

Document:-  
**A/CN.4/3031**

**Summary record of the 3031st meeting**

Topic:  
**Draft report of the Commission on the work of its sixty-first session**

Extract from the Yearbook of the International Law Commission:-  
**2009, vol. I**

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Paragraph (5)

50. Ms. ESCARAMEIA proposed the addition of the following sentence: “Some members, however, thought that the meaning of interpretative declarations was often ambiguous, and that therefore statements of reasons would clarify it.”

51. Mr. PELLET (Special Rapporteur) said he could consent to that addition, provided that it was placed at the beginning of paragraph (5), in order to make it clear that that had not been the majority view.

*Paragraph (5), as amended, was adopted.*

*The commentary to guideline 2.4.3 bis, as amended, was adopted.*

**CHAPTER X. Immunity of State officials from foreign criminal jurisdiction (A/CN.4/L.754)**

52. The CHAIRPERSON invited the Commission to take up document A/CN.4/L.754.

Paragraphs 1 to 3

*Paragraphs 1 to 3 were adopted.*

*Chapter X, as a whole, was adopted.*

*The meeting rose at 5.40 p.m.*

### 3031st MEETING

*Tuesday, 4 August 2009, at 3.10 p.m.*

*Chairperson: Mr. Ernest PETRIČ*

*Present: Mr. Caffisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Murase, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Wisnumurti, Sir Michael Wood.*

#### **Draft report of the Commission on the work of its sixty-first session (continued)**

**CHAPTER V. Reservations to treaties (continued) (A/CN.4/L.749 and Add.1-7)**

**C. Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission (continued)**

2. TEXT OF THE DRAFT GUIDELINES AND COMMENTARIES THERETO ADOPTED BY THE COMMISSION AT ITS SIXTY-FIRST SESSION [A/CN.4/L.749/ADD.4]

1. The CHAIRPERSON invited the Commission to continue its consideration of chapter V of its draft report and drew attention to the portion of chapter V contained in document A/CN.4/L.749/Add.4.

2. Mr. PELLET (Special Rapporteur) said that in such a lengthy document, despite his own attention to detail and the laudable efforts of his assistants, a few errors had slipped by. The cross references between footnotes were occasionally inaccurate or missing, but such details would be corrected in the final version of the text. References to *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2005 (ST/LEG/SER.E/24)*, the last printed version available, would be replaced by references to the more recent electronic versions. Quotations would be given in the original languages, accompanied by translations into each of the language versions in which they appeared. Lastly, as reflected in the footnote to paragraph 123 of its report on the work of its sixtieth session,<sup>292</sup> the Commission had decided that to avoid endless repetition of the word “draft”, the text of the draft guidelines and commentaries thereto should simply refer to “guidelines”, without prejudice to their legal status.

3. The CHAIRPERSON, after consulting with Mr. MIKULKA (Secretary of the Commission), confirmed that the points raised by Mr. Pellet would be taken into account in the preparation of the final version of the report.

*Commentary to guideline 2.8.1 (Tacit acceptance of reservations)*

Paragraph (1)

*Paragraph (1) was adopted.*

New paragraph (1 bis)

4. Mr. GAJA proposed that the last two sentences of paragraph (2) of the commentary to guideline 2.8.3 be transferred to form a new paragraph (1 bis) of the commentary to guideline 2.8.1. His reasoning was that the two sentences dealt with tacit acceptance, covered in guideline 2.8.1, as well as express acceptance, the subject of guideline 2.8.3, and were better placed in the earlier commentary.

*New paragraph (1 bis) was adopted.*

Paragraphs (2) to (4)

*Paragraphs (2) to (4) were adopted.*

Paragraph (5)

5. Mr. PELLET (Special Rapporteur) said that in the footnote before the quote, the reference should be to paragraph (10) below instead of to paragraph (7).

6. Sir Michael WOOD suggested that the phrase “almost useless clarification” should be replaced by “words”.

7. Mr. PELLET (Special Rapporteur) said that he could agree to that proposal, provided that the above-mentioned footnote was deleted and the reference to paragraph (10) was inserted in the following footnote, at the end of the paragraph.

*Paragraph (5), as amended, was adopted.*

<sup>292</sup> *Yearbook ... 2008*, vol. II (Part Two), p. 69, footnote 227.

Paragraphs (6) to (10)

*Paragraphs (6) to (10) were adopted.*

*The commentary to guideline 2.8.1, as a whole, as amended, was adopted.*

*Commentary to guideline 2.8.2* (Unanimous acceptance of reservations)

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were adopted.*

Paragraph (5)

8. Mr. GAJA said that, if the scenario envisaged was that of a State acceding to a treaty already in force, it could, of course, object, as the penultimate sentence said, but its objection would have no effect. In the final sentence, the word “precaution” seemed out of place, and the clause following the dash did not seem to make sense.

9. Ms. ESCARAMEIA said that she had the same problems with the final sentence as Mr. Gaja and thought that the words at the end, “unless it expresses that consent within 12 months following notification of the reservation”, should be deleted.

10. Mr. PELLET (Special Rapporteur) said that he agreed with Mr. Gaja’s remarks on the penultimate sentence, but with neither his nor Ms. Escarameia’s comments on the final sentence. Perhaps “precaution” was not the right word. Still, it was always possible for a State to object, as long as it did so within 12 months, and that was the point that the final clause was intended to convey. It came not from his own report, but from the report of the Drafting Committee, because some of its members had insisted on the point.

11. Mr. GAJA endorsed Ms. Escarameia’s proposal to delete the last clause of the final sentence and suggested that the word “precaution” should be replaced by “step”. The penultimate sentence could be retained, with the addition of wording in the footnote to make it clear that the case envisaged was a possibility, although not a very likely one.

12. Mr. PELLET (Special Rapporteur) suggested that the words “as to the limited effect of such an objection” could be inserted at the beginning of the footnote.

*Paragraph (5), as amended, was adopted.*

Paragraphs (6) to (7)

*Paragraphs (6) to (7) were adopted.*

*The commentary to guideline 2.8.2, as a whole, as amended, was adopted.*

*Commentary to guideline 2.8.3* (Express acceptance of a reservation)

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

13. Mr. GAJA said that, since the last two sentences had been transferred to the commentary to guideline 2.8.1, the

second sentence seemed superfluous. It anticipated the later discussion on validity and could safely be deleted.

14. Mr. PELLET (Special Rapporteur) said he would prefer to retain the sentence, as it introduced arguments to be made later, but suggested that it could be put into a footnote, which would also refer back to paragraph (1 *bis*) of the commentary to guideline 2.8.1.

15. Sir Michael WOOD raised the issue of whether the word “validity” should be replaced by “permissibility” in paragraph (2) and in many other provisions.

16. Mr. PELLET (Special Rapporteur) said that, indeed, the term “substantive validity”, and, where appropriate, the term “validity”, should be replaced by “permissibility” throughout the text.

*Paragraph (2), as amended, was adopted.*

Paragraphs (3) to (6)

*Paragraphs (3) to (6) were adopted.*

Paragraph (7)

17. Mr. GAJA pointed out that the way that the last sentence in the penultimate footnote had been translated from French into English distorted the meaning somewhat. The sentence should read: “This effect may be produced by an acceptance as well as by an objection.”

*Paragraph (7), as amended, was adopted.*

Paragraph (8)

*Paragraph (8) was adopted.*

*The commentary to guideline 2.8.3, as a whole, as amended, was adopted.*

*Commentary to guideline 2.8.4* (Written form of express acceptance)

*The commentary to guideline 2.8.4 was adopted.*

*Commentary to guideline 2.8.5* (Procedure for formulating express acceptance)

Paragraph

18. Mr. PELLET (Special Rapporteur), noted that the word “draft” should be deleted wherever it appeared before the word “guideline” or “guidelines”.

*The paragraph, as corrected, was adopted.*

*The commentary to guideline 2.8.5, as corrected, was adopted.*

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

19. Mr. PELLET (Special Rapporteur) noted that in the French text of the guideline itself the words “*au projet de*” should be deleted and the remaining brackets should be removed.

*The correction to the text of guideline 2.8.6 was noted.*

*The commentary to guideline 2.8.6 was adopted.*

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

Paragraphs (1) to (3)

*Paragraphs (1) to (3) were adopted.*

Paragraph (4)

20. Mr. PELLET (Special Rapporteur) said that the footnote at the end of the paragraph should be amended to refer to the documents of the Vienna Conference.

*Paragraph (4), as amended, was adopted.*

Paragraph (5)

21. Mr. GAJA said that the second sentence of paragraph (5) was historically inaccurate. At the 1986 Vienna Conference, there had been a strong tendency to align all the provisions of the 1986 Vienna Convention with the 1969 Vienna Convention. The commentary should therefore merely state that the Commission had inserted paragraph 3 of article 20 and article 5 and that the Vienna Conference had followed suit.

22. Mr. PELLET (Special Rapporteur) said that the necessary research would be done to clarify the point.

*Paragraph (5) was adopted, subject to the requisite editorial adjustments.*

Paragraphs (6) to (9)

*Paragraphs (6) to (9) were adopted.*

*The commentary to guideline 2.8.7, as a whole, as amended, was adopted.*

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

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

Paragraph (3)

23. Mr. GAJA said that the commentary slightly contradicted the text of the guideline, which placed three different organs on the same level. Since that was the case, the phrase “in the absence of a formal admissions procedure” should be deleted from the commentary, because its retention would introduce a hierarchy among those organs, in that it suggested that the organ that decided on the reserving State’s admission took precedence over the organs competent to amend the organization’s constituent instrument or to interpret it.

24. Mr. PELLET (Special Rapporteur) agreed to that amendment.

25. Sir Michael WOOD said that it would be easier to avoid that contradiction by deleting the last sentence and retaining the phrase “in the absence of a formal admission procedure”, which was meaningful.

26. Mr. GAJA, supported by Mr. PELLET (Special Rapporteur) said that, if the commentary were to be amended as suggested by Sir Michael Wood, it would no longer be consistent with the text of the guideline because it would, in fact, introduce a hierarchy of organs.

27. The CHAIRPERSON said he took it that the Commission wished to delete the phrase, “in the absence of a formal admission procedure”, as proposed by Mr Gaja.

*Paragraph (3), as amended, was adopted.*

Paragraph (4)

*Paragraph (4) was adopted.*

*The commentary to guideline 2.8.8, as a whole, as amended, was adopted.*

*The portion of chapter V contained in document A/CN.4/L.749/Add.4, as a whole, as amended, was adopted.*

#### CHAPTER IV. *Responsibility of international organizations (continued)* (A/CN.4/L.748 and Add.1–2 and Add.2/Corr.1)

##### C. *Text of the draft articles on responsibility of international organizations adopted by the Commission on first reading*

##### 2. *TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO* (A/CN.4/L.748/Add.2 and Corr.1)

28. The CHAIRPERSON invited the members of the Commission to resume their consideration of chapter IV of the draft report. He drew attention to the portion of the chapter contained in document A/CN.4/L.748/Add.2 and Corr.1, setting out the commentaries to the draft articles which were to be found in document A/CN.4/L.748/Add.1.

29. Sir Michael WOOD noted that the commentaries to the draft articles on the responsibility of international organizations were much shorter than the detailed commentaries to the draft articles on the responsibility of States for internationally wrongful acts,<sup>293</sup> even where the language of the draft articles was similar. For example, the commentary to draft article 13 (Aid or assistance in the commission of an internationally wrongful act) was very brief, whereas the commentary to the corresponding article on State responsibility contained pages of very interesting background material that elucidated the concept of “aid” or “assistance”.<sup>294</sup> He therefore suggested the insertion somewhere in the text, or in a footnote, of the following sentence: “To the extent that the present articles are based on those on the responsibility of States for internationally wrongful acts, reference may also be made to the commentaries to those earlier articles.” That sentence would be a useful pointer to the reader, or to a judge in an English court, for example, since it would explain that it might be relevant to refer to the commentaries to the articles on State responsibility.

30. Mr. VALENCIA-OSPINA said that, given the size of the document to be considered, he wondered if it was really necessary to readopt those commentaries which, to large extent, reproduced those on the articles on State

<sup>293</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 77.

<sup>294</sup> *Ibid.*, commentary to article 16, pp. 65–67.

responsibility. Perhaps the Commission could simply concentrate on those which were new.

31. Mr. GAJA (Special Rapporteur) said that, although the second proposal was tempting, the articles had been restructured to some extent and some modifications had been made to them. If members had any concerns about the substance of any of the paragraphs in the commentaries, they should raise those concerns. Nevertheless, he urged members to exercise self-restraint and to pass any minor editorial changes to the Secretariat.

32. He was not enthusiastic about the first proposal. He had tried to pick out some essential points from the earlier commentaries, but he had often been unable to refer to practice, as the earlier commentaries had pertained to practice in relation to States. It would not be a good idea to make a general statement, as it would reinforce the idea that the Commission was merely engaging in an exercise to replace a few words here and there. It might, however, be possible to say in a footnote that, where appropriate, additional reference could be made to the commentaries to the articles on State responsibility.

33. Sir Michael WOOD said that he would be quite happy with the inclusion somewhere of the statement that reference might, where appropriate, be made to the commentaries to the articles on State responsibility.

34. Mr. GAJA (Special Rapporteur) suggested that the best place for that statement would be in the first footnote to paragraph (1) of the commentary to article 3. It could be inserted before the reference to “the classical analysis”.

35. Mr. VASCIANNIE said that he was not convinced that the Commission needed to help Sir Michael in that way. In some instances the provisions were analogous with the articles on State responsibility, in others they were not. He saw no reason to include a general statement that leaned towards one perspective, when in fact it was the job of lawyers in English courts to make the case that a particular provision was of relevance.

36. Mr. GAJA (Special Rapporteur) explained that the idea was not to make a general reference in the body of the commentaries themselves, but to use the language initially suggested by Sir Michael with the addition of the phrase “where appropriate” in the first footnote to paragraph (1) of the commentary to article 3. In that way, the Commission would not give the impression that all the commentaries on State responsibility were relevant to the responsibility of international organizations.

37. Ms. ESCARAMEIA said that she agreed with Mr. Vasciannie. The Commission had not examined the commentaries on State responsibility one by one to see which were applicable, possibly with some amendment, to the responsibility of international organizations. Such references to the articles on State responsibility, as had been incorporated in the commentaries currently before the Commission, sufficed. A general comment along the lines proposed by Sir Michael would be dangerous, because the responsibility of international organizations differed greatly from that of State responsibility, even though there might be some ostensible similarities. She

was therefore against the inclusion of the proposed wording, even in a footnote.

38. Mr. VASCIANNIE said that he remembered some of the discussions that had taken place on countermeasures and self-defence, where major differences had come to light. Where the Commission contemplated applying the same rules as those pertaining to State responsibility, that point could be made in the commentary and that should be sufficient for Sir Michael’s purposes. In other instances, the matter had not been expressly considered and the Commission should not therefore create a presumption that the rules on the responsibility of international organizations were analogous to those on State responsibility.

39. Sir Michael WOOD said that he was not trying to create such a presumption. The commentary to draft article 13 referred to “[t]he application to an international organization of a provision corresponding to article 16 on the responsibility of States for internationally wrongful acts”. That was why he was suggesting the inclusion, somewhere in the commentary, of the sentence: “To the extent that the present articles correspond to those on the responsibility of States for internationally wrongful acts, reference may be made, where appropriate, to the commentaries on those earlier articles.” The alternative would be to introduce large parts of the previous commentaries into the commentaries on the responsibility of international organizations. He would be quite happy to do so, although it would be a major task.

40. Mr. HMOUD said that there was merit in both points of view. He wondered if the Special Rapporteur was happy with the commentaries as they stood, or if he regarded the commentary to draft article 13 as inadequate. Did he think that it would be advisable to include more of the material from the commentaries to the articles on State responsibility? If the Special Rapporteur had stinted on references to the commentaries to the articles on State responsibility in the commentaries to specific draft articles on the responsibility of international organizations, the point made by Sir Michael was valid. If, however, the Special Rapporteur thought that the commentaries to the draft articles on the responsibility of international organizations were sufficient by themselves, no reference to the commentaries to the articles on State responsibility was needed.

41. Mr. GAJA (Special Rapporteur) said that he had tried not to reproduce the commentaries on State responsibility *in extenso*. In some cases he had summarized their content, in others he had highlighted certain points and in yet others he had introduced slightly different wording. Draft article 13 was an example where the commentary was extremely brief because there was nothing specific to add. In his opinion, it contained an implied reference, since it was unnecessary to spell out everything in detail. He realized that English judges liked to have express wording on which to base their decisions. The problem encountered by the Commission in the current context therefore stemmed from the different legal traditions in the world. In the Italian legal tradition, there would be no need for a specific reference in a footnote. If, however, members considered that such a reference was necessary, it would do no harm if it were carefully worded and included the phrase “where appropriate”.

42. Mr. McRAE said he agreed with Ms. Escameia that, unless the Commission went through the commentary to the articles on State responsibility and decided exactly which parts should be included in the commentary to the draft articles on the responsibility of international organizations, it would be unclear what was being incorporated if the general statement proposed by Sir Michael were inserted. The phrase “where appropriate” might do no harm, but it would not necessarily help English judges to decide what was relevant. They would still have to reach their own conclusion in the light of the arguments put forward by counsel. For that reason, the Special Rapporteur’s suggestion that the proposed wording, with the qualifying phrase “where appropriate”, could be put in a footnote as far as he personally was prepared to go.

43. The CHAIRPERSON said he took it that the Commission wished to include the proposed wording with the qualifying phrase “where appropriate” in the first footnote to paragraph (1) of the commentary to draft article 3.

*It was so decided.*

PART ONE. INTRODUCTION

*Commentary to article 1* (Scope of the present draft articles)

*The commentary to article 1 was adopted.*

*Commentary to article 2* (Use of terms)

Paragraphs (1) to (13)

*Paragraphs (1) to (13) were adopted.*

Paragraph (14)

44. Mr. McRAE said that the third sentence, which read “In the application of these principles and rules, the specific, factual or legal, circumstances pertaining to the international organization concerned may be of some relevance”, should be stronger. He therefore suggested that the sentence should be recast to read: “The principles and rules set out in these draft articles are to be applied in the light of the specific factual or legal circumstances pertaining to the international organization concerned.” That would reflect more closely the discussion in the Drafting Committee.

45. Mr. GAJA (Special Rapporteur) said that the existing text attempted to balance opposing views expressed in the Drafting Committee. He could accept the proposed amendment, since it was followed by an example that was not open to question. His only concern was that the commentary should not be phrased in such a way that an organization might claim exemption from any particular rule simply because it did not suit that organization.

46. Mr. HMOUD said that the proposed amendment was acceptable so long as it did not give the impression that the draft articles applied only when the legal or technical facts relating to an organization made them applicable to that organization. As an alternative, he would suggest that the original sentence could be retained with the deletion of the word “some” from the phrase “of some relevance”. However the provision was phrased, the message should be that the draft articles applied at all times.

47. Mr. McRAE said that his proposed wording—“... applied in the light of ...”—achieved the balance sought by Mr. Gaja. Another way to achieve that balance would be to replace the words “may be of some relevance” by “are relevant”. The factual and legal circumstances were necessarily relevant in the application of the principles and rules of the draft articles.

48. Mr. GAJA (Special Rapporteur) said that the reason for the wording “may be” was that, for the majority of the draft articles, the specific circumstances were immaterial: for instance, if an organization breached an obligation, that breach entailed responsibility. However, he could accept the amendment. The commentary could convey the idea that the draft articles were relevant “where appropriate” without using that phrase, simply by the examples that followed.

49. Mr. VASCIANNIE said that the existing text accurately reflected the outcome of the long discussion in the Drafting Committee and should be retained.

50. Sir Michael WOOD said that, knowing that the Special Rapporteur had undertaken to include such a sentence, he had been surprised to find it buried in paragraph (14) of the commentary to draft article 3 and to find it rather weak. He would therefore support either of the formulations suggested by Mr. McRae. Alternatively, the phrase “may be of some relevance” might be replaced by the phrase “should be taken into account where appropriate”.

*Paragraph (14), as amended, was adopted.*

Paragraphs (15) to (20)

*Paragraphs (15) to (20) were adopted.*

*The commentary to article 2, as a whole, as amended, was adopted.*

PART TWO. THE INTERNATIONALLY WRONGFUL ACT OF AN INTERNATIONAL ORGANIZATION

CHAPTER I. GENERAL PRINCIPLES

*General commentary*

*The general commentary to Part Two, chapter I, was adopted.*

*Commentary to article 3* (Responsibility of an international organization for its internationally wrongful acts)

Paragraph (1)

51. The CHAIRPERSON recalled the amendment decided on earlier to the first footnote to the paragraph.

*Paragraph (1), as amended, was adopted.*

Paragraphs (2) to (6)

*Paragraphs (2) to (6) were adopted.*

*The commentary to article 3, as a whole, as amended, was adopted.*

*Commentary to article 4* (Elements of an internationally wrongful act of an international organization)

*The commentary to article 4 was adopted.*

CHAPTER II. ATTRIBUTION OF CONDUCT TO AN INTERNATIONAL ORGANIZATION

*General commentary*

*The general commentary to Part Two, chapter II, was adopted.*

*Commentary to article 5* (General rule on attribution of conduct to an international organization)

*The commentary to article 5 was adopted.*

*Commentary to article 6* (Conduct of organs or agents placed at the disposal of an international organization by a State or another international organization)

Paragraphs (1) to (8)

*Paragraphs (1) to (8) were adopted.*

Paragraph (9)

52. Sir Michael WOOD proposed that, in the penultimate sentence, after the words “[o]ne may note that”, the following phrase should be inserted: “the Court was addressing the question of its own jurisdiction and that”. It was an important point that had been made during the debate in the Drafting Committee, in that the case was different from the kind that the Commission had had in mind when it drafted the article.

53. Mr. GAJA (Special Rapporteur) said that he had no objection to the proposed addition. He had not stressed the issue in the commentary, since he could not see the connection between the two elements. True, the Court had had to examine its jurisdiction, but it had considered the problem of “ultimate” control independently of that issue.

*Paragraph (9), as amended, was adopted.*

Paragraphs (10) to (14)

*Paragraphs (10) to (14) were adopted.*

*The commentary to article 6, as a whole, as amended, was adopted.*

*Commentary to article 7* (Excess of authority or contravention of instructions)

*The commentary to article 7 was adopted.*

*Commentary to article 8* (Conduct acknowledged and adopted by an international organization as its own)

*The commentary to article 8 was adopted.*

CHAPTER III. BREACH OF AN INTERNATIONAL OBLIGATION

*General commentary*

*The general commentary to Part Two, chapter III, was adopted.*

*Commentary to article 9* (Existence of a breach of an international organization)

*The commentary to article 9 was adopted.*

*Commentary to article 10* (International obligation in force for an international organization)

*The commentary to article 10 was adopted.*

*Commentary to article 11* (Extension in time of the breach of an international organization)

*The commentary to article 11 was adopted.*

*Commentary to article 12* (Breach consisting of a composite act)

*The commentary to article 12 was adopted.*

CHAPTER IV. RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION IN CONNECTION WITH THE ACT OF A STATE OR ANOTHER INTERNATIONAL ORGANIZATION

*General commentary to Part Two, chapter IV*

*The general commentary to Part Two, chapter IV, was adopted.*

*Commentary to article 13* (Aid or assistance in the commission of an internationally wrongful act)

*The commentary to article 13 was adopted.*

*Commentary to article 14* (Direction and control exercised over the commission of an internationally wrongful act)

*The commentary to article 14 was adopted.*

*Commentary to draft article 15* (Coercion of a State or another international organization)

*The commentary to article 15 was adopted.*

*Commentary to article 16* (Decisions, recommendations and authorizations addressed to member States and international organizations)

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were adopted.*

Paragraph (5)

54. Sir Michael WOOD said that, in the last sentence, the clause “if the threshold of international responsibility is advanced” was obscure. He proposed that it should be replaced by the clause “if international responsibility arises at the time of the taking of the decision”.

*Paragraph (5), as amended, was adopted.*

Paragraphs (6) to (13)

*Paragraphs (6) to (13) were adopted.*

*The commentary to article 16, as a whole, as amended, was adopted.*

*Commentary to article 17* (Responsibility of an international organization member of another international organization)

*The commentary to article 17 was adopted.*

*Commentary to article 18* (Effect of this chapter)

*The commentary to article 18 was adopted.*

## CHAPTER V. CIRCUMSTANCES PRECLUDING WRONGFULNESS

*General commentary*

*The general commentary to Part Two, chapter V, was adopted.*

*Commentary to article 19 (Consent)*

*The commentary to article 19 was adopted.*

*Commentary to article 20 (Self-defence)*

## Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

## Paragraph (3)

55. Sir Michael WOOD said that the phrase “in a wider sense” in the first sentence should be replaced by “in a different sense”, in order to indicate that the term “self-defence” was not being used in the sense in which it was used in Article 51 of the Charter of the United Nations.

56. Mr. KOLODKIN said that he was troubled by the word “different”. He suggested that the words “in a wider sense” should be deleted altogether, so that the phrase would read: “the term ‘self-defence’ has often been used with regard to situations other than those contemplated in Article 51”.

57. Sir Michael WOOD said that, in the penultimate sentence, the words “cases which go well beyond” should be replaced by “cases other than”.

*Paragraph (3), as amended by Mr. Kolodkin and Sir Michael Wood, respectively, was adopted.*

## Paragraph (4)

58. Sir Michael WOOD said that, in the second sentence, the words “has become the object of an armed attack” should be replaced by “is the object of an armed attack”.

59. Ms. JACOBSSON (Rapporteur) said that the proposed amendment changed the meaning of the sentence. She asked whether it was acceptable to the Special Rapporteur.

60. Mr. CAFLISCH said that, even if the English text was changed, the French should remain unchanged. The phrase “*a fait l’objet*” conveyed either of the English versions.

61. Mr. GAJA (Special Rapporteur) said that he had taken Sir Michael’s suggestion to be a simple stylistic improvement. He hoped that someone could explain the implications.

62. Sir Michael WOOD said that the change would avoid any implication that the armed attack in question had to have occurred before the self-defence was engaged in. The word “is” was neutral on that issue and related to the phrase “if an armed attack occurs” in Article 51 of the Charter of the United Nations.

63. Mr. McRAE said that, if the change was made, the phrase “is given the power to act” should be replaced by “has been given the power to act”.

64. Mr. VASCIANNIE said that the Commission should retain the phrase “has become”.

65. Sir Michael WOOD proposed that the entire clause should read: “when one of its members is the object of an armed attack and the international organization has the power to act in collective self-defence”.

*Paragraph (4), as amended, was adopted.*

## Paragraph (5)

*Paragraph (5) was adopted.*

*The commentary to article 20, as a whole, as amended, was adopted.*

*Commentary to article 21 (Countermeasures)*

## Paragraphs (1) and (2)

66. Mr. GAJA (Special Rapporteur) said that the reference in paragraph (1), and the two references in paragraph (2), to “articles 57 to 62” were incorrect and in each case should read “articles 50 to 56”.

*Paragraphs (1) and (2), as corrected, were adopted.*

## Paragraphs (3) and (4)

67. Ms. ESCARAMEIA said that, although the commentary was written in a style that implied a consensus, in a set of draft articles adopted on first reading there was, she believed, scope for indicating areas in which strongly divergent views had been expressed. Such had been the case with the issue of countermeasures, as evidenced by the fact that it had been necessary to set up a working group to address it.<sup>295</sup> In order to reflect that controversy, she wondered whether members might agree to an addition, to be placed before the first sentence in paragraph (4), along the following lines: “There was a view among members of the Commission that countermeasures taken by an injured international organization against one of its members should not be allowed. However, a majority of the members had considered that such a possibility existed within certain limits.”

68. Mr. GAJA (Special Rapporteur) said that, although he had no objection to registering the existence of divergent views on a particular matter, he had not understood the view in the Drafting Committee to be that countermeasures should never be taken by an international organization against its members. To his recollection, the Drafting Committee had primarily discussed the reverse situation, that of countermeasures taken against an international organization by its members. Despite the fact that some members had argued against formulating any articles on countermeasures whatsoever or had advocated greater limitations than the ones that were ultimately accepted, consensus had been reached on the text as it currently stood. That said,

<sup>295</sup> *Yearbook ... 2008*, vol. II (Part Two), pp. 106–107, paras. 128–131 and pp. 109–110, paras. 148–153.

he would not object if members wished to register their opposition in the commentary but thought that it should be placed in paragraph (3), which dealt more generally with the question of countermeasures taken against the members of an international organization. He would suggest following the usual procedure, which was to draft a proposed text, decide on its placement and then proceed to its adoption.

69. The CHAIRPERSON said he took it that the Commission wished to defer the adoption of paragraph (3) until the proposed additional text had been formulated and inserted.

*It was so decided.*

70. Sir Michael WOOD proposed that in the first sentence of paragraph (4), in order to temper the wording of the phrase “two additional conditions are required”, which sounded somewhat too definite, the phrase should read “it is proposed that two additional conditions be required”.

71. Mr. GAJA (Special Rapporteur) said that Sir Michael’s proposal struck him as unusual, since all the draft articles constituted proposals, and the Commission was certainly not setting binding rules. It was merely indicating the way in which the matter should be regulated. That said, if the phrase “two additional conditions are required” was too firm, he would not object to replacing the word “required” by “listed”.

*Paragraph (4), as amended by the Special Rapporteur, was adopted.*

Paragraph (5)

72. Ms. ESCARAMEIA said that she applauded the skillful wording of the second sentence but would like to see the aspect of timeliness as it related to the term “appropriate means” made more explicit. Alongside proportionality and effectiveness, the means to which an international organization would have recourse before resorting to countermeasures against its members had to be available within a reasonable period of time. In order to convey that more explicitly, she proposed inserting the words “timely and” before “proportionate”.

73. Mr. McRAE said that if Ms. Escarameia’s proposal was accepted, the word “[h]owever” in the next sentence ought to be deleted, because that sentence also contained the word “timely”, and it would not make sense to begin the sentence with a contrasting conjunction.

74. Mr. GAJA (Special Rapporteur) said that it would be unfortunate to repeat the word “timely”, since it would mean using the same word to convey two different meanings. In one instance, it would refer to the fact that the means should be available without delay and, in the other, that they should be implemented without delay.

75. Mr. VASCIANNIE said that he objected to the use of the word “timely” in two places with two different meanings and would prefer to retain the original wording.

76. Mr. PERERA suggested that Ms. Escarameia’s concern might be met by the insertion of the word “expeditious” or the phrase “provide expeditious relief”.

77. Mr. GAJA (Special Rapporteur) said that the concern was not that the remedies themselves should be expeditious but that they should be readily available. He therefore suggested inserting the words “readily available and” before “proportionate”.

*Paragraph (5), as amended by the Special Rapporteur, was adopted.*

Paragraph (6)

*Paragraph (6) was adopted.*

*Adoption of the commentary to article 21, as a whole, was deferred.*

Commentary to article 22 (Force majeure)

*The commentary to article 22 was adopted.*

Commentary to article 23 (Distress)

*The commentary to article 23 was adopted.*

Commentary to article 24 (Necessity)

*The commentary to article 24 was adopted.*

Commentary to article 25 (Compliance with peremptory norms)

*The commentary to article 25 was adopted.*

Commentary to article 26 (Consequences of invoking a circumstance precluding wrongfulness)

*The commentary to article 26 was adopted.*

PART THREE. CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION

*General commentary to Part Three*

*The general commentary to Part Three was adopted.*

CHAPTER I. GENERAL PRINCIPLES

Commentary to article 27 (Legal consequences of an internationally wrongful act)

*The commentary to article 27 was adopted.*

Commentary to article 28 (Continued duty of performance)

*The commentary to article 28 was adopted.*

Commentary to article 29 (Cessation and non-repetition)

*The commentary to article 29 was adopted.*

Commentary to article 30 (Reparation)

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were adopted.*

Paragraph (5)

78. Sir Michael WOOD queried the accuracy of the second sentence, which seemed to equate the breach of aiding and assisting the commission of a wrongful act with that of the commission of a wrongful act.

79. Mr. GAJA (Special Rapporteur) said that the idea conveyed by the second sentence was that, while the principle of full reparation clearly applied to an entity that was solely responsible for an internationally wrongful act, that principle did not necessarily apply in the case in which more than one entity bore responsibility, since each could have had a different degree of involvement and thus a different extent of responsibility. In other words, all responsible entities were not necessarily required to provide full reparation. To his recollection, the question had not been dealt with in the articles on State responsibility with any thoroughness. In his view, the sentence in question did contribute to an understanding of how the principle of full reparation worked. On the other hand, if the problem was one of language, he would welcome suggestions for its improvement.

80. Sir Michael WOOD proposed that the second sentence should state: "... when the organization is held responsible in connection with a certain act together with one or more States or one or more other organizations ...".

81. Mr. GAJA (Special Rapporteur) said that he could accept Sir Michael's proposed amendment, since it would cover the example cited in the second sentence of aiding or assisting in the commission of a wrongful act and would not preclude further developments of the issue in the future.

*Paragraph (5), as amended, was adopted.*

Paragraph (6)

*Paragraph (6) was adopted.*

*The commentary to article 30 as a whole, as amended, was adopted.*

*Commentary to article 31* (Irrelevance of the rules of the organization)

*The commentary to article 31 was adopted.*

*Commentary to article 32* (Scope of international obligations set out in this Part)

*The commentary to article 32 was adopted.*

CHAPTER II. REPARATION FOR INJURY

*Commentary to article 33* (Forms of reparation)

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

82. Sir Michael WOOD asked whether the last sentence added anything useful, since it almost cast doubt on whether satisfaction was a form of reparation and did not seem to fit in with the rest of the paragraph.

83. Mr. GAJA (Special Rapporteur) said that it was important to include that sentence because, in one of the few examples of practice, cited in the paragraph, the Director General of the International Atomic Energy Agency had referred to satisfaction as being distinct from reparation, placing it in a different category than the one

used in the articles on State responsibility, where the Commission had defined satisfaction as a form of reparation.<sup>296</sup> However, he would be willing to move the last sentence to a footnote.

*Paragraph (2), as amended, was adopted.*

*The commentary to article 33 as a whole, as amended, was adopted.*

*Commentary to article 34* (Restitution)

*The commentary to article 34 was adopted.*

*Commentary to article 35* (Compensation)

*The commentary to article 35 was adopted.*

*Commentary to article 36* (Satisfaction)

*The commentary to article 36 was adopted.*

*Commentary to article 37* (Interest)

*The commentary to article 37 was adopted.*

*Commentary to article 38* (Contribution to the injury)

*The commentary to article 38 was adopted.*

*Commentary to article 39* (Ensuring the effective performance of the obligation of reparation)

*The commentary to article 39 was adopted.*

CHAPTER III. SERIOUS BREACHES OF OBLIGATIONS UNDER PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW

*Commentary to article 40* (Application of this chapter)

*The commentary to article 40 was adopted.*

*Commentary to article 41* (Particular consequences of a serious breach of an obligation under this chapter)

*The commentary to article 41 was adopted.*

PART FOUR. THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION

*General commentary to Part Four*

*The general commentary to Part Four was adopted.*

CHAPTER I. INVOCATION OF THE RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION

*Commentary to article 42* (Invocation of responsibility by an injured State or international organization)

*The commentary to article 42 was adopted.*

*Commentary to article 43* (Notice of claim by an injured State or international organization)

*The commentary to article 43 was adopted.*

*Commentary to article 44* (Admissibility of claims)

*The commentary to article 44 was adopted.*

<sup>296</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 95, commentary to article 34, paragraph (2).

*Commentary to article 45* (Loss of the right to invoke responsibility)

*The commentary to article 45 was adopted.*

*Commentary to article 46* (Plurality of injured States or international organizations)

*The commentary to article 46 was adopted.*

*Commentary to article 47* (Plurality of responsible States or international organizations)

84. Mr. GAJA (Special Rapporteur) said that in the text of the draft article itself, the word “draft” should be deleted from paragraph 2.

*The correction to the text of article 47 was noted.*

*The commentary to article 47 was adopted.*

*Commentary to article 48* (Invocation of responsibility by a State or an international organization other than an injured State or international organization)

85. Mr. GAJA (Special Rapporteur) said that in paragraph 3 of the text of the draft article itself, the phrase “that is not” should be replaced by “other than” in order to align it with the wording used in paragraphs 1 and 2. In addition, the word “draft” had mistakenly been left in the text in paragraphs 4 (a) and 5 but should be deleted.

*The corrections to the text of article 48 were noted.*

*The commentary to article 48 was adopted.*

*The meeting rose at 6.05 p.m.*

### 3032nd MEETING

*Wednesday, 5 August 2009, at 10.05 a.m.*

*Chairperson:* Mr. Ernest PETRIČ

*Present:* Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vascianie, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

#### **Draft report of the Commission on the work of its sixty-first session (continued)**

CHAPTER IV. *Responsibility of international organizations (concluded)* (A/CN.4/L.748 and Add.1–2 and Add.2/Corr.1)

C. **Text of the draft articles on responsibility of international organizations adopted by the Commission on first reading (concluded)**

2. **TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO (concluded)** (A/CN.4/L.748/Add.2 and Corr.1)

PART FOUR. THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION (*concluded*)

CHAPTER I. INVOCATION OF THE RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION (*concluded*)

*Commentary to article 49* (Scope of this Part)

*The commentary to article 49 was adopted.*

CHAPTER II. COUNTERMEASURES

*Commentary to article 50* (Object and limits of countermeasures)

*The commentary to article 50 was adopted.*

*Commentary to article 51* (Countermeasures by members of an international organization)

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

Paragraph (3)

1. Ms. ESCARAMEIA suggested that, in order to reflect the Commission’s heated debate over the issue of countermeasures, a sentence similar to the one added to the commentary to article 21 (Countermeasures) should be inserted, indicating that some members thought that members of an international organization should never be authorized to take countermeasures against the organization.

2. Mr. VASCIANNIE said that the phrase proposed by Ms. Escarameia should be worded in such a way as to make it clear that the point of view had been expressed by a minority of members.

3. The CHAIRPERSON suggested using the phrase “a view was expressed”.

4. Mr. GAJA (Special Rapporteur) endorsed this proposal and said that the phrase should be inserted at the end of the paragraph. The same wording, “a view was expressed”, should also be used in the commentary to article 21 (Countermeasures).

5. He outlined for members of the Commission the written comments provided to him by Mr. Nolte, who was absent from that meeting. Mr. Nolte had pointed out that the second sentence of paragraph (3) might in some respects appear to contradict what was said later regarding the principle of cooperation. For international organizations, that principle was not merely a general principle or a duty to cooperate, but a specific treaty-based obligation arising from membership of the organization, as the ICJ had pointed out in paragraph 43 of its advisory opinion of 20 December 1980, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*. The advisory opinion stated that “[t]he very fact of Egypt’s membership of the Organization entails certain mutual obligations of co-operation and good faith incumbent upon Egypt and upon the Organization.” A reference to that statement might be included in paragraph (3).

6. He himself did not think that there was really a contradiction in paragraph (3), where two distinct points