of an international organization in the commission of a wrongful act. Ms. Xue and others had suggested that another solution might be to amend the draft on State responsibility. The Commission would need to seek guidance from the General Assembly in either case, but it would probably be easier to gain approval for a revision of the

²⁰ *Ibid.*

Commission's mandate on an ongoing project than to try to amend a text whose legal status was still not very clear.

20. On attribution of conduct, he agreed with the Special Rapporteur's proposal in paragraph 23 of his report to reword article 4, paragraph 2. However, he was also sympathetic to the proposals that had been made to expand that provision. It might be useful, as had been suggested, to deal with *ultra vires* acts in the manner employed in the draft articles on State responsibility. The wrongful acts of international organizations were often the acts of their agents and as such could well be *ultra vires* acts. That issue should be addressed in the interest of citizens who might be affected by the field operations of international organizations.

21. On the breach of an international obligation, he expressed support for the proposed new wording for article 8, paragraph 2, in paragraph 42 of the report, which deleted the words "in principle". The new article 15 *bis* and the redrafting of article 15, paragraph 2 (*b*), seemed to have been generally well received.

22. On circumstances precluding wrongfulness, especially countermeasures, he said he supported the wording proposed for article 19 but also endorsed Mr. Nolte's suggestion to replace the words "reasonable means" with "reasonable procedure", which seemed more appropriate. Mr. Fomba had rightly pointed to the numerous interpretations that could be given to the word "reasonable", but for the time being there seemed to be no better solution. On the other hand, a decision had to be taken about the words "means" and "procedures". Organizations could have reduced means but formidable procedures for dealing with other organizations or States.

23. Lastly, on the question of self-defence, he wished to note that self-defence was a right that by its very nature applied only to States. However, implementation of the draft articles might be undermined if the question was ignored. It was true that self-defence as understood in the draft article was not the institution contemplated in the Charter of the United Nations, yet failure to mention the concept might be seen as acquiescing to the idea that international organizations and their agents did not have the right to exercise self-defence under their mandates during their field operations. Perhaps the simplest solution would be to include one or two paragraphs on the matter in the commentary.

24. Mr. CANDIOTI said that the Special Rapporteur on responsibility of international organizations had submitted a timely and useful revision of the draft articles in the light of comments by Governments, recent practice and judicial decisions that ought to enable the Commission to complete its consideration on first reading at the current session. He fully agreed with the Special Rapporteur's proposal to restructure the draft articles and endorsed the points made in paragraph 8 of his report about an issue not yet dealt with, invocation by an international organization of the international responsibility of a State. The Commission must deal with that issue in an appropriate manner, which might be, as Mr. Nolte had suggested, the formation of a working group to exchange ideas and formulate proposals or alternatives. Another option would be its consideration

by the Planning Group or by the Working Group on the long-term programme of work. In any event, the Commission must take a position on the matter, especially as it was now coming to the close of its extensive analysis of a topic that would have yielded several texts.

25. Turning to the specific proposals made by the Special Rapporteur in his report, he said that he agreed with the rephrasing of draft article 4, paragraph 2, on attribution of conduct, and the new definition of the term "agent". On the other hand, he would prefer not to alter the existing text of draft article 8, paragraph 2, concerning the breach of an international obligation established by a rule of an organization, which to his mind was sufficiently clear and did not prejudge the issue of whether all or some rules of the organization were rules of international law. He endorsed the proposed rephrasing of draft article 15, paragraph 2 (*b*), and the proposed new draft article 15 *bis* on responsibility of an international organization for the act of a State or of another international organization. The new wording proposed for draft article 28, paragraph 1, more clearly elucidated the responsibility of a State for an act of an international organization when the State improperly attributed competence to that organization in order to circumvent one of its international obligations. All those revisions could be referred to the Drafting Committee along with the useful comments and suggestions made during the current discussion.

26. Turning to circumstances precluding wrongfulness, he said that he agreed with those who favoured retaining draft article 18 on self-defence, as it would be useful to anticipate situations that might arise in the actual practice of the United Nations and other international organizations. The proposed draft article 19, paragraph 1, was consistent with the approach taken in the previously adopted draft articles 54 to 60, on recourse to countermeasures by a State or international organization injured by a wrongful act of another international organization. He would simply suggest the deletion of the adjective "lawful" before the word "countermeasures", since, as the Special Rapporteur noted in paragraph 111 of his report, countermeasures were *per se* unlawful and were currently admissible under international law only under strict conditions, such as those stipulated in the draft articles. Indeed, article 22 of the 2001 draft articles on responsibility of States for internationally wrongful acts²¹ refrained from characterizing authorized countermeasures as "lawful" and simply referred to the relevant chapter of the draft, which governed recourse to countermeasures.

27. While he endorsed the substance of draft article 19, paragraph 2, the wording could be improved and the text might be better placed in the chapter specifically devoted to countermeasures, along with the other conditions set out in draft articles 54 to 60.

28. Lastly, he endorsed draft articles 61 to 64, "General provisions", which the Special Rapporteur proposed in chapter IX of his excellent report.

29. Mr. DUGARD said that the Special Rapporteur had presented another thoroughly researched and carefully

²¹ *Ibid.*, pp. 75–76.

reasoned report characterized by a refreshing transparency. Unlike some Special Rapporteurs who preferred a dictatorial style, he openly shared with the Commission the problems he encountered.

30. The approach set out in paragraph 4 of the report was a good one: it was wise to review the texts already adopted before the completion of the first reading, to enable the Commission to take account of new developments and new judicial decisions, even though the decision in the joined cases *Behrami and Saramati* and other decisions seemed not to have been given sufficient weight.

31. On the question of attribution, he said that he preferred article 4, paragraph 2, in its original form. It was unclear whether the new phrase, “when they have been charged by an organ of the organization ...”, referred to the word “acts” or was intended to describe whoever was an agent. An agent was someone who acted on behalf of an international organization, and clearly that included an employee of the organization or an independent expert appointed to act on its behalf, but did it cover a member of the International Law Commission? One might argue that the Commission had been charged by an organ of the organization, namely the General Assembly, with the task of progressive development and codification; did that mean, then, that the United Nations acted through the Commission? He doubted that it did and thought it would be unwise to include the new phrase, because it might be interpreted as extending the meaning of the term “agent”. The original wording was sufficient and was consistent with the language adopted by the ICJ in its 1949 advisory opinion in the *Reparation for Injuries Suffered in the Service of the United Nations* case.

32. Turning to draft article 5, he said that he was worried by the ease with which the Special Rapporteur had discarded the *Behrami and Saramati* decision and subsequent cases. The Commission had generally paid much more attention to judicial decisions. During the work on the draft articles on State responsibility, an entire session had been devoted to deciding whether to criticize the 1966 judgment of the ICJ in the *South West Africa* cases. Some members of the Commission had taken the view that one could never disagree with a decision of the ICJ, which was nonsense, of course, but showed how seriously judicial decisions, whether of the ICJ or the European Court of Human Rights, were taken.

33. A substantive debate was therefore needed on whether to redraft article 5 to incorporate the test of ultimate authority. That could also provide an opportunity for looking at other developments relevant to the issue of effective control, such as the ICJ decision 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)*. In paragraph 30 of his report, the Special Rapporteur placed undue emphasis on the fact that the Secretary-General had distanced himself from the criterion laid down in *Behrami and Saramati*, whereas, frankly speaking, he often distanced himself from anything controversial. In general, therefore, the policy considerations put forward by the Special Rapporteur with regard to article 5 needed to be more carefully scrutinized.

34. He agreed with the retention of draft article 6.

35. Concerning draft article 8, paragraph 2, and the breach of an international obligation, he said that while there might be reasons for amending the provision, he did not think it wise to include the phrase “in principle”. It was a phrase avoided by both domestic and international lawmakers, and the Commission should avoid it as well. He agreed with the changes suggested for draft article 15, paragraph 2 (b), and endorsed the new draft article 15 *bis*.

36. With regard to circumstances precluding wrongfulness, he said that he was in favour of retaining draft article 18 (Self-defence). It was true that Article 51 of the Charter of the United Nations dealt with attacks on States and self-defence undertaken by States; on the other hand, that article had been drafted before the advisory opinion of the ICJ on *Reparation for Injuries* and the era in which the legal personality of international organizations had been recognized. Moreover, the interpretation of Article 51 itself had been expanding. For example, attempts had been made to have it include defence against terrorism, and the Security Council had supported resolutions to that effect. Thus, the Commission would not be enlarging the concept of self-defence illegitimately by including the notion of self-defence for an international organization. In certain circumstances, an international organization could in fact resort to self-defence measures, an obvious example being the case of an international organization that was administering a territory. If the territory was attacked, the organization must have the lawful capacity—the right—to respond. That made him wonder about cases such as NATO. Article 5 of the North Atlantic Treaty provided that an armed attack against one member State was to be considered an attack against all, but the role of NATO was evolving, too. For instance, if a vessel registered in Panama and having crew members who were nationals of several different NATO countries was attacked by pirates, did that constitute an attack on Panama, on the States of the individual crew members or on NATO as an organization? As he saw it, there were circumstances in which an organization would want to take measures of self-defence and should have a right to do so. He would not like to see the matter dealt with through a “without prejudice” clause.

37. He agreed with Mr. Candiotti that countermeasures were by definition unlawful. Their unlawfulness was “cured” only by the fact that they constituted a response to an unlawful or wrongful act—unless, of course, they were permitted by the rules of an organization, as in the case of the IMF, mentioned in paragraph 63 of the report. It was worth noting that the draft articles on responsibility of States (arts. 49 *et seq.*),²² did not generally use the word “lawfulness” and spoke only of countermeasures. Only article 54 employed the word “lawful”, but that article was a provision *de lege ferenda*, dealing with countermeasures taken by a non-injured State. Even at the time, the Commission had been aware that the issue was controversial; article 54 employed the words “lawful measures” rather than “countermeasures” because the article fell within the realm of progressive development. It made no sense to speak of “lawful countermeasures”: the word “countermeasures” was sufficient.

²² *Ibid.*, pp. 129 *et seq.*

38. Mr. GAJA (Special Rapporteur), referring to a point raised by Mr. Dugard and Mr. Candioti, said that, as Mr. Fomba had rightly noted, the use of the word “lawfulness” did not imply that countermeasures were generally lawful but merely reflected the existence of conditions that must be complied with in order for them to be lawful. Mr. Dugard and Mr. Candioti had both cited the example of the draft articles on State responsibility, a context in which a reference to the articles on countermeasures was feasible. The current draft articles might contain a reference to the articles on countermeasures only insofar as such countermeasures were directed by an international organization against another international organization, because chapter II in Part Three of the draft articles dealt with that topic. When addressing circumstances precluding wrongfulness, however, it should be borne in mind that the Commission needed also to deal with the case in which countermeasures were taken against a State, because if such countermeasures were lawfully taken, that was a circumstance precluding wrongfulness. However, as it was not possible to include a reference to the draft articles on State responsibility, general language would have to be found that covered a reference, to be elucidated in the commentary, both to the chapter in the current draft articles and to whatever rules applied to countermeasures taken against States. In any case, the Drafting Committee might find a better term than “lawful”.

39. Ms. XUE said that she agreed with Mr. Dugard that draft article 5 required more in-depth debate. With regard to his remark on international judicial decisions, however, she said that she understood the Special Rapporteur to be saying in his seventh report that the decisions of the European Court of Human Rights cited in the report were not conclusive. That did not mean that the Commission was criticizing the decisions of the Court, but it was nevertheless important to draw a distinction between the decisions of the European Court of Human Rights and those of the ICJ.

40. On the question of self-defence, she noted that the concerns which States had raised about draft article 18 had had to do with the case cited by Mr. Dugard, namely that an attack on one member State was regarded as an attack on the organization. She had been in favour of retaining the draft article, but not in connection with the example just cited, which was precisely the kind of case in which it was vital to proceed with extreme caution.

41. Mr. CANDIOTI thanked the Special Rapporteur for his explanation concerning the use of the word “lawful” in draft article 19, paragraph 1. In any case, such wording should not be employed when speaking of countermeasures, and it illustrated the lacuna to which Mr. Pellet had drawn attention in connection with the invocation and implementation of State responsibility when an international organization was injured. The problem of how to address countermeasures applied by international organizations against States remained.

42. Mr. DUGARD, responding to Ms. Xue’s comment on the role of judicial decisions, said he agreed that decisions of the ICJ were perhaps more persuasive than those of the European Court of Human Rights. He came from

a common-law background, in which judicial decisions played an important role in the development of the law, whereas other lawyers might be less inclined to be guided by them. The Commission should look more closely at the *Behrami and Saramati* and *Al-Jedda* cases and at the test which they had adopted, as well as at subsequent decisions, because legal opinion on the subject appeared to have evolved.

43. Mr. CAFLISCH began by making several comments of a general nature. On the question of principle, posed by Mr. Pellet, as to whether the Commission should make changes to the text of the draft articles at the present stage or whether it was preferable to wait until States had given their reaction to the entire text when it was completed, he thought that the Commission should take a pragmatic approach, making changes where it could do so without too much difficulty. That had the advantage of not overburdening the second reading while showing States that the Commission was listening to their views.

44. He endorsed the Special Rapporteur’s proposal for reorganizing the draft articles. However, with regard to the lacuna in the title and the body of the draft articles where the responsibility of States *vis-à-vis* international organizations was concerned, he said that he would prefer, like Sir Michael Wood, to use the word “intergovernmental”, and he agreed that the lacuna must not be allowed to remain. He left it to the Special Rapporteur to decide how to address that problem. Lastly, the proposal to delete the provision on self-defence was not as attractive as it had seemed at first glance, and he thus favoured retaining draft article 18.

45. He also wished to make a number of comments on individual provisions. With regard to draft article 4, he said that he had initially endorsed the reference in paragraph 4 to “established practice”, a phrase that had been used in a number of conventions, but Mr. Nolte’s remarks had convinced him that it would be preferable to employ the words “relevant practice”. He also endorsed the new wording for paragraph 2 proposed by the Special Rapporteur in paragraph 23 of his report.

46. It was clear that the text of draft article 5 posed difficult problems. In its practice, the European Court of Human Rights had replaced the criterion of “effective control” with that of “ultimate authority and control”, provided “that operational command only was delegated”. He agreed with the Special Rapporteur that this criterion concerned the Court’s jurisdiction *ratione personae* and not the organization’s international responsibility, and that there was thus no need for the Commission to alter the thrust of draft article 5. He also did not believe that it was correct to speak of a hierarchy between the ICJ and the European Court of Human Rights.

47. Turning to draft article 8, he noted that in paragraph 42 of his report, the Special Rapporteur proposed a new version of paragraph 2, although to his mind the earlier version had been perfectly clear. The new version did not show that it was linked to paragraph 1; moreover, the words “in principle” implied that the violation of an obligation resulting from a rule of an organization was not always a violation of an international obligation.

If that was indeed the case, it would be necessary to specify when it was a violation and when it was not. The words “in principle” were in fact very vague; they might be acceptable in a commentary, but not in the articles themselves.

48. Regarding draft article 15 (Decisions, recommendations and authorizations addressed to member States and international organizations), he doubted, as had Sir Michael Wood, whether an international organization could incur responsibility for an unlawful act originating in a recommendation made to a State. In deciding to act on the recommendation, it was the State that incurred responsibility, not the organization.

49. With regard to draft article 19, on countermeasures, he endorsed Mr. Nolte’s proposed version for paragraph 2 and urged that the Commission should give it due consideration. He also pointed out that in the French version, the phrase “*au titre des*” was unclear and should be replaced by “*dans le cadre des*”.

50. Mr. NOLTE said that if the Commission deleted the reference to responsibility for recommendations, the problem might resurface in the context of responsibility incurred by an international organization for aiding and assisting a State in the commission of an internationally wrongful act.

51. Mr. GAJA (Special Rapporteur) said that he agreed that there was a partial, albeit not total, overlap between draft article 12 (Aid or assistance in the commission of an internationally wrongful act) and draft article 15. However, in the case of aid and assistance, adhering to the principles established in the draft articles on responsibility of States, the act needed to be wrongful for the international organization and the State, whereas in the case of draft article 15, that condition was not present. In the case of aid and assistance, the conduct was unlawful for both the assisted State and the assisting organization, whereas in draft article 15, the conduct of the State to which the recommendation was addressed might well be lawful. When an international organization addressed a recommendation to a member State, it could not be said that since the recommendation was irrelevant it was not binding. One should assume that some members would take the recommendation seriously and act upon it. The point was to ensure that there was a strong causal link for responsibility to arise according to draft article 15, paragraph 2. In the light of comments made by States in the Sixth Committee, his suggestion was to reduce the cases in which such responsibility occurred, but to retain that concept and accept the partial overlap with the provision on aid and assistance.

52. Mr. VASCIANNIE thanked the Special Rapporteur for his thought-provoking seventh report on responsibility of international organizations and largely endorsed his approach to the topic. He did not share Mr. Pellet’s concern about considering the views of Member States during the first reading of the draft articles. The Special Rapporteur had efficiently assimilated them into his work, and given that case law on the topic had flourished recently, the Commission should take advantage of it.

53. He did, however, agree with Mr. Pellet and other members that a gap was apparent when the draft articles under consideration were read in conjunction with the draft articles on responsibility of States for internationally wrongful acts, namely an indication of the rules that ought to apply when an international organization sought to invoke the responsibility of a State for a wrongful act. The main argument for filling that gap was that the Commission should cover the topic of responsibility fully where both States and international organizations were concerned. Mr. Pellet had suggested somewhat strongly that certain provisions in the draft articles on responsibility of international organizations already touched upon the question of the responsibility of States *vis-à-vis* international organizations and that, logically, the question should be addressed more systematically. On the other hand, since one would not automatically expect to find rules relating to the responsibility of States *vis-à-vis* international organizations in a document on State responsibility, the insertion of rules governing State responsibility in the draft articles before the Commission was not logically compelling, although it would help to fill a significant gap in the Commission’s overall work on international responsibility.

54. Mr. Pellet had countered the arguments of those members who advocated the continued exclusion of provisions on the responsibility of States *vis-à-vis* international organizations with his personal recollection of the intent that lay behind the topic mandate. While he attached considerable importance to institutional memory, he was not convinced that Mr. Pellet’s position was decisive. The Special Rapporteur had proceeded on the assumption that the mandate did not require incorporation of rules on State responsibility, and there did not seem to be majority support within the Commission for Mr. Pellet’s position to date, although that did not necessarily amount to acquiescence. The Special Rapporteur had also recalled that some if not all of the relevant rules would be picked up by analogy from the draft articles on State responsibility while others would evolve in customary law. Thus the gap in the Commission’s work on the topic under consideration would not imply a gap in general international law. With those considerations, he supported the approach adopted by the Special Rapporteur, but he suggested that the commentary on the scope of the draft articles should explain why the gap had not been filled. He also expressed support for the proposals relating to the scope of the draft articles contained in paragraph 21 of the report.

55. Turning to the chapter of the report on attribution of conduct (paras. 22–38), he questioned whether the proposed reformulation of draft article 4, paragraph 2, was an improvement. The words “when they have been charged by an organ of the organization with carrying out, or helping to carry out, one of its functions” were superfluous, because if an entity was one through which the organization acted, then the entity would have been charged, implicitly or explicitly, with carrying out or helping to carry out one of the organization’s functions. Also, the term “charging” suggested that an entity required an explicit mandate in order for it to be an agent, and the Commission might not wish to rule out the possibility that an agency could arise by implication.

56. The Special Rapporteur had provided a useful analysis of recent case law in which the criterion of effective control had been invoked, which lent weight to the notion that that criterion had become a part of customary international law. However, he had also demonstrated how the way in which the criterion had been applied in the *Behrami and Saramati* decision was somewhat misleading. He hoped that the commentary to draft article 5 would explain further how the test of effective control could be applied in practice in order to avoid any misunderstanding.

57. Turning to the chapter of the report on breach of an international obligation (paras. 39–44), Mr. Vasciannie agreed that a breach of an international obligation might arise when an international organization did not act in conformity with its rules, but the new wording of draft article 8, paragraph 2, proposed in paragraph 42 did not convey that idea clearly, particularly because of the phrase “in principle”. In fact, it was quite possible that paragraph 1 of that article implicitly addressed the point made in paragraph 2 with the words “regardless of its origin”. He suggested that the matter should be taken up by the Drafting Committee.

58. Concerning 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), he questioned whether the amendment to draft article 15, paragraph 2 (b), proposed in paragraph 51, would actually improve the text. More fundamentally, he had serious doubts about whether authorizations and recommendations should give rise to responsibility in the circumstances contemplated by draft article 15. Where in cases of authorization or recommendation no binding obligation was placed on a State or other international organization to act, it was unlikely that responsibility would automatically pass to the authorizing or recommending organization. It was a different matter, however, when the organization obliged a State or other organization to act. While he took note of the Special Rapporteur’s comments that the matter had already been discussed, he considered that the proposed amendment reopened it for consideration.

59. With regard to the chapter of the report on circumstances precluding wrongfulness (paras. 55–72), he expressed support for retaining draft article 18 on self-defence. There were instances in which international organizations, through their agents, might be called upon to exercise self-defence. There might be some resistance to the draft article caused by the fear that self-defence might be invoked in inappropriate circumstances, but that should not lead the Commission to conclude that international law ruled out the possibility of self-defence for international organizations. A solution might be to delete the phrase “embodied in the Charter of the United Nations”, given that Article 51 of the Charter of the United Nations referred to the inherent right of States to self-defence.

60. While he generally supported the text of draft article 19 on countermeasures, he preferred the words “effective means” to “reasonable means” in paragraph 2—another matter to be taken up by the Drafting Committee.

61. Mr. PERERA commended the Special Rapporteur on his comprehensive seventh report. He endorsed the approach of reviewing the draft articles adopted so far in the light of comments made by Member States and international organizations. Given the fact that relevant practice, while evolving, was sparse, it was imperative for the Commission to take on board their views.

62. He agreed with those members who had urged that, for the sake of completeness, the scope of the topic should be extended to cover invocation of the international responsibility of a State by an international organization. If that raised an issue in terms of the Commission’s mandate, an appropriate recommendation could be addressed to the General Assembly.

63. He endorsed the definition of the term “international organizations” given in draft article 2, which reflected current international reality. He also supported the Special Rapporteur’s recommendation to retain the criterion of the exercise of effective control for the attribution of conduct of organs or agents placed at the disposal of an international organization by a State or another international organization. The Special Rapporteur had argued cogently in paragraphs 26 to 30 of his report in favour of its retention on the basis of an analysis of recent jurisprudence, taking due account of the practical considerations involved. He noted with interest the comment by Mr. Caflich regarding the decision of the European Court of Human Rights, which had been taken in the context of that Court’s jurisdiction, and he agreed with Mr. Vasciannie that the matter could be expanded in the commentary.

64. He was inclined to support the Special Rapporteur’s suggestion to delete draft article 18 on self-defence (para. 72), given that, as several States had pointed out, self-defence was a concept which by its very nature was applicable only to the actions of States. However, the Commission seemed to be divided on the matter. If it did decide to retain the article, he would be in favour of Sir Michael Wood’s suggestion to delete the reference to the Charter of the United Nations, since essential aspects of the concept, such as proportionality, were not expressly referred to in it but drawn from principles of international law. He also took due note of Mr. Vasciannie’s comment regarding Article 51 of the Charter of the United Nations.

65. He recalled that during the sixtieth session, some members of the Commission had urged caution regarding the inclusion of a draft article on countermeasures,²³ given the limited practice in that area, the uncertainty surrounding the legal regime of countermeasures and the risk of abuse that recourse to countermeasures entailed. They had also been mindful of the divisive nature of the debate that had taken place in the Commission and in the Sixth Committee on the same issue during the consideration of the draft articles on State responsibility. The Commission had nevertheless proceeded with the formulation of draft article 19 on the understanding that it should be subject to specific safeguards against abuse and that countermeasures should remain exceptional.

²³ *Yearbook ... 2008*, vol. II (Part Two), para. 149.

66. However, the example of countermeasures provided by the IMF, which, as the Special Rapporteur pertinently observed in paragraph 63 of his report, pertained to sanctions that an international organization might take against one of its members and should not be considered as countermeasures, underscored the need for a cautious approach to the question. He therefore endorsed Mr. McRae's suggestion to restrict the scope of draft article 19 by deleting the word "reasonable" in the phrase "reasonable means" in paragraph 2. He also had some difficulty with the words "lawful countermeasures" in paragraph 1, although the Special Rapporteur had explained that his intention had been to emphasize the lawful nature of the countermeasures in the context of circumstances precluding wrongfulness. The Drafting Committee might wish to give those and other points further consideration. He also looked forward to the forthcoming meeting with the legal advisers of international organizations for additional clarifications in the light of their organizations' practice.

67. Mr. DUGARD said that he held a minority view in that he wished draft article 5 to be reconsidered in the light of relevant judicial decisions. He wished to know how the Special Rapporteur intended to deal with the Commission's discussion of that matter. If the majority agreed that the text of draft article 5 should remain unchanged, he presumed that substantial changes would be made to the commentary thereto in order to reflect the discussion.

68. Mr. GAJA (Special Rapporteur) said that his intention was to draw conclusions on the basis of the discussion of the topic and submit certain proposals to the Drafting Committee. Once the Drafting Committee had reviewed these proposals and the relevant draft articles had been adopted by the plenary, he would revise the commentaries to reflect any changes made and also refer to elements of practice. It would seem strange for the Commission to produce commentaries to the draft articles without considering *Behrami and Saramati*, although the commentaries were not the appropriate place to express critical views of that decision. He therefore intended to refer briefly to how the criterion of effective control had been applied in the decision of the European Court of Human Rights. The commentaries would, of course, be submitted to the plenary for approval.

69. Mr. NOLTE said that while he shared Mr. Dugard's view regarding the European Court of Human Rights decision in the *Behrami and Saramati* case, he would be reluctant for the Commission to reopen the debate on draft article 5. The Court had not purported to try to change the approach of the Commission, but merely to apply draft article 5 to the special situation of the United Nations.

70. Mr. CAFLISCH agreed with Mr. Nolte: the Court had not had international responsibility in mind when dealing with the case, but instead the jurisdiction *ratione personae* of the Court. The Commission was therefore not obliged to take into account the Court's jurisprudence, not because it was in any way inferior, but because it dealt with a different issue.

The meeting rose at 12.35 p.m.

3002nd MEETING

Friday, 8 May 2009, at 10 a.m.

Chairperson: Mr. Ernest PETRIČ

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

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

[Agenda item 4]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to continue its consideration of the seventh report on responsibility of international organizations (A/CN.4/610).
2. Mr. HASSOUNA said that the fact that the Special Rapporteur had enriched his report with the views of Member States for the first reading of the draft articles was perhaps a break with tradition, but it was certainly a valuable one in a field where there was little practice. The Commission was faced with the dilemma of how to deal with the issue of invocation by an international organization of the international responsibility of a State, a matter lying outside the scope of the draft articles as defined in article 1. The issue proved the close interrelationship between the responsibility of States and the responsibility of international organizations. The question thus arose as to whether those two issues should not have been dealt with simultaneously by the Commission several years previously; history alone would judge that. He supported Ms. Escarameia's view that individuals, who had become subjects of international law, should also be entitled to invoke the responsibility of international organizations.
3. He favoured a broad definition of the term "international organization" in article 2, since international organizations now included entities other than States, namely NGOs or other regional or subregional entities. It might be appropriate to add the word "regulations" to the definition of "rules of the organization", which referred to the specific directives issued by most international organizations. It was also a term used in the definition provided by the Institute of International Law in its 1995 resolution (art. 2 (c)).²⁴ He supported the Special Rapporteur's proposals in paragraph 21 of his report concerning the restructuring of the draft articles.

²⁴ *Institute of International Law, Yearbook*, vol. 66 (1996), Session of Lisbon (1995), Part II, p. 447.