United Nations A/C.6/64/SR.15

General Assembly
Sixty-fourth session

Official Records

Distr.: General
4 December 2009

Original: English

Sixth Committee

Summary record of the 15th meeting
Held at Headquarters, New York, on Monday, 26 October 2009, at 10 a.m.

Chairman: Mr. Benmehidi . . . . . (Algeria)

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09-57665 (E)

The meeting was called to order at 10.15 a.m.

Agenda item 81: Report of the International Law Commission on the work of its sixty-first session (A/64/10 and A/64/283)

1. **The Chairman** expressed the Committee's appreciation of the International Law Commission's unique contribution to the progressive development and codification of international law. The Commission's report provided invaluable insight on a wide range of complex legal issues.

2. **Mr. Petrič** (Chairman of the International Law Commission), introducing chapters I-III, IV and XIII of the Commission's report (A/64/10), said that, in 2009, the Commission had held another productive session during which it had completed, on first reading, a set of 66 draft articles together with commentaries on responsibility of international organizations. Substantial progress had also been made on reservations to treaties, and the completion of the draft guidelines, on first reading, was within sight. The Commission had also continued its substantive discussions on expulsion of aliens and protection of persons in the event of disasters, as well as advancing its work and making preliminary decisions with regard to shared natural resources and the obligation to extradite or prosecute (*aut dedere aut judicare*). In addition, preliminary discussions had been held on the most-favoured-nation clause and treaties over time. However, the Commission had not considered the topic of immunity of State officials from foreign criminal jurisdiction at its sixty-first session. At the beginning of the session, it had elected Mr. Shinya Murase (Japan) to fill the casual vacancy caused by Mr. Chusei Yamada's resignation.

3. Interaction between Governments and the Commission was essential because, in its work of progressively developing and codifying international law, the Commission relied on Governments to provide guidance on broader policy issues, as well as information on State practice in relation to topics on the Commission's agenda. Moreover, it was important that the information received should be as representative as possible of the United Nations membership as a whole. As the Commission took up "non-traditional" topics, that interaction became even more necessary.

4. The special rapporteurs played a central role in the functioning of the Commission. The Commission therefore appreciated the General Assembly's interest in their work, as evidenced by Assembly resolution 63/123. The special rapporteur mechanism made the Commission's working methods more efficient and effective but placed an enormous burden, in terms of time and resources, on individual special rapporteurs. Consequently, the Commission hoped that the honoraria accorded to special rapporteurs in the past would be restored. Exchanges between delegations and special rapporteurs were essential at different stages of the consideration of a topic and the annual consideration of the Commission's report by the Committee presented an appropriate opportunity for such interaction.

5. Referring first to chapter XIII of the report, which concerned other decisions and conclusions of the Commission, he drew attention to the importance of cooperation between the Commission and other bodies. For example, it had received its traditional visit from the President of the International Court of Justice which, as always, had afforded an opportunity to explore the synergies between the work of the Court and the Commission. The Commission had also held a meeting with legal advisers of international organizations within the United Nations system on responsibility of international organizations. It had continued its long-standing involvement in the International Law Seminar, which made an essential contribution to the teaching, study, dissemination and wider appreciation of international law, and expressed its gratitude to those Governments that had made voluntary contributions, which had made it possible to award scholarships to participants. The Gilberto Amado Memorial Lecture Series had been relaunched with a lecture on the International Tribunal for the Law of the Sea delivered by the President of the Tribunal. The Commission was monitoring activities concerning the trust fund that had been established to clear the backlog in publishing its *Yearbook*; it was encouraged by the steps taken by the General Assembly and hoped that Governments would contribute generously to the fund.

6. Following the resignation from the Commission of Mr. Ian Brownlie, Special Rapporteur for the topic "Effects of armed conflicts on treaties", Mr. Lucius Caflisch had been appointed to replace him.

7. The Codification Division of the Office of Legal Affairs, which acted as the Commission's secretariat, had supplied the Commission with invaluable technical, procedural and substantive services, including research projects and the preparation of a memorandum on

reservations to treaties in the context of succession of States (A/CN.4/616).

8. Turning to the substantive chapters of the report, beginning with chapter IV on responsibility of international organizations, he said that the Commission had adopted, on first reading, a set of 66 draft articles, together with commentaries, and had decided to transmit the draft articles to Governments and international organizations for comments and observations, with the request that such comments and observations should be submitted to the Secretary-General by 1 January 2011 in order to ensure successful completion of the draft articles on second reading. The entire set of draft articles, together with updated commentaries, had been reproduced in the report; they took into account recent developments in the case law on responsibility of international organizations, as well as some points that had arisen from observations previously provided by States and international organizations.

9. The Commission had introduced a number of modifications to the structure of the draft articles. Draft articles 1 and 2, on the scope of the draft articles and the use of terms respectively, constituted a new Part One, entitled "Introduction". The former title of Part One, "The internationally wrongful act of an international organization", had become the title of Part Two, and the former Parts Two and Three had become Parts Three and Four respectively. In the new Part Two, a new chapter I entitled "General Principles" contained two draft articles on the responsibility of an international organization for its internationally wrongful acts and on elements of such an act. The draft articles dealing with the responsibility of a State in connection with the act of an international organization had been placed in a new Part Five. Lastly, the new general provisions adopted at the Commission's sixty-first session were grouped in a final Part Six.

10. A number of provisions adopted at previous sessions of the Commission had been modified on the basis of comments received and a general review of the text by the Special Rapporteur in his seventh report (A/CN.4/610). Draft article 2 on use of terms had initially referred only to the term "international organization"; the terms "rules of the organization" and "agent", previously dealt with in another draft article, had been moved to draft article 2 so as to offer a more comprehensive provision. The substance of the definitions concerned had not been modified. The definition of "rules of the organization" closely reproduced the wording of article 2, paragraph 1 (j), of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, with the addition of "other acts" that an organization could adopt besides decisions and resolutions. The expression "in particular" provided useful flexibility, as the rules of the organization also covered, for instance, agreements entered into with the host State. As to the term "agent", in most cases the agent would have been charged by the organization with carrying out one of its functions, as had been emphasized by the International Court of Justice. Nevertheless, the Commission had opted for a wording that was as inclusive as possible in the specific context of the draft articles.

11. Changes had also been made to Part Two of the draft articles. The provision dealing with general principles had been made into a distinct chapter and divided into two separate draft articles entitled "Responsibility of an international organization for its internationally wrongful acts" and "Elements of an internationally wrongful act of an international organization", in line with the structure eventually adopted for the articles on responsibility of States for internationally wrongful acts. Paragraph 2 of draft article 9 (Existence of a breach of an international obligation) had been modified in order to make it clearer that, apart from some exceptions, rules of the organization might create international obligations the breach of which would fall within the scope of the draft articles. The draft article retained an element of ambiguity, since it was not for the Commission to determine the extent to which international obligations might arise under the rules of an organization for the purposes of the draft articles.

12. Draft article 16 dealt with cases in which an international organization incurred responsibility in connection with an act of one of its members committed in the context of a decision, authorization or recommendation addressed to that member by the organization. An earlier version of the provision had referred to acts committed "in reliance on" an authorization or recommendation. The Commission had decided to replace the phrase "in reliance on" with the phrase "because of" in order to reinforce the causal link between the authorization or recommendation of the organization and the act of its member. Draft article 17 had been introduced in order to address, with regard

to international organizations that were members of another international organization, a situation comparable to that envisaged in Part Five of the draft articles regarding responsibility of a State that was a member of an international organization. Even though such a situation would be exceptional, if the relevant conditions were met there would be no reason to exclude the responsibility of an organization that used another organization of which it was a member as a vehicle for its wrongful conduct.

13. Draft article 20 on self-defence had given rise to extensive debate in the Commission. The Special Rapporteur had considered proposing the deletion of the provision, but the debate had revealed a need to retain a reference to self-defence. Some members had considered that the mere use of the term "self-defence" was inappropriate as it would extend to other actors a right belonging to States; others had taken the view that self-defence was an inherent right of every subject of international law. Several options had been considered in order to reconcile the different opinions, including the drawing of an analogy with the conditions for the exercise of self-defence under the Charter of the United Nations. However, some members of the Commission had been reluctant to establish any parallel between States and international organizations in that respect, given that the right of self-defence of international organizations and their agents was restricted and could not be equated to that of States. Finally, the Commission had decided to refer to the lawful measure of self-defence that an international organization might take "under international law". Although it might appear redundant, the word "lawful" was intended to allude to the conditions surrounding the exercise of self-defence by an international organization.

14. Changes had also been made to draft article 60 concerning the responsibility of a State member of an international organization that sought to avoid compliance with one of its own international obligations by taking advantage of the fact that the organization had competence in relation to the subject matter of that obligation. The purpose of the changes had been to better identify the conditions for the responsibility of member States in such circumstances. While retaining a necessarily subjective element of intent on the part of the member State seeking to avoid compliance, the Commission had stressed the causal link between the advantage taken by the State of the competence of the organization and the commission of a given act by the latter. It had eventually been agreed that the reference to the conduct of a State "prompting" the organization to commit the wrongful act would fairly describe the process by which responsibility was entailed in that specific situation.

15. With regard to the new draft articles adopted at the sixty-first session, draft article 21 dealt with the sensitive issue of countermeasures taken by an international organization as circumstances precluding the wrongfulness of an act of that organization. Paragraph 1 addressed the general case of countermeasures taken by an international organization against a State or another international organization and referred explicitly to the substantive and procedural conditions required by international law for the taking of countermeasures, some of which were listed in chapter II of Part Four of the draft articles. Paragraph 2 dealt specifically with countermeasures taken by an organization against one of its members. While it did not exclude such cases as a matter of principle, the provision was intended to restrict them; hence, paragraph 2 was phrased negatively — "an international organization may not take countermeasures ... unless" — so as to better reflect the fact that such countermeasures should remain exceptional. In subparagraph (a), the phrase "not inconsistent with the rules of the organization" was intended to ensure that, if an international organization took countermeasures, it did not depart from its rules. Subparagraph (b) emphasized the priority to be given to available means for inducing compliance other than countermeasures. Similar language was used in draft article 51.

16. The four general provisions adopted at the sixty-first session composed Part Six of the draft articles. Draft article 63, entitled "*Lex specialis*", was an essential provision in the context of the responsibility of international organizations. The rules of an organization applicable to the relations between the organization and its members provided an obvious example of the special rules envisaged in the draft article, although other kinds of special rules could also be envisaged. However, the draft article was not intended to deal with the broader issue of the need to take into account considerations resulting from the specific characteristics and variety of international organizations. Although the diversity of international organizations, and the corresponding need to apply the draft articles flexibly, should not be overlooked, the

Commission had considered it unnecessary to include a specific provision to that effect, which could be used by some international organizations as a tool for attempting to escape their responsibility. In other words, the inclusion of such a provision could have jeopardized the draft articles, because an international organization could be tempted to invoke its specific characteristics in order to avoid the consequences of its wrongful conduct altogether. The argument of the variety of international organizations should not be used to the detriment of the exercise of codification in which the Commission was engaged.

17. Draft articles 64 (Questions of international responsibility not regulated by these articles), 65 (Individual responsibility) and 66 (Charter of the United Nations) had been adopted with no substantial changes from the corresponding provisions of the articles on State responsibility. However, the obvious importance of draft article 66 for the United Nations should be emphasized. As conveyed by the commentary, the draft article should not be construed in such a way as to affect the applicability of the principles and rules set forth in the draft articles to the international responsibility of the United Nations.

18. The Commission would welcome comments and observations from Governments on the issues listed in paragraph 27 of its report, which centred on the entitlement of an international organization to invoke the responsibility of a State. It could be argued that those issues were regulated by analogy in the articles on State responsibility. However, if Member States so wished, the Commission could address them expressly in a report or specific draft articles.

19. **Ms. O'Brien** (Under-Secretary-General for Legal Affairs, the Legal Counsel), introducing the report of the Secretary-General on assistance to special rapporteurs of the International Law Commission (A/64/283), said that the report had been prepared pursuant to General Assembly resolution 63/123 and contained information on assistance currently provided to the special rapporteurs and on practical needs and challenges which they encountered in their work, taking into account previous decisions of the General Assembly.

20. The report recalled the central role played by special rapporteurs in the work of the Commission, as an intellectual pillar around which a topic was developed from its conception to its completion. It also described the two interconnected levels of assistance provided by the Secretariat in the substantive servicing of the Commission, namely assistance provided to the Commission as a whole, from which the special rapporteurs might benefit in a particular manner, and assistance reserved for individual special rapporteurs in the discharge of their specific responsibilities. In particular, the studies and research projects prepared by the Codification Division constituted an indispensable contribution to the Commission's work.

21. The report also referred to the challenges encountered by the special rapporteurs. The first was institutional, since the Commission was an independent body of experts in international law whose role was distinct from that of the secretariat. Consequently, certain aspects of the Commission's work that required the intellectual stamp of authority of the special rapporteurs and the collective imprimatur of the Commission exceeded the type of assistance normally provided by the secretariat. Second, once a session of the Commission had concluded, the special rapporteurs continued to work on their topics throughout the year, in addition to their regular professional responsibilities. The requirement of independence in the performance of their functions meant that they carried out their tasks separately from their other professional responsibilities, often at their own expense and in their own time. In some instances, special rapporteurs had used their personal resources for research activities or had foregone travel entitlements to make detours to conduct research elsewhere on their way to or from Geneva.

22. Lastly, the report reviewed what the General Assembly had done in the past in recognition of the unique role of special rapporteurs. For example, in 1949, it had authorized on an exceptional basis the payment of research grants to special rapporteurs, in recognition of the work and time involved in preparing drafts and working papers to assist the Commission.

23. In recent bienniums, limits on budget growth had led to constraints on the Organization's programmes, including the activities of the Commission. The General Assembly, acting through its appropriate committees, had competence in budgetary matters and, in presenting the report, the Secretary-General had been mindful of the Assembly's decisions on the question. The report was intended to provide the Committee with the relevant context for proceeding with the matter.

24. **Mr. Winkler** (Denmark), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that the draft articles on responsibility of international organizations achieved an overall balance between drawing inspiration from the articles on State responsibility and recognizing that the particular features of international organizations sometimes called for particular solutions. He commended the Commission on its close cooperation with international organizations and States in the quest for a more substantial basis for its codification work, which should be firmly grounded in actual practice and the views of States.

25. The preliminary view of the Nordic countries on the issues on which the Commission had requested comments was that they did not need to be covered in the draft articles; written comments in that regard would be provided in due course. He did, however, wish to make observations on the commentary to draft article 6 (Conduct of organs or agents placed at the disposal of an international organization by a State or another international organization). In the cases of *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*, the European Court of Human Rights had addressed an issue of admissibility, specifically whether the applicants were within the jurisdiction of one of the respondent States. For such an application to be admissible, the act of contributing personnel to an international operation under unified command acting under a mandate from the Security Council would have to trigger the jurisdiction of a contributing State over a foreign territory or a person in that territory. The Court would also have had to find that a contributing State did have jurisdiction in such a case. However, the Court had decided that no such jurisdiction existed, and that contributing personnel to a United Nations operation or an operation led by the North Atlantic Treaty Organization (NATO) could not establish for the State concerned "effective control" over a territory or the persons in it. In that light, the commentary to draft article 6 ought to have pointed out that the decision of the Court addressed an issue of State jurisdiction, irrespective of its view that the conduct in question was attributable to the United Nations.

26. Secondly, the Commission should perhaps have made room in its commentary for a broader functional scope of the organs or agents concerned, taking account of the variety of types of personnel and equipment that States provided to international peace operations. Organs of States, as such, might be placed at the disposal of an international organization. In addition, civilian or military experts, advisers or other personnel might be seconded to it; such individuals, clearly, were not "organs" in the sense of draft article 6, but they did fall within the general rule contained in draft article 5. However, it might be unduly restrictive to characterize contributions to peace operations as "military contingents" or "forces", because the Security Council might authorize regional or other international organizations to establish unified command and control in a regional theatre of operations, so creating international structures with their own chains of command and control. The Panel on United Nations Peace Operations had underscored the importance of ensuring the integrity of such chains of command. More frequently than the commentary suggested, specific categories of personnel with clearly defined but limited functions were included in international structures with complex multinational components.

27. The European Court of Human Rights had considered in the *Behrami* and *Saramati* cases, and in later ones, that an international organization might in principle have retained ultimate authority and control over operational matters, while having lawfully delegated certain powers. Such a position might entail consequences for the United Nations and other international organizations in situations where they retained ultimate authority and control without themselves having effective control. Greater clarity was needed with regard to the best way of ensuring respect for human rights and international humanitarian law and in order to prevent and repress internationally wrongful acts. The Commission should also consider the consequences of the lawful delegation of powers; the Security Council was uniquely placed to provide guidance in that respect. The Nordic delegations agreed with the view expressed in the commentary to draft article 6 that the international responsibility of an international organization must be limited to the extent of its effective operational control, and not merely according to the criterion of ultimate authority and control.

28. The Nordic delegations were concerned at the suggestion, in the commentary to draft article 16, that recommendations by international organizations might give rise to the international responsibility of the organization concerned. The extent of the draft article

was not entirely clear. International organizations often adopted resolutions of a political and non-binding nature, sometimes by majority vote, which might nevertheless be interpreted as recommendations.

29. **Mr. Hernández García** (Mexico), speaking on behalf of the Rio Group, said that the Group had appreciated receiving an advance copy of the summary of Chapters II and III of the Commission's most recent report, and would benefit from receiving the report as a whole a few weeks before the beginning of the General Assembly, which would give all delegations time to consider the topics under consideration. He welcomed the support given to the special rapporteurs by the Codification Division of the Office of Legal Affairs. States, international organizations and other relevant institutions should continue supplying essential evidence of State practice so that the special rapporteurs, the other members of the Commission and the Codification Division could discharge their functions. The questionnaires prepared by the special rapporteurs should focus more on the main aspects of the topic under consideration, and should seek information about national legislation or jurisprudence, which would enable more States to respond. Requests for information from the special rapporteurs should aim to enhance dialogue with Member States, in accordance with General Assembly resolution 63/123. For that purpose, there should be more contacts and consultations between special rapporteurs and representatives of Member States at meetings of the Committee. Owing to budgetary constraints, not all special rapporteurs were able to attend the Committee's meetings; ways to ensure their full participation should therefore be explored. Special rapporteurs should be available when their topics were under consideration by the Committee, to enable delegations to comment and put questions in a more informal setting. The dialogue between the Commission and the Committee should always be scheduled near the time of the meeting of legal advisers. A short list of topics to be covered should be announced well in advance, to allow for better preparation.

30. **Mr. Trauttmansdorff** (Austria), noting that the Commission's report did not seem to reflect the same level of progress as in previous years, urged the Commission to give high priority to the topic of immunity of State officials from foreign criminal jurisdiction, which was of great practical relevance and was widely discussed in international forums such as the International Court of Justice and the International Criminal Court. He commended the secretariat on its efforts to make the Commission's documents available to the general public through its website, and would welcome further efforts to make the website more user-friendly. It would be appreciated if advance copies of Commission documents could be made available before they were translated into all official languages.

31. On the topic of responsibility of international organizations, his delegation continued to be concerned about the abstract character of some of the draft articles derived from the articles on State responsibility. The draft articles in question did not seem to take sufficient account of the varying degrees of power transferred to organs of international organizations under their constituent instruments and in practice, or the different legal effects of the decisions of those organs for the members of the organizations and third States, or the different degrees of influence exercised by member States, individually or collectively, on the decision-making of those organs.

32. The Commission had invited States to comment on the question of when conduct of an organ of an international organization placed at the disposal of a State was attributable to that State (para. 27). The answer derived from applying by analogy article 6 of the articles on State responsibility would be that conduct of an organ in those circumstances would be attributable to the State if the organ was acting in exercise of elements of the governmental authority of the State. However, that answer applied only to a situation in which the organ was explicitly placed at the disposal of the State. In other situations, by analogy with article 8 of the articles on State responsibility, the conduct of an organ of an international organization might also be attributed to a State if the organ was acting on the instructions of, or under the direction or control of, the State.

33. As for the question of when consent given by an international organization to the commission of a given act by a State was a circumstance precluding wrongfulness on the part of the State, no analogy was possible with the articles on State responsibility because consent given by international organizations was not in all respects comparable to consent given by States; the powers of international organizations were more limited than those of States, and if the rights of an organization were violated, those of its members might also be affected. Other questions which arose in

that context were which organ of the organization would be entitled to give valid consent; whether a general consent by way of a non-binding resolution such as a General Assembly resolution amounted to consent in the sense of the articles on State responsibility; and whether such consent could override treaty obligations, because if so there would be conflicting norms under international law. Although the question raised by the Commission could be interpreted as relating only to consent by the organization to acts in breach of obligations owed to the organization itself, the issue might also arise in other situations. For example, the Security Council might authorize States to use force under Article 2, paragraph 4, of the Charter of the United Nations without the conditions for self-defence being met. The matter of consent by an international organization, in all its ramifications, called for further study.

34. As for the Commission's third question, on the competence of international organizations to invoke the responsibility of States, it had first to be determined whether the invocation of responsibility was limited to the rights referred to in draft article 48, paragraph 4. International organizations, especially those with monitoring bodies or compliance mechanisms, frequently discussed and invoked the responsibility of States. The right of an organization to invoke the responsibility of a State in relation to subjects of international law other than itself depended largely on its constituent instrument and subsequent practice. For example, provided that safeguarding the interest of the international community underlying the obligation breached was included among the functions of the international organization invoking responsibility, as set out in draft article 48, paragraph 3, the right of the organization to invoke the responsibility of a State with respect to *erga omnes* obligations was undisputed. Problems might arise in respect of obligations owed by a State only to one or a few of the other member States of the organization. The Nordic delegations did not believe that the organization would be entitled to invoke the responsibility of the State in question in those circumstances unless its own rules enabled it to do so.

35. **Mr. Popkov** (Belarus) said that the Commission's treatment of the topic could serve to underpin the international legal basis of the work of international organizations, while restraining States from the commission of unlawful acts under cover of international organizations. His delegation supported the overall structure of the draft articles. However, their scope could be expanded to address specific aspects of the responsibility of States towards an international organization. Responsibility of and towards international organizations were of equal significance in the law of international organizations, which had international legal personality. An international organization was entitled to invoke the responsibility of a State in certain circumstances: failure by a State to perform its treaty obligations towards the organization; the causing of damage to its property or lawful interests as a result of internationally wrongful acts of the State; and the causing of injury to the personnel of the organization in the course of their duties, or other persons acting under the control and on behalf of the organization, where the State was aware of their status. In all those instances, the purpose of invoking responsibility was to remove hindrances to the organization's fulfilment of its role. However, the responsibility of States members of the organization and of States not members might differ, and the rules of the organization, in particular its constituent instrument, might give rise to other grounds for the responsibility of States members. In that connection, it might be appropriate to ask whether the focus should be solely on the rules in the constituent instrument as *lex specialis*, or whether the question of the responsibility of a State member of the organization should be considered in the broader context of the legal relations between subjects of international law. Questions of State responsibility towards international organizations should be handled in the context of the articles on State responsibility.

36. In principle, States and international organizations should be on an equal footing with regard to their international responsibility for internationally wrongful acts. However, in exceptional cases, the question of subsidiary responsibility of a State member of an international organization towards third parties might arise if the member State had accepted responsibility, if there were relevant provisions in the organization's constituent instrument or if there were grounds for joint responsibility with the organization. In that connection, draft article 39 could be interpreted as relating to a subsidiary responsibility on the part of member States to make good any shortfall in the funds of an organization in the event of its having to pay compensation. If its funds were insufficient for that purpose, draft article 61 might apply, even if the State had not committed acts referred to in other provisions

in Part Five. His delegation would prefer to amend the wording of draft article 39 to limit the scope of the obligation of member States to inducing the organization to fulfil its obligation to make reparation within available resources and to link the obligation to Part Five of the draft articles.

37. Draft article 20 (Self-defence) could be omitted, because under Article 51 of the Charter of the United Nations self-defence was already a circumstance precluding wrongfulness. In any event, the collective self-defence of States was one of the primary aims of certain international organizations; therefore, a reference to self-defence in the draft articles might result in ambiguous or contentious legal situations.

38. He had serious doubts as to the wisdom of including draft article 24, on necessity. Practice in that area was scarce, and there was no clear understanding of the term "essential interest of the international community" used in paragraph 1 or of what was meant by "seriously impair the essential interest of the State".

39. The problematic concepts of "obligations owed to the international community as a whole" and "responsibility towards the international community" were referred to in a number of draft articles, including draft article 48 (Invocation of responsibility by a State or an international organization other than an injured State or international organization). Those concepts should not be included in the draft without prior in-depth study by the Commission. Responsibility towards the international community played only an insignificant role in invoking the responsibility of wrongdoers, and customary rules on the subject were still evolving. In practice, the prevailing concept of international responsibility was that of the bilateral relationship between the author of the act and its victim.

40. With regard to the question of when consent given by an international organization to the commission of a given act by a State was a circumstance precluding wrongfulness of that State's conduct, on which the Commission had requested comments, his delegation proposed applying the legal principle *volenti non fit injuria*, provided that the act was directed exclusively against the international organization, not against third parties; that the organization's consent was freely given and clearly expressed; and that the act in question did not seriously infringe the rights of States members of the organization consenting to it. With regard to the question of when conduct of an organ of an international organization placed at the disposal of a State was attributable to the latter, articles 6, 8, 9 and 11 of the articles on State responsibility could be applied by analogy.

41. In draft article 63, the words "are governed by special rules of international law, including rules of the organization" could be interpreted too broadly. No *lex specialis* should be contemplated apart from the internal law of the international organization concerned. If the majority view was in favour of retaining that wording, the commentary to the draft article should contain examples of *lex specialis* which would apply to the situation in question.

42. **Mr. Duan** Jielong (China) noted that the draft articles on responsibility of international organizations were still based mainly on the practice of the United Nations and the European Union. Given the diversity of types and functions of international organizations, further in-depth study was needed of the differences between international organizations and States as to characteristics, composition, purposes and functions, and of the practice of international organizations other than the United Nations and the European Union.

43. Concerning the definition of international organizations, new developments in the practice of such organizations had resulted in non-State entities being able, in some cases, to join them alongside States. International organizations were, however, intergovernmental in character, being composed mainly of sovereign States, and the definition in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations was appropriate to the topic. His delegation therefore proposed limiting the definition in draft article 2 to intergovernmental organizations.

44. With regard to countermeasures, there was an important difference between international organizations and States, in that international organizations represented a certain degree of centralization of the international community, in which States were the main actors. Introducing the concept of countermeasures into the regime of responsibility of international organizations would run counter to that centralizing function; his delegation therefore recommended a more cautious approach by the Commission to the whole matter.

45. The relationship between the responsibility of an international organization under draft articles 13 to 16

and the responsibility of a State under draft articles 57 to 61 was not clear. Where a member State and an international organization were both responsible for certain wrongful acts, the question arose of how responsibility should be assigned. Moreover, given the special relationship between member States and international organizations, it was difficult to define in practice whether the act of a member State was an act of "aid or assistance", "direction and control", or "participation in the decision-making process of the organization according to the pertinent rules of the organization". The question should be further studied, and as much clarification as possible provided in the draft articles or the commentaries.

46. **Ms. Wasum-Rainer** (Germany) said that the draft articles on responsibility of international organizations and the articles on responsibility of States for internationally wrongful acts would be significant for national and international jurisprudence and a leading reference for the practice of States and international organizations. The Special Rapporteur had successfully balanced the similarities and differences between the two subjects of responsibility under international law. The highest courts of her country had been guided on many occasions by the articles on State responsibility and, as noted by the representative of Denmark, the European Court of Human Rights had referred to the draft articles on responsibility of international organizations in its decision in the cases of *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*.

47. Concerning the responsibility of a State in connection with the act of an international organization, her delegation had already stated that it rejected the attribution of responsibility to a State merely because of its membership of an international organization. It welcomed the inclusion of the new draft articles 57 to 62 regarding important aspects of that issue, which had been deliberately omitted from the articles on State responsibility, and supported the emphasis on the question of whether the State exercised control over the conduct in question, which was in line with the rationale of draft article 6 (conduct of organs or agents placed at the disposal of an international organization by a State or another international organization).

48. With regard to Part Six of the draft articles, it was her delegation's understanding that relations between an international organization and its member States were to be governed exclusively by the internal rules of that organization. If the intention was indeed that the draft articles should not be applicable in such cases, the title of draft article 63, *Lex specialis*, could be misleading as it suggested a subsidiary rather than an exclusive relationship.

49. Turning to the specific issues on which comments would be of particular interest to the Commission, she said that the issue of when conduct of an organ of an international organization placed at the disposal of a State was attributable to the latter should be addressed in the context of the articles on State responsibility. The situation in question was unlikely to occur since, in most cases where an international organization assumed effective control, it was because the State was unable to act; the organ in question could not be said to be placed at the State's disposal and the conduct was attributable to the international organization, not to the State. It was, however, conceivable to attribute responsibility for the conduct of an organ of an international organization to a State if the latter exercised effective control; an analogy with draft article 6 would be appropriate.

50. In order to answer the question of when consent given by an international organization to the commission of a given act by a State was a circumstance precluding wrongfulness of that State's conduct, it was necessary to consider the nature of the rule that would be violated in the absence of such consent. If the rule was one that protected the rights of the organization, the organization's consent would seem to preclude the wrongfulness of the conduct. If, however, the rule protected the rights of other States, international organizations or individuals, the wrongfulness of the conduct could not, as a matter of principle, be precluded by the organization's consent.

51. As her delegation had stated at the previous session, in addressing the question of when an international organization was entitled to invoke the responsibility of a State, it was important to distinguish between the organization's relations with its member States and its relations with other States. In the first case, the organization's internal rules that were binding on both the organization and its member States should take precedence in governing the relationship between them. In all other cases, by analogy with article 42 of the articles on State responsibility, an organization that was directly injured as a result of a wrongful act committed by a State should be entitled to invoke that State's responsibility. If a State's right was violated and

the international organization was mandated to protect that right, the organization should likewise be entitled to invoke the responsibility of the injuring State on behalf of the injured State. It remained to be decided whether that question should be answered in the draft articles on responsibility of international organizations, or whether it should be dealt with in the context of State responsibility. In the latter case, one solution would be for the Commission to adopt a separate draft article on the subject for endorsement by the General Assembly.

52. **Mr. Montecino Giralt** (El Salvador) encouraged the special rapporteurs of the Commission to continue their work, which would doubtless make a valuable contribution to the codification and progressive development of international law. His country's new Government planned to become more active in the international community, including by becoming a party to additional multilateral instruments. It therefore attached great importance to the work of the Commission and the Committee, which gave Member States an opportunity to adopt, on an equal footing, new international instruments that were of benefit to humankind. The close relationship between those two bodies was an essential mechanism for the exchange of views on current and future aspects of international law.

53. **Mr. Horák** (Czech Republic) said that the adoption of the draft articles on responsibility of international organizations on first reading was a major achievement of the Commission during the current quinquennium.

54. On the issue of when the conduct of an organ of an international organization placed at the disposal of a State was attributable to the latter, he noted that the responsibility of an international organization and that of a State were not mutually exclusive; under certain conditions, conduct regarded as that of an organization could also be attributed to a State. However, the existing case law was, to say the least, ambiguous. The solution was to respect the separate legal personalities of the two, on the understanding that it might sometimes be necessary to pierce the corporate veil of the organization. A member State acting at the behest of an international organization would incur responsibility only if its act exceeded the scope of conduct attributable to the organization, if the act in question was manifestly *ultra vires* or if the act constituted a serious breach of a *jus cogens* obligation.

55. The first case showed that a State could not hide behind the responsibility of an international organization if, in acting at the organization's behest, its conduct exceeded the scope of conduct attributable to that organization. In the second case, the conduct only appeared to be that of the organization since it manifestly exceeded the latter's authority. However, in order to attribute such conduct to the State, whether or not the organization itself incurred any degree of responsibility, it must be proved that the organization's authority had been manifestly exceeded. That standard was the same as the standard of manifest established in article 46, paragraph 2, of the 1986 Vienna Convention for the invalidity of treaties.

56. In the third case, the situation was even more complicated. It appeared from the 66 draft articles adopted on first reading that an international organization could incur responsibility for a serious breach of a *jus cogens* obligation. However, that did not preclude the responsibility of a State which had taken direct, active steps to commit an internationally wrongful act if its conduct met both the objective and the subjective standards for such an act. Thus, while there could be no sweeping attribution of responsibility to all member States of an international organization, under certain circumstances those States could incur responsibility for a breach of secondary obligations under draft article 41 or for aiding or assisting an international organization in the commission of an internationally wrongful act under draft article 57.

57. Concerning the Commission's question as to when consent given by an international organization to the commission of a given act by a State was a circumstance precluding wrongfulness of that State's conduct, his delegation considered that the question of the organization's consent would not be relevant if the State's act was lawful, but only if the organization gave the State its consent to perform an act that the State would not, in itself have authority to perform under international law. Thus, an international organization's valid consent to the State's performance of a given act would preclude the wrongfulness of that act, provided that the organization's granting of consent fell within the limits of its authority, that the State acted strictly within the limits of that consent and that the act did not conflict with a *jus cogens* norm that allowed for no exceptions, even for the organization.

58. With regard to the Commission's third question, the International Court of Justice's advisory opinion of

11 April 1949 on *Reparation for Injuries Suffered in the Service of the United Nations* showed that an international organization was entitled to invoke the responsibility of a State. The rules set forth in draft article 42 might be applied mutatis mutandis; however, since each international organization had its own special competence *ratione materiae* and *ratione personae*, invocation of the responsibility of member States themselves would seem to be an easier option. In that case, the special rules of the international organization might also come into play, unless the organization was invoking the State's responsibility for breach of an *erga omnes* obligation. Furthermore, draft article 48, mutatis mutandis, would not be applicable if a regional organization invoked the responsibility of States other than its members; a similar problem with competence *ratione materiae* arose in the case of specialized organizations.

59. A separate problem arose in the case of draft article 63 (*Lex specialis*). The general rules could be supplemented with special rules, for example, in order to establish the strict liability of international organizations in certain areas, as did the 1972 Convention on International Liability for Damage Caused by Space Objects in the area of space law, or to regulate responsibility in relations between the organization and its member States. In no case, however, should such rules relieve the organization from responsibility or establish double standards among organizations.

60. Issues of responsibility in relations between States and international organizations were so complex that the Commission could not simply rely on analogies with the articles on State responsibility; it would have to address those issues directly. Draft articles would be the best solution, on the understanding that the final form would not be determined until the draft had been finalized.

61. **Mr. Dinescu** (Romania) said that his delegation appreciated the efforts made by the Commission, in cooperation with the Secretariat and other bodies and with Member States, to disseminate information on international law and the work of the Commission. He hoped that the Commission's website would continue to be updated on a regular basis and expressed appreciation for the work of the special rapporteurs, which involved individual research that often represented a challenge in terms of time, financial resources and assistance. The International Law Seminar gave young practitioners an opportunity to familiarize themselves with the Commission's work and to discuss current topics such as piracy and the future role of the Commission. With regard to the specific issues raised in chapter III of the Commission's report, his delegation would be submitting written comments in due course.

62. The topic of responsibility of international organizations was both sensitive and complex and was complicated further by the scarcity of practice in the field. While the articles on State responsibility could provide inspiration in some circumstances, the different nature and diversity of international organizations must be taken into account. Completion of the first reading of the draft articles had confirmed the difficulty of encapsulating rules on the responsibility of various organizations in a single text.

63. His delegation shared the view that the definitions of the terms "rules of the organization" and "agent" were better placed in draft article 2. While it generally agreed with the approach taken in Part Six, which was largely inspired by the corresponding articles on State responsibility, the wording of draft article 63 (*Lex specialis*), which was of great importance, should be given further consideration by the Commission. All the draft articles should reflect the similarities and differences between the responsibility of States and that of international organizations and the diversity of those organizations, but draft articles 16, 60, 61 and 63 were of particular importance and should be drafted with care, taking into account the recommendations and practice of States and international organizations.

64. **Ms. Belliard** (France) said that her delegation would provide written comments in due course on the draft articles on responsibility of international organizations. She noted with satisfaction that the provisions of draft article 21 concerning counter-measures taken by an international organization against one of its members had been worded as restrictively as possible. However, the difficulties of principle raised by the issue, which her delegation had noted at the previous session, remained.

65. In his seventh report on responsibility of international organizations (A/CN.4/610), the Special Rapporteur had emphasized the innovative nature of the idea underlying draft article 28 on international responsibility in case of provision of competence to an international organization (now draft article 60 on responsibility of a member State seeking to avoid compliance), although it could be found in some

jurisprudence. It might also be wondered whether that idea was consistent with the Commission's previously expressed views on the issue of responsibility for wrongful acts. When the provision had been initially proposed, her delegation had stated its willingness to approve it, provided that its scope of application was strictly limited. It was clear from the current text, which had been reworded at the most recent session of the Commission, that the objective pursued by the member State was the basis for the responsibility envisaged. In that context, paragraph (7) of the commentary to draft article 60 seemed somewhat weak, since it stated that only a significant link between the conduct of the member State seeking to avoid compliance and that of the international organization was required and that an assessment of a specific intent on the part of the member State of circumventing an international obligation was not required. On the contrary, specific intent was the key issue. A simple transfer of competence or the act of taking advantage of such a transfer could not, in itself, give rise to the State's responsibility; nor, in principle, could an act committed by an international organization give rise to the responsibility of one of its members.

66. There were still some uncertainties with regard to the exact scope of the term "self-defence" in relation to international organizations. In practice, it was employed in reference to the use of force by an international organization or one of its organs or agents, particularly in the context of United Nations forces. However, it would be risky to make too general an inference concerning the analogy between the State's natural right to self-defence against armed aggression, which was one of the principles that governed the use of force in international relations, and any right of an international organization or of its organs or agents to resort to force in a variety of circumstances. The wording of draft article 20 was nonetheless sufficiently general to leave that question open.

67. The new proposals discussed by the Commission and reflected in the draft articles adopted on first reading were not especially problematic; in particular, draft articles 62, 63 and 64 were satisfactory.

68. Of the three issues on which the Commission had sought comments from Governments, the first two could be easily addressed by analogy with the articles on State responsibility. However, the question of when an international organization was entitled to invoke the responsibility of a State merited in-depth discussion as it might relate to the issue of the functional protection by international organizations of their officials and, in light of the advisory opinion of the International Court of Justice on *Reparation for Injuries Suffered in the Service of the United Nations*, to the possibility of overlapping between such protection and the diplomatic protection exercised by States. The Commission should consider whether draft articles on that issue were necessary; if so, they could be included in an annex to the draft articles on responsibility of international organizations.

69. **Mr. Joyini** (South Africa) invited the Commission to promote closer cooperation with the recently established African Union Commission on International Law. He noted with pleasure the Commission's decision to include the topic "Immunity of State officials from foreign criminal jurisdiction" in its programme of work. That topic was of particular importance in light of the Committee's recent discussion of the related issue of universal jurisdiction, during which his delegation had raised questions concerning the scope of immunities in relation to specific *jus cogens* crimes that the Commission might help answer. In so doing, it would be well served by considering the judgment of the International Court of Justice in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, which showed how complex the issue remained. In particular, it was not clear from the Court's judgment whether ministers for foreign affairs and other senior officials enjoyed full immunity under customary international law; whether such immunity was applicable to genocide, war crimes and crimes against humanity; whether there was a temporal limit on such immunity and, if so, whether that limit was the same for all categories of officials; and whether the fact that the aforementioned serious crimes potentially fell within the *jus cogens* category in any way affected the extent of the immunities, as suggested in the dissenting opinion of Judge ad hoc Van den Wyngaert in the *Arrest Warrant* case.

70. The immunity of State officials to which he had referred was applicable only to the domestic exercise of criminal jurisdiction, not to the exercise of criminal jurisdiction by the international tribunals specifically established to prosecute crimes against humanity, war crimes and genocide. The question then arose as to whether a foreign court could arrest a State official who enjoyed immunity, pursuant to an arrest warrant

issued by such a tribunal. His delegation believed that the foreign court should be able to do so since the national authorities would be acting under the direction of the tribunal; he would nonetheless be keen to hear the Commission's views on the matter.

71. Concerning the topic of responsibility of international organizations, to which his delegation attached great importance, he noted that, since such organizations had legal personality, they could sue and be sued. It was therefore important to ensure that the final product of the Commission's work was aligned with the articles on State responsibility and, in particular, that there was no confusion between the responsibility of States and that of international organizations. In that connection, the reference to a "State which aids or assists an international organization" in draft article 57 required clarification, particularly in light of the assertion in the commentary that the possibility that aid or assistance could result from conduct of the State within the framework of the organization could not be totally excluded. The words "directs and controls" in draft article 58 were equally ambiguous; in particular, the circumstances under which a State would be deemed to have coerced an international organization should be clarified. Draft articles 57 to 60, if not properly understood, could blur the distinction between the acts of the State and those of international organizations, particularly where the former were lawful and the latter unlawful, and could call into question the separate legal personality of international organizations.

72. Draft article 16, which made international organizations responsible for acts committed by their member States or organizations pursuant to a decision binding on those States or organizations, also required deeper scrutiny since States tended to use international organizations to legitimize measures that would be politically difficult to implement without the organization's blessing. The draft article would place a heavy obligation on an organization's member States to resist even the powerful in their midst when asked to take, in the organization's name, decisions that would authorize conduct inconsistent with its principles. On the other hand, it might encourage States to be more vigilant in not allowing the international organization to be used to legitimize action taken in the national interest of one or more of its members rather than in the collective interest of all its members.

73. **Mr. Yee** (Singapore) said that his delegation appreciated the Commission's practice of seeking the views and comments of Member States. It would respond in due course to the questions raised by the Commission on the topic of responsibility of international organizations. The draft articles on that topic were significant since an increasing amount of State-to-State interaction took place in the context of international organizations. In 2007, the Association of Southeast Asian Nations (ASEAN), of which Singapore was a member, had adopted a Charter that sought to support its activities, the increasing diversity and complexity of which made it increasingly likely that issues relating to the Association's international responsibility would arise. The Commission's work was particularly helpful in that respect.

74. International organizations could be large or small, multilateral and intergovernmental or with non-State members. They engaged in a broad spectrum of legally significant activities ranging from procurement to peacekeeping. Crafting a set of legal rules to govern the responsibility of such organizations for wrongful acts, as well as the international responsibility of States for the wrongful act of an organization, was therefore a challenging endeavour.

75. While the draft articles built on the articles on State responsibility, many of them — including draft articles 16 and 60 — were innovative as they addressed the difficult conceptual and practical problem presented by the interface between member States (the "principals") and the international organization (their "agent"). His delegation supported the basic principle that member States should not be able to circumvent their international obligations by "outsourcing" liability to an international organization, just as such organizations should not be able to "outsource" liability to a member State. Although the Commission had sought to elucidate the text of the two draft articles in their respective commentaries, including through references and explanations based on relevant regional jurisprudence, there was little State practice in that area and the draft articles therefore constituted a progressive development of international law.

76. Both draft articles relied on the element of circumvention, in which one entity avoided its international obligations by "outsourcing" conduct to another. While his delegation agreed that that was a necessary element, it was not clear precisely what it was intended to cover. In the commentary to draft

article 16, the Commission explained that the existence on the part of the international organization of a specific intention of circumventing was not required and that the fact of circumvention might be inferred from the circumstances. In order to facilitate application of the draft article, it might be worthwhile to elaborate on what those circumstances might be. The same could be said of the words "seeking to avoid compliance" in draft article 60.

77. Draft article 16, paragraph 2 (b), set out a requirement of causality between the authorization or recommendation of the international organization and the act of its member State or organization. In the commentary, the Commission explained that that condition required a contextual analysis of the role that the authorization or recommendation actually played in determining the conduct of the State or organization; it left open the question of whether a mere factual link, or a further element such as predominant purpose, was required. That ambiguity should be clarified.

78. In the commentary to draft article 60, the Commission stated that a significant link between the conduct of the member State seeking to avoid compliance and that of the international organization was required in order for the State to incur international responsibility for the organization's conduct and that the organization's act had to be prompted by the member State. It would be helpful for the Commission to clarify the meaning of "significant link" and the distinction, if any, between that concept and the requirement of causality in draft article 16, paragraph 2 (b).

The meeting rose at 1 p.m.