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Summary record of the 3007th meeting

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in principle, a breach of an international obligation. The phrase “in principle” appropriately conveyed the idea that the general rule allowed for certain exceptions, depending on the particular circumstances of each case.

54. As to responsibility of an international organization in connection with the act of a State or another international organization (paras. 45–54), draft article 15, paragraph 1, stated that an international organization incurred international responsibility if it adopted a decision binding a member State or international organization to commit an act that would be internationally wrongful if committed by the organization itself. According to the Special Rapporteur, that article was designed to prevent an international organization from successfully circumventing one of its international obligations by availing itself of the separate legal personality of its members, whether they were States or other international organizations. It followed from paragraph 1 that a decision that bound a member of an international organization to commit an internationally wrongful act was manifestly an illegal decision. By the same token, an international organization that bound one of its members to commit such an act incurred international responsibility. However, the text did not address the case of a member State which, knowing that such a decision was a breach of international law, refrained from carrying out the required act. Such disobedience was likely to incur the wrath of the international organization, and the member in question would need to be protected from punishment by the organization. To that end, a new paragraph could be inserted immediately following the current draft article 15, paragraph 1, and could read: “No member of an international organization shall be subjected to proceedings under the rules of the international organization by reason only of non-compliance with or non-implementation of the decisions referred to in paragraph 1 of this article.”

55. The Special Rapporteur had suggested the creation of a new article 15 *bis* in order to fill in the gaps in chapter V of the draft articles, which contained no provision relating to the possibility that an international organization might incur responsibility as a member of another international organization (para. 52 of the report). The new article 15 *bis* would read: “Responsibility of an international organization that is a member of another international organization may arise in relation to the act of the latter also under the conditions set out in articles 28 and 29 for States that are members of an international organization.” However, the Special Rapporteur had conceded that international organizations were not frequently members of other international organizations. His proposal therefore did not seem to be sufficiently justified by practice, custom or judicial decision. In his own opinion, the isolated comment of the representative of the Netherlands⁷³ cited by the Special Rapporteur (para. 52) did not justify the insertion of a new draft article.

56. With regard to the circumstances precluding wrongfulness (paras. 55–72), he agreed with the numerous comments that “self-defence was, by its very nature,

applicable only to the actions of a State”. He therefore supported the proposal of the Special Rapporteur to delete draft article 18 on self-defence from the circumstances precluding wrongfulness.

57. With regard to the content of international responsibility (paras. 93–101), he noted that in paragraph 97 of his report, the Special Rapporteur had suggested adding a second paragraph to article 43 in order to clarify that when it stated that the members of a responsible international organization were required to take appropriate measures in order to provide the organization with the means for effectively fulfilling its obligations under chapter VIII, article 43 was not implying that member States had an obligation to provide reparation to the injured State or international organization. In his opinion, such a clarification would merely make the text of article 43 verbose. As the Special Rapporteur had acknowledged, “the current text does not appear to convey that there would be an obligation for members towards the injured entity”. Draft article 43 as it stood clearly showed that the primary and, in fact, only obligation fell on the international organization, not on its members.

58. As to the current wording of draft article 43, reference should be made to the fact that it was not in all cases that the rules of an international organization required member States or entities to take the measures envisaged in the draft article. Where such a gap existed in the rules of an international organization, it was likely to give member States an escape valve to evade international responsibility. Consequently, the obligation envisaged should not be dependent on the rules of the international organization concerned. That appeared to be the reason why New Zealand had warned that the reference to the rules of the organization “should not be interpreted as justifying inaction by the members of an organization in the absence of suitable rules”. The phrase “in accordance with the rules of the organization” should thus be deleted.

59. Lastly, Mr. Ojo endorsed the text of draft articles 44 to 64 as proposed by the Special Rapporteur.

The meeting rose at 1 p.m.

3007th MEETING

Tuesday, 19 May 2009, at 10.05 a.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Caffisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue.

⁷³ *Official Records of the General Assembly, Sixty-first Session, Sixth Committee, 14th meeting (A/C.6/61/SR.14)*, para. 20.

Reservations to treaties⁷⁴ (A/CN.4/606 and Add.1, sect. C, A/CN.4/614 and Add.1–2,⁷⁵ A/CN.4/616,⁷⁶ A/CN.4/L.744 and Corr.1–2 and Add.1⁷⁷)

[Agenda item 3]

REPORT OF THE DRAFTING COMMITTEE (A/CN.4/L.740⁷⁸)

1. The CHAIRPERSON recalled that at the end of the sixtieth session,⁷⁹ the Chairperson of the Drafting Committee had introduced the Committee's final report on the topic "Reservations to treaties" (A/CN.4/L.740). The Commission had taken note of that report without formally adopting the draft guidelines, as that would have meant that the draft guidelines and the commentaries thereto would have had to be included in the Commission's report to the General Assembly, an unrealistic objective owing to a lack of time. In order to allow the Special Rapporteur sufficient time to prepare commentaries on the draft guidelines, he invited the Commission to adopt those contained in the report of the Drafting Committee.

Draft guideline 2.8.1 (*Tacit acceptance of reservations*)

Draft guideline 2.8.1. was adopted.

Draft guideline 2.8.2 (*Unanimous acceptance of reservations*)

Draft guideline 2.8.2 was adopted.

Draft guideline 2.8.3 (*Express acceptance of a reservation*)

Draft guideline 2.8.3 was adopted.

Draft guideline 2.8.4 (*Written form of express acceptance*)

Draft guideline 2.8.4 was adopted.

Draft guideline 2.8.5 (*Procedure for formulating express acceptance*)

Draft guideline 2.8.5 was adopted.

Draft guideline 2.8.6 (*Non-requirement of confirmation of an acceptance made prior to formal confirmation of a reservation*)

Draft guideline 2.8.6 was adopted.

Draft guideline 2.8.7 (*Acceptance of a reservation to the constituent instrument of an international organization*)

Draft guideline 2.8.7 was adopted.

Draft guideline 2.8.8 (*Organ competent to accept a reservation to a constituent instrument*)

Draft guideline 2.8.8 was adopted.

⁷⁴ For the text of the draft guidelines and the commentaries thereto provisionally adopted so far by the Commission, see *Yearbook ... 2008*, vol. II (Part Two), chap. VI, sect. C.

⁷⁵ Reproduced in *Yearbook ... 2009*, vol. II (Part One).

⁷⁶ *Idem.*

⁷⁷ Mimeographed; available on the Commission's website. See also the 3014th meeting below, paras. 35 *et seq.* and the 3025th meeting, paras. 68 *et seq.*

⁷⁸ Mimeographed; available on the Commission's website, documents of the sixtieth session.

⁷⁹ See *Yearbook ... 2008*, vol. I, 2988th meeting, paras. 45–78.

Draft guideline 2.8.9 (*Modalities of the acceptance of a reservation to a constituent instrument*)

Draft guideline 2.8.9 was adopted.

Draft guideline 2.8.10 (*Acceptance of a reservation to a constituent instrument that has not yet entered into force*)

Draft guideline 2.8.10 was adopted.

Draft guideline 2.8.11 (*Reaction by a member of an international organization to a reservation to its constituent instrument*)

Draft guideline 2.8.11 was adopted.

Draft guideline 2.8.12 (*Final nature of acceptance of a reservation*)

Draft guideline 2.8.12 was adopted.

The draft guidelines contained in the report of the Drafting Committee (A/CN.4/L.740), as a whole, were adopted.

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*)

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

3. Ms. ESCARAMEIA said that the Special Rapporteur had proposed expanding draft article 43 (Ensuring the effective performance of the obligation of reparation) with a new second paragraph. The new text reflected the concerns that had led to the proposal of an alternative for article 43 at the Commission's previous session.⁸⁰ Since she shared those concerns, she supported the proposed new paragraph. The new text made it clear that there was no obligation on members of an international organization that had committed a wrongful act to make reparation to an injured State or international organization. As to the placement of article 43, she thought that it ought to be included among the general principles in chapter I because it clarified the responsibilities of international organizations and their members; however, she could also go along with its placement elsewhere.

4. She endorsed articles 44 and 45 as they stood.

5. Turning to article 46, she said that the fact that remarks by Mr. Pellet (2998th meeting above, para. 28) had raised anew the issue of enlarging the scope of the draft had emboldened her to reopen a debate from the fifty-ninth session. Under article 46, the responsibility of an international organization could be invoked by States or international organizations, but she thought that other entities—specifically, individuals—should be entitled to do so as well. In practice, the invocation of the

⁸⁰ *Yearbook ... 2008*, vol. II (Part Two), chap. VII, sect. C, para. 164, footnote 539. For the commentary to this draft article, see *Yearbook ... 2007*, vol. II (Part Two), pp. 91–92, para. 344.

responsibility of an international organization by other international organizations or States members of an international organization was rare. What happened instead was that international organizations—for example, peace-keeping forces—injured people, who sometimes had real, and not just theoretical, means of invoking the responsibility of the organization concerned. Thus a reference to individuals would give the draft articles a practical application.

6. Furthermore, if the rules of an organization were considered to constitute international law, then a breach of those rules could and should be covered by the draft on responsibility of international organizations. The text could then also address relations between international organizations and their employees, for example, labour disputes or other conflicts, and thus reflect real-life situations.

7. She was grateful that, after much insistence on her part, Mr. Gaja had inserted draft article 53 as a “without prejudice” clause to take account of the other entities—not only individuals but also moral persons or associations—that could invoke responsibility to international organizations and States.⁸¹ Article 53 should be retained to cover entities other than individuals, but it would be good also to have a reference to individuals in draft article 46. That would not constitute a major change and would in fact be quite simple to do: in both draft articles 46 and 47, the words “or an individual” could be inserted after the phrase “a State or an international organization”. Minor adjustments would then be required in only a few other places.

8. She still thought there were problems with the distinction that was drawn between countermeasures taken against international organizations that engaged in wrongful acts and those taken against States. The first type could undermine an organization’s functioning and even its very existence. The proportionality test in draft article 57 did not necessarily solve that problem, because a countermeasure might be proportional to the harm done by the organization but fail to take into account the organization’s weaknesses, which might prevent it from surviving the countermeasure. On the other hand, unlike States, international organizations might have as part of their functions the defence of the interests of the international community as a whole: that was often the very reason why they had been created. Thus, when the functions of certain international organizations were impaired, the defence of certain ideals was also undermined. Accordingly, great care should be taken with the draft articles dealing with countermeasures that could be applied against international organizations. Article 54, paragraph 4, addressed that point, but the wording remained a bit weak: countermeasures must “as far as possible” be taken in such a way as to “limit their effects” on the organization’s exercise of its functions. That did not, however, cover a situation in which the very existence of an organization might be imperilled. She would prefer to delete the phrase “as far as possible” and to insert a reference to the need to take into account the specific nature and particular needs of the organization.

⁸¹ For the commentary to this draft article, see *Yearbook ... 2008*, vol. II (Part Two), chap. VII, sect. C, para. 164.

9. The problem was even more complicated because of the unique relationship that existed between international organizations and their members. She agreed with the statements made by the representatives of Germany,⁸² France⁸³ and Greece⁸⁴ in the Sixth Committee to the effect that countermeasures should not enter into that relationship. Article 55 should be redrafted to minimize the chances that countermeasures might be used by members against an organization. The phrase “reasonable means” was ambiguous—did it imply means that were effective or means that were available? Perhaps such means permitted a rapid response or provided reparation. While those questions would be dealt with in the commentary, the draft article itself should say something more than just “reasonable”. In addition, it was unclear whether the word “means” was intended to refer to an institutionalized settlement mechanism, a procedure or a mere rule.

10. The phrase “available in accordance with the rules of the organization” was likewise unclear. The internal rules of an organization probably did not address the issue of countermeasures, yet the expression “in accordance with” implied that they did.⁸⁵ An earlier version of the text had used the phrase “not inconsistent with”,⁸⁶ which she preferred. Furthermore, the text ought to indicate whether means external to the international organization, such as courts, could also be used. She thought that they could, but the text did not make that clear.

11. Lastly, draft article 55 had to be harmonized with draft article 19. Whereas draft article 55 covered countermeasures taken by members against an international organization, draft article 19, paragraph 2, covered countermeasures taken by an international organization against its members. Both situations should be contemplated in both articles.

12. Turning to the general provisions proposed in paragraphs 120 to 134 of the report, she noted that draft article 61 on *lex specialis* was similar to article 55 in the draft on responsibility of States for internationally wrongful acts.⁸⁷ Instead of merely referring to the rules of the organization applicable to the relations between an organization and its members, however, article 61 should go further and mention the relevant practice, which might even be customary law. Draft article 62 likewise paralleled article 56 in the draft on State responsibility, and she endorsed it, but wished to offer some drafting suggestions. The phrase “continue to govern” was puzzling, and she would like to know why it had been chosen. Why not simply use the word “govern”? To her mind, the phrase “continue to govern” suggested that only rules that had existed when the text was adopted were applicable; however, rules not foreseen at that time might later be found

⁸² *Official Records of the General Assembly, Sixty-third Session, Sixth Committee, 19th meeting* (A/C.6/63/SR.19), para. 86.

⁸³ *Ibid.*, 20th meeting (A/C.6/63/SR.20), paras. 40–41.

⁸⁴ *Ibid.*, 21st meeting (A/C.6/63/SR.21), para. 2.

⁸⁵ See article 55 [52 bis] as provisionally adopted by the Drafting Committee at the sixtieth session (A/CN.4/L.725/Add.1, mimeographed; available on the Commission’s website). See also *Yearbook ... 2008*, vol. II (Part Two), chap. VII, para. 130.

⁸⁶ *Yearbook ... 2008*, vol. II (Part Two), para. 141, footnote 481.

⁸⁷ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 140–141.

to be applicable. In addition, the phrase “internationally wrongful act” should be followed by the qualifying phrase “of the international organization” in order to make it clear that the internationally wrongful act in question was not one committed by a State.

13. She endorsed draft articles 63 and 64.

14. To sum up, she favoured referring new draft articles 61 to 64 to the Drafting Committee, with due regard taken for the comments made in plenary. Draft article 55 could also be sent to the Drafting Committee for a second look at the distinction between countermeasures taken in the context of the relationship between international organizations and their members and those taken outside that relationship. Draft article 55 and draft article 19, paragraph 2, should be harmonized so that both referred to all situations in which members applied countermeasures to international organizations and vice versa.

15. Notwithstanding her proposed changes, she found the report to be a remarkable piece of scholarship.

16. Mr. NOLTE observed that Ms. Escarameia favoured maximum restrictions on countermeasures to which, she argued, international organizations were particularly vulnerable; when such organizations represented the common good, then countermeasures should not impede their functioning. He suggested that a distinction should perhaps be made between international organizations that represented the common good in a universal sense and those that represented only the aggregate common good of individual States. If that was a reasonable distinction, then the logic whereby international organizations should be protected owing to their particular vulnerability might be inverted to suggest the need for stronger countermeasures against international organizations which merely represented the aggregate common good of their member States.

17. Ms. ESCARAMEIA said that Mr. Nolte’s point, as she understood it, was that an international organization was the sum total of several States. If it committed a wrongful act, that was equivalent to all those States having cumulatively committed the act and required a very strong response, not a very restricted one as she had suggested. She agreed with Mr. Nolte that not all international organizations were working for the common good, hence the need to have some reference in the draft articles to the specific nature of particular organizations. On the other hand, she found it difficult to view international organizations as a composite of their members. After all, such organizations were defined in the draft articles as having international legal personality. A countermeasure taken against a powerful organization did not have the same effect as one taken against a smaller, more regionally oriented one. In addition, much depended on the internal dynamics of the organization: for instance, some had many members but were dominated by one or two countries. It did not make sense, then, to penalize such organizations for something that one country had done.

18. Sir Michael WOOD said that Ms. Escarameia’s suggestion to amend draft article 46 to cover the possibility that individuals might invoke the responsibility of international organizations, far from being simple, as she had described it, would greatly complicate the Commission’s

task. He saw no reason why that idea should be included in the draft on responsibility of international organizations when it had not been included in the draft on State responsibility, as there was no real difference between the two sets of articles in that respect. The issue, though important, would be better left aside.

19. He agreed with the Special Rapporteur’s proposals to make certain limited improvements in Parts Two and Three, on the content and the implementation of international responsibility, respectively, and thought that together with the suggestions made in other parts of the seventh report, they should be referred to the Drafting Committee.

20. In introducing his report, the Special Rapporteur had invited the Commission to reconsider the wording of draft article 55 to see whether the limits on the possible use of countermeasures by the members of an organization could be stated more clearly and in a way that indicated how exceptional such countermeasures should be. He supported that proposal and suggested that the Drafting Committee should attempt to find appropriate language.

21. However, he had three specific comments to make regarding that text. First, in the phrase “if some reasonable means ... are available”, he was in favour of deleting the word “reasonable”, which did not add much, if anything, in that particular context, and he agreed with the implication of Ms. Escarameia’s questions about its meaning. Secondly, he suggested that the emphasis in that phrase might be changed by saying “unless, in the particular circumstances, no means ... are available”. Thirdly, instead of referring to “means for ensuring compliance”, which seemed unlikely to exist, “ensure” being a very strong word, the text could adopt the wording used in draft article 54, paragraph 1, and refer to “means to induce compliance”, a formulation that corresponded more closely to the nature of countermeasures. With those changes, draft article 55 would then read:

“In addition to the other conditions set out in the present Chapter, an injured member of an international organization may not take countermeasures against that organization unless, in the particular circumstances, no other means to induce that organization to comply with its obligations under Part Two are available to the injured member in accordance with the rules of the organization.”

22. He shared Ms. Escarameia’s doubts about the phrase “in accordance with the rules of the organization”, which should be deleted. Countermeasures should not be permitted when other procedures outside the rules of the organization were available. He also agreed with Ms. Escarameia that if a change was made in draft article 55, the Drafting Committee should propose a similar change to the parallel provision in draft article 19, paragraph 2, which dealt with countermeasures by an international organization against one of its members.

23. Turning to the new draft articles proposed in paragraphs 120 to 134 of the report, on general provisions, he endorsed draft article 62 (Questions of international responsibility not regulated by these articles), draft article 63 (Individual responsibility) and draft article 64 (Charter of the United Nations). In the explanation of

draft article 62 given in paragraph 129 of the report, it would have been more accurate, or at least less controversial, to have referred to those “whose action constitutes a crime under international law” rather than to “those who are instrumental for the serious breach of an obligation under a peremptory norm of general international law”. He asked the Special Rapporteur to take that point into account when preparing the commentary to draft article 63.

24. He also supported draft article 61 (*Lex specialis*), although its current wording required further elaboration. Draft article 61 was perhaps even more important in the context of the current draft articles than it was in the draft articles on responsibility of States for internationally wrongful acts. A central question to be addressed in the context of the current topic was how to adequately reflect the diversity of international organizations. Unlike States, international organizations were not all equal in law; they had limited competences and a limited capacity to act on the international stage; they had specific powers and functions laid down in their individual constituent instruments; and their relations with their own members and with non-members varied greatly.

25. It was against that background that draft article 61 was important. It would disapply the articles “where and to the extent that” the rules contained in the draft articles were “governed by special rules of international law”. Moreover, it rightly gave as an example “the rules of the organization that are applicable to the relations between an international organization and its members”. He agreed with that as far as it went.

26. However, something more was needed, perhaps in draft article 61, but probably elsewhere. In paragraph 121 of his report, the Special Rapporteur wrote: “These special rules (*lex specialis*) may supplement the more general rules that have been drafted in the current text or may replace them, in full or in part.” By confining draft article 61 essentially to what was contained in article 55 of the draft articles on State responsibility for internationally wrongful acts, the Special Rapporteur had failed to capture the full range of what was meant by “supplementing” the general rules. As the text of the draft article suggested, and as was clear from the commentary to article 55 of the draft articles on State responsibility,⁸⁸ the scope of the provision on *lex specialis* was rather limited. While, as the 2001 commentary stated, the provision applied to all the draft articles, it seemed only to apply in cases where States, when defining the primary obligations that applied between them, made special provision for the legal consequences of a breach of those obligations or for determining whether there had been a breach. Other limitations were also suggested in the 2001 commentary.

27. In the current context, then, assuming that it wished to permit the flexibility that the diversity of international organizations seemed to demand, the Commission should allow for cases in which the general rules were not so much disapplied, in full or on part, by express provisions, but were instead applied taking into account the specificities of the organization in question. However, that would only

be done to a limited extent if, as the Special Rapporteur suggested, the Commission incorporated into many of the draft articles a notion that was apparently implicit (or, in the case of draft article 61, explicit), namely, the provision “subject to the special rules of the organization”. As he recalled, the Special Rapporteur had said that the phrase could have been inserted in about 25 of the draft articles. If the Special Rapporteur could indicate, in the commentary to article 61 or in the commentaries to the relevant articles, just which 25 draft articles those were, it might help to clarify matters, provided that it could be done without creating any misleading *a contrario* implications.

28. Yet, even that would not fully address his concern. In order to cover the notion of supplementing the rules in the draft articles by applying them in the light of the specificities of the organization concerned, he proposed adding new text that might read: “In applying these articles to a particular organization, any special considerations that result from the specific characteristics and rules of that organization shall be taken into account.” Ms. Escarameia had used similar language in the context of countermeasures. Such a provision might become a new draft article rather than being incorporated into draft article 61. The notion he was trying to express was conceptually different from that of *lex specialis*. Consequently, the inclusion of a new draft article, probably in the general provisions, would be his preference, but if others, and the Special Rapporteur in particular, felt that the idea was better covered in the commentary, then he would consider that alternative, in which case it should probably be dealt with in the introductory commentary, where presumably the point would be made about the varied nature of international organizations.

29. In conclusion, he said that all four draft articles proposed in the Special Rapporteur’s seventh report should be sent to the Drafting Committee.

30. Mr. VALENCIA-OSPINA said that the Special Rapporteur’s constructive proposal to have the Commission review, prior to completing its first reading of the draft articles, some of the provisions already adopted in the light of comments by States and international organizations, had enabled new members of the Commission to gain a broader picture of the draft articles. He shared the Special Rapporteur’s conclusion that some of the changes to be made would make a certain restructuring of the draft articles necessary.

31. He had a number of comments on specific draft articles. With regard to draft article 4 (General rule on attribution of conduct to an international organization), he endorsed the Special Rapporteur’s proposal to insert paragraph 4, which contained a definition of the term “rules of the organization”, as a new paragraph 2 in draft article 2 (para. 21 of the report), where the word “article” would be rendered in the plural. That would mean that paragraphs 1 and 2 would both be covered by the single *chapeau* “For the purposes of the present draft articles”, a phrase that did not need to be repeated at the beginning of each defined term.

32. Whereas article 4 of the draft articles on State responsibility contained a description of what constituted

⁸⁸ *Ibid.*, pp. 140–141.

an organ of the State, the draft articles before the Commission did not, much less a definition of an organ of an international organization, despite the proposal made by the Special Rapporteur in his second report⁸⁹ to include the following wording for draft article 4, paragraph 2: “Organs, officials and persons referred to in the preceding paragraph are those so characterized under the rules of the organization.” The commentary to draft article 4⁹⁰ explained why the Commission had decided not to follow the State responsibility model in describing an organ of an international organization, as the Special Rapporteur had originally intended.

33. The Commission had again departed from the State responsibility model by including, in article 4, paragraph 2, a definition of “agent”, a term that did not appear in the draft articles on responsibility of States. Yet while the possibility had been expressly foreseen in a footnote to the article in successive annual reports of the Commission,⁹¹ the Special Rapporteur had not proposed transferring paragraph 2 to article 2, as he had in the case of article 4, paragraph 4. The term “agent” appeared in draft articles 5 and 6, as well as in paragraph 3 of draft article 4 itself, the very article that contained its definition, but the definition was expressly limited “for the purposes of paragraph 1” of article 4 only. No explanation had been given for the difference in treatment proposed for the terms “agent” and “rules of the organization”, although they were both defined in the same article. It might be that the context in which each term was used throughout the draft might justify the differentiation, but the transfer of the definition of “agent” from article 4, paragraph 2, to become article 2, paragraph 3, appeared to be warranted.

34. In view of the many critical comments by States and international organizations, the Special Rapporteur proposed that draft article 18 (Self-defence) should be deleted. The article had been adopted by the Commission on first reading at its fifty-eighth session⁹² on the basis of a text included in the Special Rapporteur’s fourth report.⁹³ Following closely the corresponding article in the draft on responsibility of States, the Special Rapporteur’s text had referred to a “lawful measure of self-defence taken in conformity with the Charter of the United Nations”. In adopting an article on self-defence, the Commission, taking into account “the fact that international organizations are not members of the United Nations”, had replaced the reference to the Charter of the United Nations with a reference to “principles of international law embodied in the Charter of the United Nations”, wording that already appeared in the articles concerning the invalidity of treaties because of coercion in the 1969 Vienna Convention and the 1986 Vienna Convention. That change in wording clearly suggested the nature of the debate to which the inclusion of an article on self-defence in the context

of the responsibility of international organizations had given rise within the Commission and the Sixth Committee, a debate that was further reflected in the written comments of international organizations.⁹⁴ He was in favour of retaining an article on self-defence in the current draft for reasons that included those more convincingly advanced by the Special Rapporteur in his report than the ones given by the Commission in its commentary. The wording adopted by the Commission, although an improvement on that originally proposed by the Special Rapporteur, was still far from satisfactory for many States and international organizations, and for himself as well, as it still pointed in the only direction in which a reference to the right of self-defence under the Charter of the United Nations could lead, namely Article 51. As the ICJ had stated in its 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*:

The entitlement to resort to self-defence under Article 51 is subject to certain constraints. Some of these constraints are inherent in the very concept of self-defence. Other requirements are specified in Article 51.

The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law. ... This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed. [paras. 40–41 of the opinion]

35. In so holding, the Court had confirmed its dictum in its 1986 judgment in *Military and Paramilitary Activities in and against Nicaragua* that there was “a specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law” (para. 176 of the judgment). As Bruno Simma, a former member of the Commission and currently a judge on the Court, had written in the second edition of *The Charter of the United Nations: A Commentary*,⁹⁵ “[w]ith regard to the requirement of an ‘armed attack’, the ICJ considers that Art. 51 and the right of self-defence under customary international law coincide” and “[a]s regards UN members, ... Art. 51, including its restriction to armed attack, supersedes and replaces the traditional right to self-defence”. Although the Commission had taken note in its commentary to draft article 18 of “the fact that international organizations are not members of the United Nations”,⁹⁶ ultimately the current drafting could only lead to Article 51, a provision which, moreover, specified in its first sentence that the right of self-defence could be used only until the Security Council had taken measures necessary to maintain international peace and security. There was no need to dwell on the implications of that provision if the right of self-defence was to be invoked by the United Nations acting through one of its organs, namely the Security Council.

36. Accordingly, the retention of article 18 in the current draft might be better assured if the draft article was worded in a way that made a clearer distinction between the position of States and that of international organizations or

⁸⁹ *Yearbook... 2004*, vol. II (Part One) document A/CN.4/541, p. 10, para. 28.

⁹⁰ *Yearbook... 2004*, vol. II (Part Two), pp. 48–50, especially paragraphs 9, 11 and 12 of the commentary.

⁹¹ *Yearbook ... 2005*, vol. II (Part Two), p. 40, footnote 101; *Yearbook ... 2006*, vol. II (Part Two), p. 118, footnote 569; *Yearbook ... 2007*, vol. II (Part Two), p. 82, footnote 394; and *Yearbook ... 2008*, vol. II (Part Two), chap. VII, sect. C.1, footnote 492.

⁹² *Yearbook ... 2006*, vol. II (Part Two), pp. 122–123.

⁹³ *Ibid.*, vol. II (Part One), document A/CN.4/564 and Add.1–2.

⁹⁴ *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/582, p. 25, comments by the European Commission and the International Monetary Fund on draft article 18.

⁹⁵ B. Simma (ed.), in collaboration with H. Mosler *et al.*, Munich, Verlag C. H. Beck, 2002, 2nd ed., vol. I, pp. 793 and 806, respectively.

⁹⁶ *Yearbook ... 2006*, vol. II (Part Two), p. 122, para. (5) of the commentary.

between international organizations in the exercise of the right of self-defence. To that end, the Commission might wish to avail itself of the solution it had adopted in its draft articles on the law of treaties between States and international organizations or between international organizations,⁹⁷ the basis for the 1986 Vienna Convention. The comparison was appropriate, since the position of that Convention with respect to the 1969 Vienna Convention was similar to that of the current draft with respect to the draft articles on State responsibility. When elaborating article 2, on use of terms, of the draft that had eventually become the 1986 Vienna Convention, the Commission had concluded that in the case of international organizations, it could not speak of “ratification” in paragraph 1 (b), the term that had been used in the corresponding provision of the 1969 Vienna Convention. As the Commission had explained in its commentary, “[t]he use of the term ‘ratification’ to designate a means of establishing the consent of an international organization to be bound by a treaty, however, gave rise to considerable discussion within the Commission in the context of the consideration of article 11 on means of expressing consent to be bound by a treaty”. Bearing in mind that the draft articles (i.e., the future 1986 Vienna Convention), like the 1969 Vienna Convention, “make use of a terminology accepted ‘on the international plane’ (art. 2, subpara. 1 (b), of the Vienna Convention)”, the Commission had considered that “the term ‘ratification’ should be reserved for States”, whereas for international organizations, the term should be “act of formal confirmation”. The Commission had explained its position thus: “When necessary, international organizations, using a different terminology, can thus establish on an international plane their consent to be bound by a treaty by means of a procedure which is symmetrical with that which applies to States.”⁹⁸

37. On the basis of the above approach, Mr. Valencia-Ospina proposed the following wording for draft article 18 (Self-defence): “The wrongfulness of an act of an international organization is precluded if the act constitutes under international law an act corresponding to a lawful measure of self-defence taken by a State in conformity with the Charter of the United Nations.”

38. Turning to draft article 19 (Countermeasures), he recalled that at its previous session, when considering Part Three of the draft, on the implementation of the international responsibility of an international organization, the Commission, through a working group, had accepted the premise that informed the Special Rapporteur’s proposals in his sixth report,⁹⁹ namely that international organizations, like States, could take countermeasures against a responsible international organization. On that basis, the Drafting Committee had adopted chapter II of the current Part Three, comprising draft articles 54 to 60, which had yet to be adopted in plenary.¹⁰⁰ The Special Rapporteur maintained that when discussing circumstances precluding wrongfulness it was necessary to start from the same

premise, and on that basis had proposed a text for draft article 19 in his seventh report (para. 66). In its first paragraph, the text of the draft article was modelled closely on article 22 of the draft articles on State responsibility for internationally wrongful acts,¹⁰¹ except that instead of characterizing a countermeasure as an act taken in accordance with chapter II of Part Three, as article 22 did, it sought to achieve the same objective by characterizing the act as a “lawful” countermeasure.

39. Since chapter II of Part Three of the draft articles covered countermeasures taken both by injured States and by injured international organizations, the Special Rapporteur concluded in paragraph 64 of his report that a reference to the conditions that States needed to fulfil in order for their countermeasures to be considered lawful could be made only in general terms, given the still undefined status of the draft articles on responsibility of States. He therefore considered it preferable to refer to the conditions for the lawfulness of countermeasures by requiring simply that they should be “lawful”—a term that would apply also to the conditions under which an international organization could take countermeasures against another international organization. That line of reasoning seemed doubtful even in the case of States, since the conditions for the lawfulness of countermeasures taken by States were spelled out in draft articles 54 to 60, which closely followed the corresponding provisions of the draft articles on State responsibility. That reasoning did not apply at all to the conditions that international organizations were required to meet in order to obtain the same result, and in any case it was misleading to qualify countermeasures as “lawful”, since they were legitimate by operation of law, as had been pointed out by several members.

40. The use of the adjective “lawful” was even less called for in draft article 19 (Countermeasures), since paragraph 1 of that article concerned countermeasures that an international organization could take, not only against another international organization, as indicated in paragraph 61 of the report, but also against a State. In both cases, he agreed with the Special Rapporteur’s assessment that it would be coherent to consider that a circumstance precluding wrongfulness justified an otherwise wrongful act, subject to the conditions set out in chapter II of Part Three.

41. For draft article 43 (Ensuring the effective performance of the obligation of reparation), the Special Rapporteur had proposed the retention of the single-paragraph article adopted by the Commission at its fifty-ninth session¹⁰² as paragraph 1; that paragraph placed emphasis on the members of a responsible international organization, rather than on the organization itself, in the context of the measures to be taken to provide the organization with the means for effectively fulfilling its obligations under chapter II of Part Two. As currently worded, paragraph 1 appeared to indicate that a member State that failed to meet the stipulated requirement would be committing an internationally wrongful act entailing its international responsibility *vis-à-vis* the organization in question. The proposal to add a second paragraph to article 43 seemed to

⁹⁷ *Yearbook ... 1982*, vol. II (Part Two), pp. 17 *et seq.*

⁹⁸ *Ibid.*, p. 19, paras. (6)–(9) of the commentary to article 2.

⁹⁹ See footnote 17 above.

¹⁰⁰ Document A/CN.4/L.725/Add.1, available on the Commission’s website, documents of the sixtieth session. See also *Yearbook ... 2008*, vol. I, 2989th meeting, paras. 2–20.

¹⁰¹ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 75–76.

¹⁰² *Yearbook ... 2007*, vol. II (Part Two), pp. 91–92.

reinforce that conclusion, and while it expressly provided that member States had no obligation to make reparations, thereby possibly suggesting that such an obligation might be implicit in the first paragraph, the Special Rapporteur clearly indicated in paragraph 97 of his report that such was not the case. Thus the concerns expressed by a few States in the Sixth Committee in that regard did not seem to warrant the addition of the second paragraph proposed by the Special Rapporteur.

42. As author of the proposed alternative text for draft article 43, which had been reproduced in the commentary to draft article 43 contained in the report of the Commission on the work of its fifty-ninth session,¹⁰³ he fully subscribed to the arguments in favour of the alternative that had been presented by a number of delegations—in particular, the delegation of Austria.¹⁰⁴ According to the representative of Austria, the current wording of draft article 43 was “out of line with the logic of the draft articles, which concerned the responsibility of international organizations, not of States”, and his delegation therefore favoured the aforementioned alternative. As the representative of Austria understood it, the rationale of that proposal was “to commit the responsible organization to organizing its budget in a manner which ensured the satisfaction of an injured party. At the same time, it would oblige the members of an international organization to provide the means to meet the financial consequences of illegal activities or *ultra vires* acts attributed to their organization. If the responsible organization were to be dissolved before compensation was paid, the proposal would make possible proper budgetary liquidation of the outstanding liability”.

43. Draft article 55 (Countermeasures by members of an international organization) was based on paragraph 4 of draft article 52 (Object and limits of countermeasures), which had been proposed by the Special Rapporteur in his sixth report.¹⁰⁵ However, when the Commission had adopted draft article 55, it had replaced, in both paragraphs 4 and 5 of draft article 52, the phrase “only if this is not inconsistent with the rules of the ... organization”, proposed by the Special Rapporteur, with the phrase “if some reasonable means for ensuring compliance with its obligations under Part Two are available in accordance with the rules of the organization”. In the comments and observations received from international organizations on the topic of responsibility of international organizations (A/CN.4/609), UNESCO, noting that countermeasures were often not specifically provided for by the rules of international organizations, had expressed support for the notion that an injured member of an international organization might be able to resort to countermeasures that were not explicitly allowed by the rules of the organization. In the light of that observation and others made by States in the Sixth Committee, the Special Rapporteur proposed in his seventh report that the Commission might wish to reconsider draft article 55 as currently worded. He

himself supported that proposal on the grounds advanced by UNESCO.

44. As the Special Rapporteur explained in his report, draft article 62 (Questions of international responsibility not regulated by these articles) contemplated issues of State responsibility other than those dealt with in the current chapter X of the draft articles, even if they were not expressly covered in the draft articles on responsibility of States. One such issue, which had been raised repeatedly in the Commission’s debates, concerned the invocation by an international organization of the international responsibility of a State. According to the Special Rapporteur, that was a matter that lay outside the scope of the current draft as outlined in draft article 1, a position that had been echoed by some members. His own view was that the Commission enjoyed complete flexibility as to the provisions that would ultimately constitute its final product on the topic. What was certain was that it would be inappropriate for the Commission to recommend that the draft articles on responsibility of States, which had been submitted in final form to the General Assembly and were still under consideration by the latter insofar as their future status was concerned, should be extended to include the invocation of the responsibility of a State by an international organization. If it was deemed inconvenient to include an express provision to that effect in the present draft articles, then a compromise solution might be to include a reference to the issue at the end of draft article 62 by way of example. He suggested that the phrase “such as the invocation by an international organization of the international responsibility of a State” might fill that purpose.

45. In conclusion, he favoured referring to the Drafting Committee the articles comprising the chapter on general provisions as well as those for which specific proposals for improvement had been made by the Special Rapporteur in the light of the debate in the Commission and the drafting suggestions of members. Draft article 18 (Self-defence) should be referred to the Drafting Committee on that same basis.

46. Mr. McRAE said that he found the new draft articles proposed by the Special Rapporteur to be generally acceptable; with a few exceptions, he was in favour of referring them to the Drafting Committee. One of those exceptions concerned the addition of a new second paragraph to draft article 43, to which he was decidedly opposed. On that point, he agreed with Mr. Valencia-Ospina, although perhaps for slightly different reasons. Draft article 43 had been the subject of much controversy at the fifty-ninth session, relating not only to the choice between the two proposed alternatives, but also to the question of whether such a provision should be included at all.¹⁰⁶ Article 43 reflected one of the basic difficulties with the draft, which was that the Commission had started out with a notion of legal personality but had been unable to look beyond that notion when considering decisions made by organizations. In reality,

¹⁰³ *Ibid.*, p. 85, footnote 441; see also p. 91, para. (4) of the commentary to the draft article.

¹⁰⁴ *Official Records of the General Assembly, Sixty-second Session, Sixth Committee, 18th meeting (A/C.6/62/SR.18)*, paras. 53–54.

¹⁰⁵ See footnote 17 above.

¹⁰⁶ See *Yearbook ... 2007*, vol. I, 2935th meeting, p. 137, para. 1 and pp. 144–146, paras. 70–84; see also the 2932nd meeting, pp. 119–120, paras. 20–26; the 2933rd meeting, pp. 131–132, paras. 77–83; and the 2934th meeting, pp. 135–136, paras. 10–11 and 16–18. See also *ibid.*, vol. II (Part Two), p. 85, footnote 441, and the commentary to this draft article, pp. 91–92.

States were the decision-makers of international organizations, but they had made it clear that they rejected the idea that the international responsibility of an international organization devolved to its member States. Draft article 29 set out the limited circumstances in which a member State could be responsible for the wrongful act of an international organization, which were confined to the member State's acceptance of responsibility or to its leading the injured party to rely on its responsibility. The irony was that international legal personality was much more impenetrable than domestic legal personality; in the case of a corporation, for example, it was possible to attribute responsibility to those who had actually made the decisions in question. Moreover, the draft made no allowances for differences between international organizations: accordingly, all international organizations were protected, even those composed of only a small number of member States, who were the *de facto* collective decision-makers of the organization. While he could understand the difficulty and undesirability of devolving responsibility to the States members of large organizations, many of which might not have voted for—or might even have voted against—the action incurring responsibility, it was less justifiable in the case of smaller organizations whose actions were generally taken with the agreement of all member States. If it was solely up to him, he would make the members of some organizations responsible for the actions of their organization, but he could understand that the Commission, basing itself on the notion of international legal personality, was not prepared to make such distinctions.

47. In the light of that reality, draft article 43 represented an attempt to place a minimum obligation on States to take measures when the organization of which they were members committed an internationally wrongful act. From that perspective, draft article 43 was on the right track. He was surprised that it had not been rejected outright by States, and that aside from some queries about its interpretation, most States seemed to be in basic agreement with its inclusion. That being said, the addition of a second paragraph to draft article 43 was simply unnecessary: it reinforced the obvious fact that States sought to avoid responsibility when acting through an international organization. That had not been stated explicitly in draft article 29, and there was no reason why it should be stated indirectly in draft article 43. If it was still considered necessary to include that point somewhere, he felt that the only proper place for it was in the commentary.

48. If draft article 43 was retained as it currently stood, then practice could develop around that provision without the need for a second paragraph. Such a paragraph detracted somewhat from the obligations set out in paragraph 1, which stipulated that member States had at the very least had an obligation to provide the international organization with the means to fulfil its international responsibility. As Mr. Valencia-Ospina had pointed out, failure to do so could give the injured State some basis for invoking the responsibility of the member States.

49. He shared the view that draft article 55 should be aligned as far as possible with draft article 19, paragraph 2. However, at the risk of swimming against the tide, he would caution against going too far in limiting the resort to countermeasures by member States. While he could

agree that an international organization that had rules, mechanisms or means should be limited to using them, it did not seem to make sense to introduce, in the case of member States, what essentially amounted to a broad rule requiring the exhaustion of all possible remedies when a parallel rule had not been established regarding the resort to countermeasures by a State or international organization in a general sense. Moreover, member States could interact with international organizations in many different ways—in their capacity as host States, for example—and it seemed unreasonable to limit their rights simply on the basis of that status. Moreover, such a rule might end up having a broader effect than the Commission intended.

50. He supported the proposal made by Sir Michael Wood to add a paragraph or a new article after draft article 62 or near the beginning of the draft to indicate that the rules relating to responsibility should take into account the specificity of each international organization.

51. On a final point, he said that he had found the meeting with the United Nations Legal Counsel to be very helpful in allowing the Commission to learn first-hand her views on the draft articles. He would welcome a similar meeting with the legal counsels of other international organizations, particularly regional organizations outside the United Nations system, to learn more about how they would be affected by the draft articles.

52. Mr. PELLET, responding to points raised by previous speakers about the specificity of international organizations, said that there was no doubt that considerable differences existed between them, as could be seen from a comparison of the European Community, the United Nations, NATO and the International Bureau of Weights and Measures, for example. Yet while considerable differences also existed between States, as a comparison of China, Latvia and San Marino, for example, revealed, that had not precluded the formulation of common rules applicable to all States. Hence, even though at its core the law tended to level differences, the fact that common rules could nevertheless be developed and applied was equally true in the case of international organizations.

53. Apart from the issue of sovereignty, there was also a vast difference, as far as the Commission's work was concerned, between States and international organizations, and that difference had an unavoidable impact on the law of international responsibility as it applied to each. To borrow the wording employed by the ICJ in its 1949 advisory opinion on *Reparation for Injuries*, whereas States possessed the totality of international rights and duties recognized by international law, the rights and duties of international organizations were necessarily limited by the principle of speciality. Even though Sir Michael had been right to draw attention to that point, the Special Rapporteur's insistence on the rules of the organization would seem sufficient to address Sir Michael's concerns, thereby eliminating the need for the new article the latter had proposed.

54. He had relatively few comments about the amendments proposed by the Special Rapporteur in paragraphs 93 to 101 of his report. He welcomed the fact that

the majority of the States that had expressed an opinion had approved the principle contained in draft article 43, as it was one of the key provisions for fulfilling the objective of the draft articles, which was to provide reparation for damages caused by international organizations. Without wishing to dwell on that positive outcome—after all, the draft articles were only at the stage of first reading—he nonetheless saw no reason why draft article 43 should be rejected in second reading, in view of the positive reactions of States, which had surprised him as much as they had Mr. McRae. It was gratifying to have reached such a satisfactory conclusion to what had been a long and drawn-out controversy.

55. On the other hand, like most previous speakers, he was opposed to the addition of a second paragraph to draft article 43 or, in any event, to the categorical statement it contained: namely, that paragraph 1 did not imply that members acquired towards the injured State or international organization any obligation to make reparation. Surely it must be clear that paragraph 1 implied nothing of the sort. Nevertheless, it was not possible to completely rule out such an obligation in all circumstances; there could well be instances in which, by virtue of the rules of the organization or for other reasons, such an obligation might arise. Although he was opposed to it, he would prefer a “without prejudice” clause to the current wording if members insisted on including additional text at all costs.

56. He had no major problems with the last section of the report, not even with regard to countermeasures, despite attempts to demonize them, an effort that had the effect of continually reopening the debate on the subject. In his view, it would be better to regulate them than to ignore them: by regulating them, one could limit their abuse, whereas by ignoring them one gave them free rein. Given Ms. Escarameia’s desire to reopen the debate, however, he wished to respond with two comments. First of all, countermeasures, for lack of anything better, existed for the sole purpose of obliging an international organization that had failed to do so to respect the law of international responsibility. As such, they constituted a necessary mechanism and one that appeared consistent with the notion of an international community governed by the rule of law. That being so, if the draft articles were going to address both countermeasures taken by an international organization against a State and those taken by a State against an international organization, as well they should, and since that would be consistent with draft article 19, paragraph 2, it was probably necessary to draw a distinction between countermeasures taken against member States and those taken against non-member States. That coincided perfectly with the distinction that must necessarily be drawn between countermeasures and sanctions. Yet not all international organizations had the right to impose sanctions on their members, and when they did, such sanctions were often extremely limited. Accordingly, where the possibility of imposing sanctions existed, recourse to countermeasures should not be allowed, but where the constituent instrument or the rules of the organization made no provision for imposing sanctions, there did not appear to be any compelling reason to deny international organizations recourse to countermeasures.

57. His other main comment had to do with draft article 48, which he could not accept, despite the explanations provided by the Special Rapporteur in paragraph 103 of his report, which were not entirely lucid. It was still unclear to him why the draft should be silent on the issue of the functional protection of the officials of an international organization by that organization. If he understood it correctly, the reason was essentially the Special Rapporteur’s refusal, notwithstanding the welcome, though isolated, second paragraph of draft article 19, to address the implementation by an international organization of the responsibility of another entity. It had no doubt appeared illogical to the Special Rapporteur to include the claims of international organizations against responsible States in the current draft articles, even though it was precisely through such claims that functional protection was exercised. Although the inclusion of functional protection in the draft might not be in line with the Special Rapporteur’s reasoning, it nevertheless seemed necessary and logical in its own right. In response to requests from members for the draft to cover the possibility that an international organization could invoke the responsibility of a State, the Special Rapporteur had replied that in order for it to do so, the draft articles on responsibility of States would have to be amended. Quite frankly, that was not a realistic response, and the result would be a major gap in the law of international responsibility. Since functional responsibility was linked to the activity of the international organization, it would be infinitely more coherent to include functional protection in the draft on the responsibility of international organizations rather than in the articles on responsibility of States.

58. Turning to the section on general provisions, which appeared to be the standard ones, he said that he had no particular quarrel with them, except to say what had been said many times before, which was that it was highly regrettable that the draft articles did not address problems relating to the responsibility of States *vis-à-vis* international organizations. While he did not expect his insistence on that point to lead to an amendment of draft article 62, the scope of that article nevertheless depended on the content of the draft itself. He therefore wished to reiterate the need to amend, or at least to supplement, the draft articles along those lines.

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

[Agenda item 1]

59. Mr. VÁZQUEZ-BERMÚDEZ (Chairperson of the Drafting Committee) announced that the Drafting Committee on the topic “Responsibility of international organizations” would be composed of Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Hmoud, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Perera, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue and Ms. Jacobsson (Rapporteur), *ex officio*.

The meeting rose at 11.40 a.m.

* Resumed from the 3000th meeting.