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Summary record of the 3009th meeting

Topic:
Responsibility of international organizations

Extract from the Yearbook of the International Law Commission:-
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competence in order for it to incur responsibility. But the new wording ("purports to") did not obviate the need to assess intent. The injured entity would still have to prove bad faith on the part of the State, just as it would have to prove the other elements of the breach. At all events, the burden of proof should not be shifted to the respondent State by the inclusion of a reference to "what may be reasonably assumed from the circumstances".

21. With regard to the proposal to add a second paragraph to draft article 43, he drew attention to the fact that that draft article had been the fruit of intensive negotiations within the Commission, which had finally adopted the principle that members should cooperate in fulfilling an organization's obligations to an injured party. It had, however, been understood that draft article 43 would not in any way entail a member's direct responsibility towards the injured party. The current version of draft article 43 did not convey the idea that a member was directly responsible for reparation or that the injured party could not rely on the organization's rules regulating legal relations within the organization and between the latter and its members. But if the Commission thought that the second paragraph made for greater clarity, it should be adopted; otherwise, the commentary would suffice.

22. He had already voiced his support for the inclusion of a countermeasures regime in the draft articles, not only because there was no reason to differentiate between States and international organizations with regard to the relevance of such a regime, but also because it would make it possible to regulate and limit the application of countermeasures to international organizations. Furthermore, the General Assembly was generally in favour of including such a regime in the draft articles. In paragraph 117 of his report, the Special Rapporteur said that the Commission might wish to reconsider the question of countermeasures in relations between an international organization and its members. That suggestion was based on comments that draft article 55 did not sufficiently limit the application of countermeasures between members and an organization. Nevertheless, the question had to be asked whether there were any other legal or policy reasons, apart from the scope of the rules of an organization, its nature and its ability to perform its functions, that would warrant extending the limitations that were already applicable under the general conditions governing the use of countermeasures.

23. As far as *lex specialis* was concerned, it was important to include a draft article stating that special rules on responsibility took precedence over the draft articles, which were general in nature. There were matters that the Special Rapporteur and the Commission had consistently stressed were hard to regulate owing to a lack of practice or theory in the matter. In view of the diverse nature and structure of international organizations, it was imperative to include in the draft articles a provision stating that *lex specialis* prevailed. Moreover, there were other matters that were not dealt with either by special rules or by the current draft articles. Hence the importance of draft article 62, which stated that they were regulated by the applicable rules of international law. Nor did the draft articles seem to deal with some other matters that were not regulated by either *lex specialis* or the other rules of international law. Although the system established in the draft articles should not be disturbed by making their application dependent upon the nature of the organization, if developments in the future warranted the formulation of specific rules applicable to a particular kind of organization, the Commission could tackle the issue when it considered the draft articles on second reading. In conclusion, he recommended that draft articles 19 and 61 to 64 be referred to the Drafting Committee.

The meeting rose at 10.50 a.m.

3009th MEETING

Friday, 22 May 2009, at 10 a.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Nolte, Mr. Perera, Mr. Saboia, Mr. Singh, 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 (*concluded*)

1. Mr. DUGARD said that he disagreed with the suggestion put forward in paragraph 97 of the seventh report on responsibility of international organizations (A/CN.4/610) that another paragraph might be added to draft article 43 in order to specify that States were not obliged to make reparation for wrongful acts of an international organization. In fact, it would be best to leave that question open.

2. Commenting on draft article 48, on admissibility of claims, he recalled that when the Commission had considered paragraph 1 of that article,[113] he had pointed out that when a State or an international organization brought a claim relating to an obligation owed to the international community as a whole, the situation addressed by draft article 52, it was obviously unnecessary to establish nationality of the claim. The omission of a clause to that effect had been an oversight in the draft articles on responsibility of States for internationally wrongful acts,[114] and the Commission had decided not to rectify it. He was surprised that States had not noticed that lacuna in either the draft articles on State responsibility or the draft articles currently under consideration, and he supposed that it was too late to remedy it.

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[113] *Ibid.*, vol. I, 2962nd meeting, para. 26.

[114] See footnote 10 above.

3. The question of functional protection referred to in paragraph 103 had been considered by the Commission in the context of diplomatic protection.[115] When the Commission had elaborated its text on that topic, he had prepared a draft article on functional protection,[116] which the Commission had decided to omit. At the time, it had been suggested that the best place for such a provision would be in the draft articles on responsibility of international organizations. However, he shared the Special Rapporteur's misgivings as to whether such a provision did belong in the current draft and therefore thought that it might be advisable for the Commission to embark upon a separate study of the question.

4. Draft article 52 as proposed by the Special Rapporteur, should be retained. It would be unwise to limit that article along the lines suggested by Belarus and Argentina,[117] since it was a very important provision that bolstered article 48 of the draft articles on responsibility of states and clearly represented an exercise in progressive development. It was, however, interesting that draft article 52 seemed to be gaining support among international tribunals and States. Moreover, the fact that States had not objected to that draft article indicated that it was becoming an accepted part of international law.

5. Although some States had doubts about including provisions on countermeasures, he was pleased that the Commission was not going to repeat the debate it had held on that subject during its consideration of the draft articles on State responsibility,[118] during which many members had sought to exclude the subject of countermeasures solely on the grounds that they were an unfortunate feature of international law to which no allusion should be made. The Commission should, however, mention the unmentionable, and he therefore urged the Special Rapporteur to retain the provisions on countermeasures. He agreed with the Special Rapporteur that there was no need to draw a distinction between countermeasures and sanctions.

6. Turning to the new provisions proposed by the Special Rapporteur, he said that draft article 61, dealing with *lex specialis*, was essential, although he wondered whether the last phrase was necessary. It would be wiser to end the sentence after the phrase "are governed by special rules of international law", since the phrase "such as the rules of the organization that are applicable to the relations between an international organization and its members" might be construed as exempting a State from the rules contained in the draft articles.

7. He had no objection to draft article 62. As for draft article 63, on individual responsibility, while the commentary thereto should make it plain that the responsibility in question was individual criminal responsibility, he was unsure whether that should be spelled out in the text of the draft article itself.

8. Draft article 64 was a standard clause. Such a provision was necessary and self-explanatory in any set of draft articles relating to States, but in the case of international organizations it posed greater problems because Article 103 of the Charter of the United Nations, which dealt with conflicts between obligations under the Charter of the United Nations and those under treaties, clearly applied solely to States and not to international organizations. The Commission must face the fact that the relationship between international organizations and the Charter of the United Nations was an unexplored area. For decades, it had been a moot point whether the provisions of the North Atlantic Treaty on collective self-defence were consonant with Article 51 of the Charter of the United Nations, and a debate was currently under way on whether the provisions of the Constitutive Act of the African Union that allowed humanitarian intervention were compatible with Article 2, paragraph 4, of the Charter of the United Nations. Of course, the provisions which he had just mentioned were primary rules, whereas the draft articles were concerned with secondary rules, but it was by no means certain that international organizations were subject to the prescripts of the Charter of the United Nations in respect of either primary or secondary rules. While he was not suggesting that draft article 64 should attempt to address that issue, the Special Rapporteur should consider it in the commentary and thus demonstrate that the Commission was aware of the dilemmas it posed.

9. Mr. FOMBA, commenting on the last three chapters of the report (paras. 93–134), said that the addition of a second paragraph to draft article 43 would shed light on whether a member State or member international organization might have a subsidiary obligation to provide reparation. He endorsed the opinion of the Special Rapporteur on the placement of that draft article.

10. The Special Rapporteur was right to contend that the concern that had been raised regarding the need to take into account an international organization's ability to act under its mandate was adequately addressed in the commentary to draft article 45.

11. Two arguments relating to functional protection were put forward in the section of the report dealing with implementation of international responsibility (paras. 102–119). First, it was maintained that a claim made in the context of diplomatic protection had a different basis than that of a claim made in the context of functional protection. That position echoed the advisory opinion of the ICJ on *Reparation for Injuries*. Secondly, it was argued that it would be difficult to establish a general rule that would be applicable to all international organizations. Although that line of argument had merit from a legal and practical standpoint, the Commission still had to deal with functional protection. How that should be done was a matter for discussion.

12. For an international organization, functional protection involved bringing a claim against a State or another international organization that was responsible for an

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[115] *Yearbook … 2006*, vol. II (Part Two), p. 26, para. (3) of the general commentary to the draft articles.

[116] *Yearbook … 2004*, vol. II (Part One), document A/CN.4/538, paras. 14–18.

[117] *Official Records of the General Assembly, Sixty-third Session, Sixth Committee, 19th meeting* (A/C.6/63/SR.19), paras. 60 and 78, respectively.

[118] See *Yearbook ... 1992*, vol. II (Part Two), pp. 19–41, paras. 121–276. See also *Yearbook ... 1993*, vol. II (Part Two), p. 38, paras. 227–229, and *Yearbook ... 1999*, vol. II (Part Two), chap. V, pp. 87–88, paras. 438–449.

internationally wrongful act against one of its agents. It was termed "functional" because it rested on the functional link between the international organization and the agent. In the 1949 advisory opinion of the ICJ on *Reparation for Injuries*, the Court had found that "it becomes clear that the capacity of the Organization to exercise a measure of functional protection of its agents arises by necessary intendment out of the Charter" [p. 184 of the opinion]. In cases in which functional protection might conflict with diplomatic protection, the Court had stated that "there is no rule of law which assigns priority to the one or to the other" [p. 185 of the opinion]—i.e., to the diplomatic protection that was the prerogative of a State or to the functional protection that could be exercised by an international organization. That consideration should be taken into account during the debate and in any solution proposed.

13. Turning to the requirement that local remedies must be exhausted, he tended to agree with the view expressed by the representative of France in the Sixth Committee[119] that the term "local remedies" needed to be clearly defined, especially as the commentary to draft article 48 did not appear to be entirely satisfactory. He also concurred with the Special Rapporteur that it was difficult to state a general rule regarding a time limit after which a claim could be treated as having lapsed.

14. In absolute terms, it might be tempting to say that all international organizations had the right to invoke responsibility in the event of a breach of an international obligation owed to the international community as a whole, but if one argued that the speciality rule applied, it would be logical to adhere to the Commission's position. However, he agreed with the Special Rapporteur that limiting that right to international organizations that had a "universal vocation" failed to take account of all possible scenarios.

15. On the question of countermeasures, he agreed that it was not so much a matter of deciding whether it was necessary to deal with them as it was of how to do so. He thus approved of the approach which entailed placing substantive and procedural restrictions on them. Draft article 54, paragraph 4, seemed to offer a useful way of preventing countermeasures from paralysing the functioning of international organizations. Generally speaking, the risk of such paralysis should not constitute an argument for categorically rejecting countermeasures.

16. As to the question of relations between an international organization and its members and, more specifically, of determining whether an injured member of a responsible organization could take countermeasures against that organization, he believed a residual rule must be established to fill any possible gaps in the rules of international organizations, since it was essential to establish the principle of the *modus operandi* of countermeasures and to specify the limitations to it. In his view, the restrictions on the obligations that might be breached when taking countermeasures had been correctly interpreted. In the light of the Special Rapporteur's explanations and arguments then, there was certainly no need to propose any amendments to draft articles 46 to 60.

17. Moving on to the section of the report dealing with general provisions, he said he found the proposal to restructure the draft articles acceptable. It was clear that the large body of *lex specialis* already in existence was due to the legal and structural diversity of international organizations and to their varied functions.

18. Deciding whether, generally speaking, the conduct of a State or international organization in implementing a decision of another international organization of which it was a member was attributable to the latter organization was a sensitive and complex matter that required thorough consideration. However, both the letter and the spirit of draft article 61, on *lex specialis*, were acceptable. He also agreed with the reasoning underpinning draft article 62 and its current wording, and he concurred with the reasons given in paragraphs 128 and 129 for draft article 63 as it stood.

19. Turning to draft article 64, he said that the impact of the Charter of the United Nations on issues of responsibility was an important question owing to both the role played by the Organization and the position of the Charter of the United Nations in general international law. The impact of the Charter of the United Nations flowed directly from the Charter itself and from law derived from that text. He endorsed the Special Rapporteur's interpretation of the scope of Article 103 of the Charter of the United Nations, illustrated by a convincing example in paragraph 132. Like the Special Rapporteur, he thought it unwise to attempt to define the extent to which international responsibility of an international organization might be affected, directly or indirectly, by the Charter of the United Nations.

20. In conclusion, he was in favour of including the four new provisions proposed by the Special Rapporteur in the draft articles and sending them to the Drafting Committee.

21. Mr. HASSOUNA said that, having already spoken on the first several sections of the Special Rapporteur's report at an earlier meeting, he would confine his comments to paragraphs 93 to 134.

22. The rule incorporated in draft article 43, which required the members of an international organization to provide it with the means for fulfilling its obligations, had been a source of deep controversy at the previous session. While he supported the wording that was eventually agreed upon, he was sceptical as to the appropriateness of adding a second paragraph to that article, since the terms of the draft article and the scope of member States' responsibility under those terms were perfectly clear. However, if clarification was needed, it could be provided in the commentary to the draft article.

23. He shared the view of Ms. Escarameia that draft article 46 and other relevant articles should establish the right of individuals or groups of individuals to invoke the responsibility of international organizations. Although draft article 48 contemplated situations in which a State might act on behalf of its nationals where their rights had been violated by an international organization, it should be noted that States had wide discretion when exercising diplomatic protection and were under no obligation to

[119] *Official Records of the General Assembly, Sixty-third Session, Sixth Committee, 20th meeting* (A/C.6/63/SR.20), para. 39.

provide an individual with reparation once they had exercised such protection. Allowing individuals to invoke the responsibility of an international organization would confer a more autonomous role on the individual, in keeping with current trends in international law.

24. Moreover, international practice had demonstrated that individuals had *locus standi* at the international level to obtain redress for their rights. For example, individuals and groups of individuals had used the World Bank's Inspection Panel to hold the Bank accountable when their human rights had been violated as a result of its projects and policies.[120] In many cases, the World Bank had paid financial compensation to the injured parties. The inclusion of articles on the responsibility of international organizations *vis-à-vis* individuals would enhance the relevance of the Commission's work, given the criticism of the activities of some international organizations as having had a detrimental impact on the human rights and lives of communities in developing countries.

25. As far as draft article 48 was concerned, he agreed that functional protection should be granted to the officials of international organizations, in view of the difficult situations they often encountered in practice, which had been described by Mr. Melescanu.

26. The importance of draft article 52 had been underscored in Governments' comments and by the support it had received from States Members of the United Nations. The article raised the question of whether an international organization comprising a small number of States could invoke responsibility in the event of a breach of an international obligation owed to the international community as a whole. He tended to agree with the Special Rapporteur that the Commission should not *a priori* exclude that eventuality. The articles should be as comprehensive as possible and envisage all conceivable situations, however remote, that might give rise to the responsibility of international organizations. The Commission should try to cover the entire normative dimension of the responsibility of international organizations, since what was at stake was ensuring their accountability through the effective implementation of international law.

27. Despite the divergence of views on the draft articles on countermeasures, expressed in the Commission and in the Sixth Committee, those articles should be included and accompanied with clear substantive and procedural rules, since he concurred with Mr. Pellet that it would be better to regulate them than to demonize them (3007th meeting above, para. 56). For that reason, he supported draft articles 54 to 60 as proposed because they attempted to clarify the scope of countermeasures and the conditions warranting their use and termination, and they made it plain that countermeasures must comply with the proportionality principle. It was to be hoped that the commentary to those articles would provide examples from international practice and explain how countermeasures differed from other coercive measures such as sanctions, retortion or reprisals.

28. While he acknowledged that in principle an injured State could not take countermeasures against an organization of which it was a member, he wondered if such action might be possible if the international organization had violated *erga omnes* or *jus cogens* rules.

29. In draft article 61 (*Lex specialis*), the Commission must take into account the very diverse nature, composition and functions of international organizations because their diversity had wider legal implications than did that of States. He therefore supported Sir Michael Wood's suggestion that a new draft article should be added to the general provisions, or that the subject should be addressed in the introductory commentary.

30. The distinction drawn in draft article 63 between the responsibility of an international organization and the personal responsibility of an official of that organization under international criminal law would ensure the draft articles' consistency with the other norms of international law. Like Mr. Dugard, he believed that draft article 64 required some clarification in the commentary to explain the extent to which the responsibility of international organizations under the Charter of the United Nations differed from that of States.

31. Lastly, he was in favour of sending all the draft articles on which he had commented to the Drafting Committee.

32. Mr. MURASE expressed his sincere appreciation to all the members of the Commission for his election and thanked them for their kind words of welcome. Judge Roberto Ago had once said that a freshman member of the Commission should just listen to the debate and not speak during the first year. Going against that prescription, he wished to make a few comments on responsibility of international organizations and, first of all, to congratulate the Special Rapporteur for his splendid and untiring work in elaborating draft articles on the topic.

33. He had long wondered whether the Commission could reconsider the scope of the draft articles with a view to including the question of the responsibility of international organizations *vis-à-vis* third parties, meaning banks, corporations and private companies, depending on their particular contractual relations. He was well aware that, in his first report,[121] the Special Rapporteur had indicated that questions of civil liability should remain outside the scope of the draft articles because the Commission had been given a mandate to deal with internationally wrongful acts. While it was not his intention to reopen the issue, he did think that debates on the question of the third-party responsibility of international organizations would shed light on the Commission's current work on the plurality of responsibility and the effective performance of the obligation to make reparation. He also hoped that at some time in the future, third-party liability could be considered by the Commission as an exercise in the progressive development of international law.

[120] See World Bank, *The Inspection Panel: we can help make your voice be heard*; see also The Inspection Panel, *Accountability at the World Bank: the Inspection Panel at 15 Years*, Washington, D.C., 2009 (available from: www.inspectionpanel.org).

[121] *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/532, paras. 29–31.

34. From a practical point of view, it was far less likely for international organizations than for States to commit wrongful acts intentionally or knowingly. The most likely case in which an international organization could be held responsible was when it was faced with dissolution or bankruptcy, leaving large debts owed to third parties. In such a situation, the crux of the matter was who bore responsibility—the international organization itself or its member States. Discussions on third-party responsibility would provide the Commission with important lessons for the formulation of certain parts of the draft under consideration, in particular draft articles 51 and 43.

35. There were numerous precedents in the area of third-party responsibility, such as the case involving the Arab Organization for Industrialization of 1975 (*Westland Helicopters Ltd.*), and the famous case of the International Tin Council in the early 1980s. A more recent example involved the Korean Peninsula Energy Development Organization (KEDO), an international organization composed of 12 countries and the European Union, with 19 other contributing non-member States. In May 2006, the KEDO Executive Board had decided, for reasons that were well known, to terminate its planned installation of nuclear power plants in the Democratic People's Republic of Korea.[122] KEDO was seeking reparation from that country for the damage caused by its alleged non-fulfilment of obligations under the relevant supply agreement, and the negotiations between the two parties would certainly continue. What was relevant to the Commission's work was the responsibility of KEDO toward the third parties that had been involved in the project, notably an electric power corporation that had been designing and developing the basic plan for the project. After KEDO had decided to terminate its contract with that corporation in December 2006, it had owed a substantial amount of debt to the export/import banks that had supplied funds for the project. The question was who was going to pay those debts.

36. Such a situation was conceivable for any international organization involved in commercial, financial or economic activities. In most cases, however, the constituent instruments of international organizations did not have provisions that could be applied in such situations to determine the allocation of third-party responsibility between the international organization and its member States, or among the member States. Nevertheless, international organizations wishing to participate in economic activities as responsible actors in the world market had to be equipped with proper legal safeguards against such unexpected events as gross deficit, bankruptcy or dissolution of the organization. To his knowledge, the only organization that was equipped with such a provision, was the European Space Agency. Article XXV, paragraph 3, of the Convention for the establishment of a European Space Agency provided that "[i]n the event of a deficit, this shall be met by the ... [member] States in proportion to their contributions as assessed for the financial year then current". Given the absence of such provisions in most of the constituent treaties of international organizations, the Commission could do much to help avoid or solve actual or potential disputes in that area by providing adequate guidelines.

[122] See the KEDO website (www.kedo.org).

37. In academic circles, much had been written on the subject of the responsibility of international organizations *vis-à-vis* third parties, including works by Moshe Hirsch,[123] Rosalyn Higgins,[124] C. F. Amerasinghe,[125] Ignaz Seidl-Hohenveldern[126] and himself. The writers had divided the various regimes, existing or proposed, into several types. First was a regime establishing the direct and primary responsibility of member States, in which the international organization in question tended to be characterized as an unincorporated body to which the principle of "lifting the corporate veil" was applied. Other categories included indirect responsibility, concurrent responsibility, secondary responsibility and limited responsibility of member States, all of which implied that member States shared responsibility with the international organization in one way or another. Lastly, several international organizations, including KEDO, had provisions stating that there was no responsibility on the part of member States.

38. In light of the foregoing, he would submit that the commentaries to draft article 51 (Plurality of responsible States or international organizations) and draft article 43 (Ensuring the effective performance of the obligation of reparation) should try to provide clear and detailed guidelines regarding the allocation of responsibility. The Special Rapporteur rightly stated in paragraph 107 of his report that whether responsibility was subsidiary or concurrent depended on the pertinent rules of international law. He suggested that the manner in which the "pertinent rules" might operate should be elaborated in more detail in the commentary, as had been done with the regimes described in the precedents and the works he had just mentioned. There was a danger that, without such guidelines, the articles would end up creating problems rather than helping to solve them.

39. Draft article 18, on self-defence, was most likely to address situations in which peacekeeping operation units came under military attack. Unfortunately, the use of terms in the documents emanating from the Department of Peacekeeping Operations was sometimes misleading. For instance, the General Guidelines for Peacekeeping Operations[127] issued in October 1995 stated that the "use of force" was permitted in two situations: first, in the case of "self-defence", and second, when it was required for the performance of the authorized official missions of peacekeeping. In the context of peacekeeping, however, "self-defence" actually meant the self-protection of peacekeeping personnel and units, which had nothing to do with the right of self-defence accorded to States

[123] *The Responsibility of International Organizations Towards Third Parties: Some Basic Principles*, Dordrecht, Martinus Nijhoff, 1995.

[124] "The legal consequences for member States of the non-fulfilment by international organizations of their obligations towards third parties", preliminary exposé, *Institute of International Law, Yearbook*, vol. 66 (1996), Session of Lisbon (1995), Part I, pp. 249–259.

[125] "Liability to third parties of member States of international organizations: practice, principle and judicial precedent", *American Journal of International Law*, vol. 85, No. 2 (April 1991), pp. 259–280.

[126] "Liability of member States for acts or omissions of an international organization", in *Liber Amicorum Ibrahim F.I. Shihata: International Finance and Development Law*, S. Schlemmer-Schulte and Ko-Yung Tung (eds.), 2001; *Corporations in and under International Law*, Cambridge, Grotius, 1987.

[127] United Nations, General Guidelines for Peacekeeping Operations, New York, 1995.

under international law or Article 51 of the Charter of the United Nations. Nor was the term "use of force" appropriate, since Article 2, paragraph 4, of the Charter prohibited the use of force by States. The use of military means by United Nations peacekeeping units should be characterized as "use of weapons" rather than "use of force". In the second situation, the military activities performed by official peacekeeping units were comparable to the use of weapons by police officers in the performance of their official duties in the domestic context.

40. The Commission should not introduce inaccuracies or confusion through its use of legal terms in its draft articles, and from that perspective, he was in favour of deleting draft article 18 altogether. If it was necessary to retain it, however, he proposed that the words "a lawful measure of self-defence" should be replaced by the phrase "a lawful measure of self-protection or for the performance of its authorized mission".

41. Mr. VASCIANNIE said that the main argument for adding the new paragraph proposed for draft article 43 was that it clarified the article and defined its limits. Paragraph 1 said that the members of an organization were required to take appropriate measures to ensure that the organization met its obligations, while the new paragraph said that the State itself was not liable for reparation in respect of those obligations. As the commentary to draft article 43 noted, that approach was built on the idea that the legal personality of the organization was separate from that of its members; the liability of the collective did not imply liability on the part of the individual components of the collective. While that approach was plausible and perhaps reflected the majority view within the Commission, paragraph 2 appeared to negate paragraph 1.

42. If an international organization committed a wrongful act giving rise to the obligation to make reparation, yet claimed that it could not afford to do so, then, following the reasoning outlined by Judge Sir Gerald Fitzmaurice in his separate opinion relating to the advisory opinion of the ICJ on *Certain Expenses of the United Nations*, the members still had to do something to meet the organization's obligation, namely, provide funds [pp. 207–208 of the opinion]. However, the new paragraph 2 exempted the members from their responsibility if they were unable to come up with the funds. Thus, taken as a whole, article 43 now indicated that the members of an organization had an obligation to find the money to make reparation but that they could not be sued by the injured State over that obligation. That was not a satisfactory formulation; the Commission should say either that member States were obliged to provide funds in such a situation or that they were not. His preference would be not to include the proposed new paragraph. As to the placement of article 43, he thought the Special Rapporteur was correct and that it should remain in the chapter on reparation for injury.

43. Turning to the provisions on the invocation of responsibility, he said that when draft article 46 was applied in practice, issues might arise over whether the breach of an obligation "specially affected" a State or organization (subpara. (*b*) (i)) and was "of such a character as radically to change" the position of other States or organizations (subpara. (*b*) (ii)). As an example of the former phrase, the commentary to draft article 46 referred to pollution of the high seas that particularly affected coastal States, but he thought that obligation was to the coastal State individually and was thus covered by draft article 46 (*a*). In explaining the latter phrase, the commentary referred to a party to a disarmament treaty or any other treaty where each party's performance was effectively conditioned upon and required the performance of each of the others. Many, if not most, treaties effectively made performance by one side conditional on performance by others, however, so the category of obligations under draft article 46 (*b*) (ii) might be very broad. Including other examples in the commentary might sharpen the understanding of the two types of obligation contemplated in draft article 46 (*b*).

44. Draft article 47, paragraph 2, was now well settled in the draft and was accepted by States and organizations. It said very little, however, except that States or international organizations "may", but were not required to, specify the form reparations should take. Presumably they might also choose not to specify the form of reparations and, in addition, they might choose to specify other things, since the text did not appear to be exhaustive. The uncertainty as to what was ruled in and ruled out by paragraph 2 should be clarified, perhaps in the commentary.

45. Some Commission members had launched a significant challenge to the inclusion in the draft articles of provisions on countermeasures against international organizations. That challenge had been met with the counterargument that there was no evidence in practice that countermeasures could not be applied in certain circumstances by States or international organizations *vis-à-vis* an international organization that engaged in a wrongful act. The reactions of States and international organizations to draft articles 54 to 60 tended to bear out that counterargument. So, too, did the approach taken in the arbitral award in the case concerning the *Air Service Agreement of 27 March 1946 between the United States of America and France*, even though it had been about relations between States and was therefore not precisely relevant to relations between States and international organizations. The arbitral tribunal had observed that negotiations towards judicial settlement did not bar the application of countermeasures and that, under international law as it then stood, States had not renounced their right to take countermeasures in such situations, regrettable though that might be. Thus the tribunal had considered that States had to do something in order to demonstrate that they had renounced their right to take countermeasures against other States. He questioned whether they had done anything. Similarly, even though the Committee on Economic, Social and Cultural Rights, in its General Comment No. 8, on the relationship between economic sanctions and respect for economic, social and cultural rights,[128] adopted a restrictive attitude to the implementation of sanctions and, by extension, countermeasures, it did not proceed on the assumption that international organizations could not take countermeasures or that countermeasures could not be taken against international organizations.

[128] *Committee on Economic, Social and Cultural Rights, Report on the sixteenth and seventeenth session, Official Records of the Economic and Social Council, Supplement No. 2* (E/1998/22-E/C.12/1997/10), annex V, p. 119.

46. Mr. Pellet had raised a policy argument in defence of keeping countermeasures in the draft, namely, that it might be better to have them there and to regulate them than to leave them to the vagaries of general law. In fact, draft articles 54 to 60 set out at least 15 limitations or preconditions for the taking of countermeasures, something that might help to restrict the possibility of their abuse.

47. As to whether an injured member of an organization could take countermeasures against the organization, while on rare occasions there might be a relevant rule of the organization that would apply as *lex specialis*, in other cases, a provision like draft article 52 might be helpful. He agreed that the phrase "reasonable means" for ensuring compliance was perhaps not sufficient, and he preferred the terms "effective means", which provided greater assurances to the injured member of an organization. The Drafting Committee might also wish to consider the idea of "necessary means", a phrase used by the arbitrators in *Air Service Agreement of 27 March 1946 between the United States of America and France*.

48. He wondered whether in draft article 53, paragraph 1 (*a*), it might not be better to refer to the obligation to refrain from the threat or use of force, not "as embodied in the Charter of the United Nations", but "in international law", given that Article 2, paragraph 4, of the Charter of the United Nations referred to States and not to international organizations.

49. The general provisions contained in draft articles 61 to 64 were acceptable, although the Drafting Committee might need to examine the wording of draft article 61. In general, there was a strong argument for not departing from the terms in the draft articles on responsibility of States. In particular, he did not believe that the idea of individual responsibility should be included in draft article 63, for that might give rise to problems in other parts of the draft and weaken the overall acceptability of the final product to States: the "without prejudice" clause was sufficient.

50. He was in favour of referring all the new draft articles, with the exception of draft article 43, paragraph 2, to the Drafting Committee.

51. Mr. SINGH thanked the Special Rapporteur for his comprehensive report which, in addition to putting forward some new articles, proposed amendments to some of the draft articles already provisionally adopted and introduced some further clarifications in the commentary. He concurred with the Special Rapporteur's view that the suggestion of some States that Part Three of the draft articles should also cover the invocation by an international organization of the international responsibility of a State lay beyond the scope of the topic as set out in article 1.

52. He agreed that article 4, paragraph 4, which defined the term "rules of the organization", should be moved to article 2 as a new paragraph, and he supported the other drafting proposals made in paragraph 21 of the report. The term "agent" was defined in article 4, paragraph 2, with reference to paragraph 1 of that article, but the term was also used in other articles; accordingly, article 4, paragraph 2, should also be moved to article 2 so that it did not apply solely to article 4, paragraph 1. The Special Rapporteur had proposed that article 4, paragraph 2, should be rephrased in the light of the concerns expressed by the ILO and UNESCO that the definition of "agent" was too wide. However, he thought that the text was quite clear and favoured retaining it in its present form (para. 23 of the report).

53. He agreed with the Special Rapporteur's recommendation that article 18 on self-defence should be deleted in the light of critical comments by States stressing that self-defence was applicable only to the actions of a State.

54. With regard to draft article 19, he noted that the Commission's members held differing views on whether an international organization could take or be subjected to countermeasures. Since international organizations were established by States, they could only have such competence and powers as were provided for under their constitutive instruments, and therefore the rules of the organization should be decisive in determining whether an organization could resort to countermeasures or be the target of countermeasures by its members. Considering the uncertainty over the legal regime for countermeasures and the risk of abuse that they entailed, the concerns expressed by the Commission, the Sixth Committee and some international organizations, and the exceptional nature of countermeasures, the circumstances in which an international organization could resort to them should be strictly limited. He therefore supported the proposal to delete the word "reasonable" in draft article 19, paragraph 2. He had some difficulty with the use of the term "lawful countermeasures" in paragraph 1 of that article; it seemed to indicate that there existed rules on the basis of which the lawfulness of the measure was to be judged. Further clarification was needed.

55. Draft article 43 required the members of a responsible international organization to take appropriate measures to provide the organization with the means for effectively fulfilling its obligations. The Special Rapporteur proposed the addition of a new paragraph to address the view that the article should not be understood as implying that member States or international organizations had a subsidiary obligation to provide reparation. While the Special Rapporteur's proposal provided a useful clarification, draft article 43 was still an obligation of member States, and not one of the responsible international organization.

56. He agreed that the inclusion of draft article 61 (*Lex specialis*) would make it unnecessary to repeat the proviso in different draft articles, and he endorsed the suggestion made during the debate to refer in the commentary to the specific articles for which that proviso was relevant. Paragraph 121 of the report noted that the "great variety of international organizations" made it essential to acknowledge the existence of special rules on international responsibility that applied to certain categories of international organizations or to one specific international organization. As some members had stressed during the debate, that idea should be reflected in the text of the draft article.

57. In closing, he said that draft articles 61 to 64, as well as all other draft articles on which the Special Rapporteur had made proposals for review or amendment, should be referred to the Drafting Committee.

58. Mr. VÁZQUEZ-BERMÚDEZ said that draft article 43 placed proper emphasis on making effective the right of the injured entity to receive full reparation for the injury caused. The Special Rapporteur had proposed the insertion of a new second paragraph to make it clear that the right did not imply that members were under an obligation to repair the injury suffered by that entity. However, he did not think it was necessary to include such a text in draft article 43 because the original wording did not suggest the contrary. Similarly, draft article 34 clearly established that the responsible international organization must repair in full the injury caused by its wrongful act—after all, it was a general principle that the responsible party was under an obligation to make reparation for the injury suffered.

59. Former chapter X, which would become the new chapter VII, referred to cases in which the members of an international organization incurred responsibility—including subsidiary responsibility, as in the case covered by draft article 29—in connection with the wrongful act of an international organization, and therefore had an obligation to make reparation. The idea contained in the Special Rapporteur's proposed paragraph 2 should be incorporated and expanded in the commentary to draft article 43.

60. He had supported the inclusion of a chapter on countermeasures, which, to prevent abuse, must be limited, strictly regulated and allowed only as an exception. Indeed, in relations between international organizations and their members, they should be even more exceptional, given that the principle of cooperation should prevail. He agreed with the Special Rapporteur, who, noting that some States had maintained that, as a general rule, countermeasures had no place in the relations between an international organization and its members, had suggested that the Commission might wish to reconsider the wording of draft article 55 to make it reflect more adequately the importance of the rules of the organization with respect to countermeasures and, again bearing in mind the principle of cooperation between members and the organization, to ensure that countermeasures were subject to even stricter limitations. That could be done during the current session or during the Commission's second reading of the draft articles.

61. On the whole, he agreed with the comments made by the Special Rapporteur on the other issues discussed in the second part of the seventh report, and he endorsed the sending of draft articles 61 to 64 to the Drafting Committee.

62. Mr. SABOIA agreed with Ms. Escarameia and Mr. Hassouna that the invocation of responsibility by individuals should be considered. The example cited by Mr. Hassouna in which the World Bank had agreed to pay compensation to injured parties showed that individuals could be injured by actions of international organizations and that they must be entitled to invoke responsibility for an organization's wrongful acts. He also shared the view that it was important to state clearly, either in the draft articles themselves or in the commentary, that international organizations were entitled to exercise functional protection of their officials in the course of missions, since their protection was important for the discharge of the duties of the international organization.

63. With regard to the issue, raised by the Special Rapporteur in paragraph 132 of his report, of whether and to what extent international organizations were bound by Article 103 and other provisions of the Charter of the United Nations, he was somewhat concerned at the statement by Mr. Dugard. At first glance, he found it difficult to accept that the terms of Article 103 should not be extended to include international organizations: as international organizations were understood as being composed mostly of States, he failed to see the logic of keeping them outside the scope of that important provision of the Charter of the United Nations. Moreover, Chapter VIII of the Charter of the United Nations specified that regional arrangements and their activities must be consistent with the purposes and principles of the United Nations. In paragraph 132 of his report, the Special Rapporteur noted that the impact of the Charter of the United Nations was not limited to obligations of members of the United Nations and that the Charter might well affect obligations—and hence the responsibility—of an international organization. The Special Rapporteur had concluded that it was not necessary to discuss the issue, but in his own opinion, that was an important point that should be addressed in the commentary, because it would be very harmful for the development and strengthening of the rule of law at the international level to suggest that international organizations were less subject to an important source of law, namely the Charter of the United Nations, than States. The danger of such an assumption was that it would encourage States to use international organizations to circumvent important rules of international law.

64. Mr. GAJA (Special Rapporteur) said that, in summing up the debate on the topic, he wished to focus on the comments concerning the draft articles for which he had made proposals for amendments. Some important questions which had been raised could be discussed again during the second reading.

65. Two lacunae to which some speakers had referred had actually been covered in part. First of all, the question of the responsibility of international organizations towards individuals was in fact addressed in draft article 36, paragraph 2, in a "without prejudice" provision that specifically indicated that individuals could acquire rights as a consequence of a breach of an international obligation by an international organization. Secondly, draft article 29 and the related commentary had given extensive consideration to the issue of subsidiary responsibility of member States. Two new proposals had been made during the debate and had attracted some support, one by Mr. Pellet relating to the invocation of State responsibility by an international organization, and the other by Sir Michael Wood, on the need to emphasize the specificity of international organizations. He would comment on these proposals at the end of his summing up.

66. Many speakers had approved his proposal to restructure the draft articles, which would now be broken down into the following parts: Part One, headed "Introduction" and comprising the first two draft articles; Part Two, entitled "The internationally wrongful act of an international organization" and including draft articles 3 to 24; Parts Three and Four, corresponding to the current Parts Two and Three; Part Five, consisting of the current chapter X

(arts. 25 to 30); and Part Six (General provisions), comprising the final articles yet to be adopted. He believed that it would facilitate the Commission's work on the topic if the plenary would indicate to the Drafting Committee that the text should be reorganized accordingly, thereby allowing the Drafting Committee to focus on the revision of the draft articles.

67. He then turned his attention to the individual draft articles on which the debate had focused. There seemed to be general agreement about moving paragraph 4 of draft article 4 to draft article 2. As a number of speakers had pointed out, that transposition would entail some redrafting of article 2. Although several remarks had been made regarding the definition of the terms "international organization" and "rules of the organization", he would be reluctant to see the discussion reopened on those questions in the Drafting Committee, which should simply be requested to incorporate draft article 4, paragraph 4, into draft article 2. In another proposal, Mr. Valencia-Ospina, supported by Mr. Singh, had suggested that the definition of "agent" in draft article 4, paragraph 2, should be placed in draft article 2, and he had rightly pointed out that the term "agent" was also used in places other than in draft article 4, paragraph 1. The Drafting Committee might therefore wish to state that the definition was applicable throughout the entire chapter on attribution of conduct. However, since the definition of the term "agent" was central to the chapter on attribution and not to any other chapter, his preference would be to retain the definition in draft article 4.

68. In any event, article 4, paragraph 2, should be referred to the Drafting Committee. His proposal for rewording the definition of "agent", which was based on the longer version in the advisory opinion of the ICJ on *Reparation for Injuries* and was reflected in paragraph 23 of his report, had appeared to receive the support of the majority, but there had also been other views endorsing the current text. Some speakers had been in favour of a revised version of his proposal, deleting the words "through whom the international organization acts" and using only the first part of the language of the advisory opinion on *Reparation for Injuries*. Those matters could be left for the Drafting Committee to discuss, and it appeared that the Committee's prospects for reaching a consensus on a revised text of article 4, paragraph 2, were good.

69. While he intended to consider only those draft articles on which he had made proposals, he wished to make an exception in the case of draft article 5, given the importance that it had assumed in the debate and elsewhere. There was some curiosity among legal experts as to how the Commission would react to the decision by the European Court of Human Rights in the *Behrami and Saramati* case; indeed, many references had been made to that ruling during the debate. He was pleased to note the virtually unanimous opinion in the Commission that, notwithstanding *Behrami and Saramati*, draft article 5 should not be amended and that the criterion of effective control should be retained. The commentary on draft article 5 would need to be expanded in order to refer to the *Behrami and Saramati* decision, the judgement by the House of Lords in the *Al-Jedda* case and the judgement of the District Court of The Hague (*H. N.* v. *the Netherlands*). All those decisions had been handed down after the commentary had been provisionally adopted, and thus some updating was called for. In revising the commentary to draft article 5, the Commission might wish to specify, as had suggested by Mr. Caflisch, that the *Behrami and Saramati* decision had considered issues of relevance to draft article 5, in the context of establishing whether the Court had jurisdiction *ratione personae*, which to some extent diminished the importance of the precedent.

70. The text he had suggested for draft article 8, paragraph 2, had not been well received, in particular the words "in principle". In fact, there had been little enthusiasm for the entire paragraph. Some proposals had been made for its redrafting, and perhaps the Commission should try to arrive at more felicitous wording. During the debate, Mr. Vázquez-Bermúdez had suggested that a possible solution might be to add wording at the end of paragraph 1 and to delete paragraph 2. That option should be left open for the Drafting Committee, to which the entire draft article 8 should be referred.

71. During the debate on draft article 15, some speakers had expressed doubts that an international organization should be held responsible for having recommended a certain course of conduct to its members. However, the issue before the Commission now seemed to be whether suitable wording could be found that would make it clear when such responsibility was incurred and prevent a broad interpretation of the text, which some States in the Sixth Committee had feared. A majority of speakers saw a need to clarify and, to some extent, restrict draft article 15, paragraph 2 (*b*). He had suggested replacing the words "in reliance on" by "as the result of" as a way of restricting the text, but he had not persuaded all members that this change achieved what was intended. Some members had made other suggestions: Mr. McRae, for instance, had argued that in order for an international organization to be responsible, a recommendation had to be "the principal or predominant cause for the State to commit the act in question". Given the prevailing dissatisfaction with the current wording, and although the Commission did not yet have a proposal that had met with broad acceptance, it would be preferable to refer draft article 15, paragraph 2 (*b*), to the Drafting Committee to see whether it could produce a better wording.

72. No criticism had been expressed regarding draft article 15 *bis*, which was a new article and should be referred to the Drafting Committee.

73. Draft article 18, on self-defence, should be retained, since the majority of speakers had not endorsed his proposal to delete it. Various drafting suggestions had been made during the debate, including, in particular, the deletion of the reference to the Charter of the United Nations. He therefore proposed that draft article 18 be referred to the Drafting Committee so that its wording could be improved.

74. Draft article 19, on countermeasures, was a new article that was generally considered necessary, given that the Commission had already provisionally adopted draft

articles concerning countermeasures that an international organization could take against another international organization. His proposal to characterize countermeasures as "lawful" in paragraph 1 of that draft article had elicited much criticism, yet, as Mr. Fomba had pointed out, that term was intended to refer to the substantive and procedural conditions imposed on countermeasures by international law. Perhaps the Commission could develop that reference more fully and include, in the case of an international organization resorting to countermeasures against another international organization, a cross-reference to the conditions set out in draft articles 54 to 60. That would not, however, address the problem of countermeasures taken by international organizations against States, and the Commission could not refer to the draft articles on the responsibility of States for internationally wrongful acts, despite the fact that such a reference would, at least by analogy, establish the conditions that an international organization would have to fulfil in order to resort to countermeasures against a State. Consequently, a reference could perhaps be made in paragraph 1 to international law, on the assumption that the reader would understand it as an implied reference to the draft articles on responsibility of States.

75. Another question that should be referred to the Drafting Committee was how to improve the proposed wording of paragraph 2 of draft article 19. The text of that paragraph had been based on draft article 55, reflecting the idea that there were hardly any reasons for differentiating between countermeasures taken by States members of an international organization against that organization (the subject of draft article 55) and countermeasures taken by an international organization against its members (the subject of draft article 19, paragraph 2). During the discussion in plenary, many drafting suggestions had been made with a view to improving the text of either article 19, paragraph 2, or article 55. For example, a significant trend towards the deletion of references to "the rules of the organization" had emerged, and Mr. Nolte's suggestion to refer to "reasonable procedures" instead of "reasonable means" had also received support. He therefore proposed that those and other suggestions relating to draft articles 19 and 55 should be considered by the Drafting Committee, a proposal that had received almost unanimous support. Moreover, draft article 19 was a new article that would have to be referred to the Drafting Committee in any case before it could be adopted.

76. In response to criticism from States, he had proposed a rewording of draft article 28, paragraph 1. The new text was intended to convey that the transfer of competence by a State to an international organization did not *per se* imply circumvention—in other words, it was not the fact of transferring competence, but the use of the international organization's separate legal personality that entailed responsibility. His proposed new text did not contain the verb "circumvent", which appeared in both draft articles 15 and 28. Given the element of subjectivity implied in the concept of circumvention, he had proposed a more objective formulation that did not specifically refer to circumvention or intent. Since most members had been in favour of that wording, he proposed that draft article 28, paragraph 1, should be referred to the Drafting Committee for revision.

77. The proposed addition of a new second paragraph to draft article 43 had proved to be quite controversial, and the majority of members who had expressed an opinion appeared to be against it. The idea expressed in paragraph 2 had already been reflected in the commentary to draft article 43, and it might be best to leave it at that. Those who were not satisfied with that solution would have another opportunity to propose changes during the revision of the commentary, which would be necessary for adopting the text on first reading.

78. Although the Commission had adopted draft article 55 at its sixtieth session following an extensive debate,[129] the fact that that article served as a model for draft article 19, paragraph 2, implied the need to reconsider it when draft article 19 was revised. He therefore proposed that draft article 55 should also be referred to the Drafting Committee for revision.

79. The general provisions contained in draft articles 61 to 64 had received wide support, and he consequently proposed that they should be referred to the Drafting Committee. It would be useful to mention in the commentary that draft article 63 was not a new article and corresponded to article 58 of the draft articles on State responsibility for internationally wrongful acts.[130] When the Drafting Committee turned its attention to draft article 61, on *lex specialis*, it might wish to consider the issue of the specificity of international organizations, bearing in mind Sir Michael Wood's proposed text, which 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". As had been suggested during the debate, initially by Sir Michael himself, that text could become a new paragraph under draft article 61, a separate article or a passage in the introductory commentary. Prior to adopting that text, however, the Commission needed to reflect further on the implications of that statement. There was general agreement that there was a wide variety of international organizations, and the draft articles had repeatedly been criticized for not reflecting that situation sufficiently. His answer had always been that the Commission was drafting very general provisions, which could then be applied in a differentiated manner. The suggested text, however, seemed to be hinting that, beyond differences in application, there might also be differences in the rules themselves, given the specificity of individual organizations. In that case, it would be useful to know which draft articles were likely to be affected and in what way. The Commission would also have to consider the fact that the draft articles applied, not to international organizations directly, but to the relations between an international organization and other entities. For that reason, he appealed to Sir Michael and to other like-minded speakers to shed more light, for the benefit of the Drafting Committee, on the implications of the proposed text or a similar text that would be incorporated in draft article 61 or placed elsewhere in the draft.

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[129] *Yearbook ... 2008*, vol. I, 2989th meeting, pp. 250–251, paras. 8–11.

[130] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 142–143.

80. Turning to the question of the lacuna concerning the invocation by an international organization of the responsibility of a State, he said that while he was attracted by Mr. Valencia-Ospina's proposal to include an express reference to that issue at the end of draft article 62 in order to demonstrate the Commission's awareness that a lacuna existed, that proposal did not address the problem of how to fill the lacuna. Discussion of that problem had initially been polarized between the position taken by Mr. Pellet, who favoured the inclusion of some 30 new articles in the current draft, and his own position, which was that the Commission could not resolve the matter in the current draft because doing so would affect the articles on State responsibility, whose status was still under consideration in the General Assembly.

81. The invocation of a State's responsibility by an international organization did not constitute the only lacuna in the regime of State responsibility as it related to international organizations. A much broader range of issues was potentially involved and affected, in the draft articles on responsibility of States, not only articles 42 to 48, on invocation, but those on countermeasures and many other provisions as well, some of which had been referred to in paragraphs 8 and 9 of his seventh report.

82. Article 6 of the draft articles on State responsibility was a case in point, as it had originally included a reference to international organizations that had subsequently been dropped. As it currently stood, draft article 6 referred only to the case in which the conduct of an organ placed at the disposal of a State by another State was considered an act of the former State, but did not contemplate the parallel case involving the conduct of an organ placed at the disposal of a State by an international organization. While it was recognized that States frequently placed certain of their organs at the disposal of international organizations, the reverse was occasionally also true, and thus that situation needed to be covered by the draft articles on State responsibility. Given the number of articles in that draft that would require revision, there did not seem to be any reason for the Commission to address only the lacuna in the draft articles on invocation of responsibility.

83. The Commission had thus far avoided making any reference in the current draft to the draft articles on State responsibility because the status of that text had yet to be defined. Had it been able to do so, the Commission could have pre-empted another frequent criticism, which was that the current draft was too repetitive of the articles on State responsibility. A general reference to the earlier draft articles would have allowed the Commission to confine the current draft to those issues that related specifically to international organizations. Since that had not been possible, it had been considered necessary to err on the side of repetition and to include the full text in each case.

84. If the solution to be adopted was to incorporate additional text to cover all the omissions in the draft articles on responsibility of States that dealt with State responsibility as it related to international organizations, it would require rewriting a long list of draft articles and reproducing them in an amended form. In the case of draft article 6, which he had cited previously, the amended text would read: "The conduct of an organ placed at the disposal of a State by another State or an international organization shall be considered an act of the former State."

85. He did not believe that most members favoured such an approach, since during the debate they had appeared to move away from that eventuality—at times by referring to the problem of the Commission's mandate and at others by exploring imaginative ways in which the lacunae could be filled. One suggestion that might eventually be taken up was to make States aware of the omissions and then to try to find ways to address them. Rather than suggesting to the Sixth Committee that it was necessary to amend the draft articles on State responsibility, the Commission could study the issues involved more carefully, even if the result was ultimately the same.

86. In summing up his reflection on the discussion of the lacunae, his own suggestion would be to invite States to give their views as to how the Commission ought to proceed in its study of the issues of State responsibility that affected international organizations. It could then draw attention to the invocation of the responsibility of a State by an international organization and, in particular, the question of functional protection by an international organization. One way to proceed in requesting States' views on the matter would be to include some carefully drafted questions in chapter III of the Commission's annual report to the General Assembly and invite States and international organizations to comment.

87. In conclusion, he proposed that the following draft articles should be referred to the Drafting Committee: draft article 2; draft article 4, paragraph 2; draft article 8; draft article 15, paragraph 2 (*b*); draft article 15 *bis*; draft articles 18 and 19; draft article 28, paragraph 1; draft article 55; and draft articles 61 to 64. The Drafting Committee should bear in mind that articles 15 *bis*, 19 and 61 to 64 were new articles, whereas the others had been provisionally adopted and were to be revised. He also proposed that the Drafting Committee should be invited to reorganize the draft articles into six parts.

88. Ms. ESCARAMEIA said that her questions had to do with two draft articles that were not being referred to the Drafting Committee. The first concerned draft article 46 and an issue that had been raised during the debate concerning the invocation of the responsibility of an international organization by an individual or group of individuals. She was not suggesting that the issue should be reopened in the Drafting Committee, since it had received only minor support; however, it was encouraging to note that there would be another opportunity to address it during adoption of the draft articles on second reading. Accordingly, she wondered whether the Commission would consider including among the questions to be addressed to States and international organizations in chapter III a question along the following lines: "Have individuals or groups of individuals invoked the responsibility of your organization, and, if so, what was the result of such action?" She had formulated that question in keeping with the Special Rapporteur's recommendation that such questions should be specific. It would be

helpful to learn about the practice of international organizations and to hear the views of States on the subject.

89. Her second question had to do with draft article 43, paragraph 2, which the Special Rapporteur had not proposed to refer to the Drafting Committee. Although he had noted that opinions had been fairly evenly divided on whether to retain that paragraph (paras. 96–97 of the report), the Special Rapporteur had ultimately concluded that a slight majority was opposed to doing so. She was not contesting that conclusion, even though she would have preferred to have the article referred to the Drafting Committee, but she nevertheless wondered what would become of the paragraph or, for that matter, of Mr. Valencia-Ospina's alternative proposal to it, which had been included in a footnote to the article.[131] Her own preference would be to place the proposed paragraph 2 in a footnote to draft article 43 in the list of draft articles.

90. Mr. DUGARD, referring to Ms. Escarameia's comments, said that the Special Rapporteur had discussed submitting a number of very important questions to States and international organizations for their comments. Although such questions were not normally considered by the Drafting Committee, in view of their unusual significance, he wondered whether, subject to the opinion of the Special Rapporteur, those questions might be formulated by the Drafting Committee in order to ensure that they reflected a more collective viewpoint.

91. Sir Michael WOOD said that he was in total agreement with the Special Rapporteur's excellent summary and proposals but would appreciate clarification about what action the Special Rapporteur suggested the Commission should take regarding the proposals he himself had made in connection with draft article 61 (3007th meeting above, para. 28). As to the Special Rapporteur's recommendation that the implications of the text should be clarified, he wished to make it clear that he had merely intended to state expressly what was perhaps implicit, which was that, in applying the rules of the organization, any special considerations that resulted from the characteristics or rules of a particular organization should be taken into account. Given that his proposal had received a certain amount of support, he hoped that it would be considered by the Drafting Committee.

92. Mr. GAJA (Special Rapporteur) reiterated that, in its consideration of draft article 61, the Drafting Committee should consider Sir Michael's proposal or some variation thereof. The Committee had enough flexibility to determine what form the new text should ultimately take.

93. It was not the usual role of the Drafting Committee to draft questions for inclusion in chapter III of the Commission's annual report, and while there was no harm in advancing ideas, such questions were usually considered by the plenary during the second part of the session. If international organizations, which had tended not to reveal much of their practice with regard to individuals, were in future willing to disclose more, then the time might indeed be ripe to pose the question proposed by Ms. Escarameia. The practice of international organizations in respect of individuals had a bearing on their practice in respect of States or international organizations, and there was a kind of continuity in the law that made such information relevant. Having said that, however, he urged the Commission to refrain from drafting questions on chapter III at present; it would perhaps be wise first to discuss the delicate matters concerned, and the Chairperson could hold consultations about how best to handle the issue of the lacunae.

94. The Commission had followed an unusual procedure in respect of draft article 43 in that it had gone along with the Drafting Committee's decision to place an alternative provision both in a footnote and in the commentary to the draft article itself. In 2007, the Commission had invited States to indicate whether they preferred the text provisionally adopted by the Commission or the alternative text continued in the footnote.[132] Since the prevailing view in the Sixth Committee had been that the actual text of draft article 43 was preferable to the alternative text contained in the footnote,[133] the Commission should probably not go back on the matter by retaining the text in the footnote, which he assumed would now be deleted.

95. The CHAIRPERSON said he took it that the Commission wished to refer the draft articles indicated by the Special Rapporteur to the Drafting Committee.

It was so decided.

96. The CHAIRPERSON said that, as proposed by the Special Rapporteur, the Drafting Committee would also be entrusted with the task of reorganizing the draft articles into six parts.

The meeting rose at 1 p.m.

3010th MEETING

Tuesday, 26 May 2009, at 10 a.m.

Chairperson: Mr. Nugroho WISNUMURTI

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

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[131] *Yearbook … 2007*, vol. II (Part Two), p. 85, footnote 441. For the commentary to this draft article, see *ibid.*, pp. 91–92.

[132] *Ibid.*, p. 14, para. 29.

[133] Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-second session, prepared by the Secretariat (A/CN.4/588, mimeographed; available on the Commission's website, documents of the sixtieth session), para. 152–156, especially para. 154.