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Summary record of the 2960th meeting

Topic:
Responsibility of international organizations

Extract from the Yearbook of the International Law Commission:-
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37. The CHAIRPERSON said that the consultations just held had shown that the differences of opinion among members were greater than he had initially thought. However, all members considered that the proposal to adopt a two-step approach made by the Special Rapporteur in paragraph 9 of his fifth report was acceptable for the moment. With regard to the proposal to draft a preamble, nothing appeared to justify the establishment of a working group for that purpose. If he heard no objection, he would therefore consider that the Commission wished to entrust that task to the Special Rapporteur, who would submit a draft text to the plenary Commission, which would then refer it to the Drafting Committee.

It was so decided.

The meeting rose at 12.05 p.m.

2960th MEETING

Friday, 9 May 2008, at 10.05 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Cafisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Responsibility of international organizations²⁴ (A/CN.4/588, sect. E,²⁵ A/CN.4/593 and Add.1,²⁶ A/CN.4/597,²⁷ A/CN.4/L.725 and Add.1²⁸)

[Agenda item 3]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR

1. Mr. GAJA (Special Rapporteur), introducing his sixth report on responsibility of international organizations (A/CN.4/597), said that the report considered issues relating to the implementation of the international responsibility of international organizations. Questions concerning the final clauses and the placement of the chapter on the responsibility of a State in connection with the act of an international organization would be addressed in his seventh report. In the course of the session, a working group

²⁴ For the text of the draft articles with commentaries thereto provisionally adopted by the Commission at its fifty-ninth session, see *Yearbook ... 2007*, vol. II (Part Two), chap. VIII, sect. C, pp. 81 *et seq.*

²⁵ Mimeographed; available on the Commission's website.

²⁶ Reproduced in *Yearbook ... 2008*, vol. II (Part One).

²⁷ *Idem.*

²⁸ Mimeographed; available on the Commission's website. For the text of the articles as adopted by the Commission at the present session and the commentaries thereto, see *Yearbook ... 2008*, vol. II (Part Two), chap. VII, sect. C.2.

should be convened for a brief discussion of some of the questions to be addressed in the seventh report. As hitherto it had been the Commission's practice to adopt the draft articles provisionally at the same session at which they had been submitted by the Special Rapporteur, the comments submitted by Governments and international organizations always related to texts already provisionally adopted. Accordingly, his seventh report would provide the occasion for responding to comments made by States and international organizations on the draft articles already adopted, and would also contain proposals to review some of its draft articles.

2. International responsibility of an international organization could exist *vis-à-vis* a State, another international organization or other entities or persons. Yet the draft articles that he now proposed addressed only the invocation of responsibility of an international organization by a State or another international organization. That was consistent with the approach taken in Part Two of the draft articles, article 36 of which stated that this Part covered only obligations owed to one or more organizations, to one or more States, or to the international community as a whole, while the Part was without prejudice to any right, arising from the international responsibility of an international organization, which might accrue directly to a person or entity other than a State or an international organization. Thus, although not expressly stated in a separate provision, the limitation on the scope set forth in Part Two of the draft articles also applied to Part Three, and clearly resulted from draft article 46. The reason for not including a separate provision was to maintain consistency with the approach taken in the draft articles on responsibility of States for internationally wrongful acts,²⁹ in which a similar limitation had been expressed in Part Two with regard to the obligations of the responsible State, and an implied limitation had been reflected in Part Three, with regard to the implementation of the international responsibility of a State. That being said, if members considered it necessary for the sake of clarity to introduce a separate provision, he would have no objection.

3. The question of the implementation of the responsibility incurred by a State *vis-à-vis* an international organization clearly related to the responsibility of States and thus lay outside the scope of the present draft articles. The fact that this position had not been covered in the draft articles on responsibility of States did not justify its inclusion in the current draft; one would have to amend several articles on responsibility of States, a course of action which it would probably be unwise to undertake at the present juncture. Obviously, some of the issues to be discussed under the current topic with regard to relations between a responsible international organization and an injured State or international organization might also be relevant where the responsible entity was a State. There was also a more extensive body of practice for cases in which the State rather than the international organization was responsible. Nonetheless, the Commission should resist any temptation to extend the scope of the topic to cover that lacuna.

²⁹ See *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, para. 76 (see footnote 12 above).

4. Since, in most cases, the entities that were injured by a wrongful act of an international organization were States, the definition of an injured State provided in article 42 on responsibility of States should also apply in the context of the current draft. According to that article, there were three cases in which a State might be considered as injured: the case in which the obligation breached was owed to that State individually; the case in which the obligation breached was owed to a group of States, including that State, but the breach specifically affected that State; and the case in which the obligation breached was owed to a group of States, including that State, and the breach was of such a character as to change radically the position of all the other States to which the obligation was owed with respect to the further performance of the obligation. What applied to States would seem also to be applicable by analogy to international organizations. That view was reflected in draft article 46. Thus, for instance, if two international organizations concluded an agreement and one of them subsequently breached an obligation under the agreement, the other organization would be regarded as injured on the ground that the obligation breached was owed to it individually.
5. Articles 43 to 45 on responsibility of States dealt with certain procedural matters. Clearly, provisions on notice of claim and loss of the right to invoke responsibility should apply to injured States irrespective of whether the responsible entity was a State or an international organization. Furthermore, it was hard to see why different rules should apply when the injured entity was not a State but an international organization. Draft articles 47 and 48 therefore replicated the corresponding provisions in the articles on responsibility of States, albeit with some minor adaptations.
6. The main question addressed in his report with regard to procedural rules was whether it was necessary to replicate in the current draft the provisions concerning nationality of claims and the exhaustion of local remedies set forth in article 44 on the responsibility of States. While the draft articles he proposed did not include a provision to that effect, that was not because there might not be cases in which a State could exercise diplomatic protection *vis-à-vis* an international organization. A straightforward example would be that of an international organization that was responsible for administering a territory and that had caused injury to the national of a State, which subsequently exercised diplomatic protection on behalf of its national *vis-à-vis* the international organization. The possibility could also be envisaged of an international organization invoking the responsibility of a second international organization on behalf of one of its agents, for personal injuries suffered by that agent following a breach committed in a territory administered by the latter organization—a situation that closely paralleled the exercise of diplomatic protection. That was a situation envisaged in the advisory opinion of the ICJ of 11 April 1949 on *Reparation for Injuries Suffered in the Service of the United Nations*, which afforded not only functional protection in respect of the damage caused to the United Nations, but also reparation due to the victim or to persons entitled through him. The term “diplomatic protection” was not applicable to such situations, however, as it had been defined by the Commission as relating exclusively to action taken by States.
7. With regard to the exhaustion of local remedies, he could not categorically rule out the possibility that effective remedies might exist within certain organizations. Although the question of the applicability of the local remedies rules to international organizations had been the subject of lively debate in the literature, it arose much less frequently in relation to international organizations than in relation to States. His conclusion was that there was no need to address issues of admissibility in the draft articles. That did not imply, however, that nationality of claims and exhaustion of local remedies could never be relevant when a claim was made against an international organization.
8. An additional advantage in not replicating article 44 on responsibility of States in the current draft was that omitting it would help to dispel the impression given by article 48 of the draft articles on responsibility of States, which at first sight appeared to suggest that the nationality of claims requirement applied also to a State invoking responsibility other than as an injured State. Although that interpretation was clearly wrong, the ambiguity would be averted if no provision concerning nationality of claims was included in the draft articles.
9. In the context of the current draft, a plurality of injured entities or a plurality of responsible entities were likely to exist, especially when both an international organization and its members, or some of them, were responsible in relation to the same internationally wrongful act. The corresponding articles on responsibility of States could be used as models, albeit with a certain number of adaptations that were illustrated in the report. The details of those adaptations could be found in draft articles 49 and 50.
10. On the question of the invocation of responsibility by an entity other than an injured State or international organization, in some respects the position of international organizations did not differ from that of States, as set forth in article 48 of the articles on responsibility of States, which considered the case of an obligation owed to a group of States. In the context of the current draft, the appropriate wording could be “group of entities”. If such a group included an international organization, the latter would be entitled to invoke the responsibility of another international organization on the basis of a provision parallel to that of article 48, subject to the proviso that the obligation breached must be one established for the protection of a collective interest of the group.
11. A more difficult question was whether international organizations were in the same position as States when an international organization breached an obligation owed to the international community as a whole. One example would be the case of an international organization that had committed a breach of a human rights obligation stemming from general international law. Who would then be entitled to invoke responsibility? It seemed clear enough that, in such cases, a State was entitled to invoke the responsibility of the international organization just as it could invoke that of another State. What remained open to question, however, was whether an international organization could invoke the responsibility of another international organization when the latter committed a breach of an obligation owed to the international community as a whole.

12. What little information had been provided by international organizations and Governments suggested that practice in respect of that specific provision was non-existent. It was, however, impossible to rule out the eventuality of an international organization committing this type of wrongful act, for instance a breach of an obligation relating to the protection of human rights under general international law. Should such a breach occur, it was unlikely that another organization would invoke responsibility. But could the Commission take the view that it would not be entitled to do so? Some examples existed of an international organization invoking the responsibility of a non-member State held to be in breach of an obligation towards the international community. Insofar as an international organization was deemed to be entitled to invoke the responsibility of a State, it was conceivable that a similar solution could apply to the invocation of the responsibility of an international organization, which was the only question that had to be addressed in the current draft articles.

13. In chapter III of the report on the work of its fifty-ninth session,³⁰ the Commission had invited Governments and international organizations to express their views on that question. The majority of the comments received indicated that the entitlement of an international organization to invoke responsibility for a breach of an obligation owed to the international community was more limited than that of a State. He had surveyed those comments in paragraph 36 of his report. The crucial element was considered to be whether an international organization would have the mandate to protect the general interests underlying the obligation, for only if that condition were met would an international organization be able to react to a breach relating to interests the protection of which fell within its mandate.

14. That view was reflected in draft article 51, paragraph 3, which seemed to be in line with the passage he quoted, in paragraph 37 of his report, from the advisory opinion of 8 July 1996 on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, in which the ICJ had found that international organizations “are invested by the States which create them with powers, the limits of which are a function of the common interest whose promotion those States entrust to them” [p. 78, para. 25 of the opinion].

15. Consequently, as the Commission of the European Communities had held at the end of the passage quoted in paragraph 36 of his report, a technical transport organization would not “be allowed to sanction a military alliance for a breach of a fundamental guarantee of international humanitarian law that may be owed to the international community as a whole”. The International Law Commission could accept that approach.

16. States and international organizations which were entitled to invoke responsibility as entities other than an injured State or international organization could not seek reparation on their own behalf. After all, they had not been injured. What they could do, as was indicated in draft article 51, paragraph 4, on the model of article 48 of

the draft articles on responsibility of States, was to request cessation of the internationally wrongful act, assurances and guarantees of non-repetition, and performance of the obligation of reparation in the interest of the injured State or organization, or of the beneficiaries of the obligation breached.

17. Those entitlements to invoke responsibility had been set forth in the draft articles on responsibility of States in order to give meaning to the obligations owed to the international community as a whole, or which were established for the protection of a collective interest of a group. Otherwise, if no State had been injured by the wrongful act, the breach would have no legal consequences because, although there would be an obligation of reparation, no State would be able to request it. That was a concern which had resulted in what paragraph (12) of the commentary to draft article 48 on responsibility of States had termed “a measure of progressive development”.³¹ In his view, the same approach should be taken with regard to a breach committed by an international organization.

18. The final section of the report, dealing with countermeasures that States or international organizations could take against a responsible international organization, provided a few examples from practice relating to countermeasures taken by injured States within the framework of the World Trade Organization (WTO). There would be no reason to consider that injured States, which could under certain conditions take countermeasures against responsible States, could not, under the same conditions, take countermeasures against a responsible international organization. While practice offered some examples of countermeasures taken by international organizations against a responsible State, he had found no examples of countermeasures taken by an injured international organization against a responsible international organization. While such action was possible, it was unlikely to occur very often.

19. Countermeasures by international organizations were a delicate question on which the Commission had requested comments in chapter III of the report on the work of its fifty-ninth session. As paragraph 45 of his sixth report recorded, several States had taken the view that, in principle, an injured international organization could resort to countermeasures under the same conditions as those applicable to States. In view of the replies given and the difficulty of finding policy reasons for a different solution, the proposed draft articles on countermeasures were therefore largely similar to the corresponding articles on responsibility of States.

20. However, special rules were likely to apply to the relations between an international organization and its members, whether the injured party was the member or the international organization. The rules of the organization might restrict the resort to countermeasures in one case or the other, or in both. In his report, he had given some examples of such restrictive conditions. That would reflect the duty of cooperation underlying relations between an organization and its members. Although the rules of the organization might affect the relations

³⁰ *Yearbook ... 2007*, vol. II (Part Two).

³¹ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 127.

between an international organization and its members in many ways that were relevant to the issues of international responsibility, the reason he had included draft article 52, paragraphs 4 and 5, was that he felt that such an implicit or explicit restriction on countermeasures resulting from the rules of the organization was sufficiently important to deserve a mention.

21. Draft article 57 dealt with two separate questions. The first related to measures taken against a responsible international organization by an entity other than an injured State or international organization. As was well known, article 54 of the draft articles on responsibility of States provided that the chapter on countermeasures did not prejudice the right of any State which was not injured but which was entitled to invoke the responsibility of another State, to take lawful measures against the responsible State.³² “Lawful measures” was a term about which much had already been written; it was not appropriate for the Commission, at the present stage, to clarify the term, which had represented a compromise solution adopted in order to reach consensus on the articles on responsibility of States. Given the history of article 54 of the articles on responsibility of States and the fact that it would be difficult to find reasons to depart from its wording, the same approach should be followed in paragraph 1 of draft article 57 on the responsibility of international organizations. The fact that measures might be taken by another international organization, rather than by a State, did not justify taking a different approach. The question needed to be left open, although there were examples of international organizations which had not been injured by a breach taking lawful measures against a State.

22. In the second paragraph of draft article 57, he had suggested a rule concerning the resort to countermeasures by members of an international organization to which the injured members had transferred exclusive competence over certain matters. In that case, the member State would not be in a position to resort to countermeasures in the areas for which competence had been transferred, because the entitlement to take them in those areas had been transferred along with competence. One example in which such a situation might arise was that of a regional economic integration organization. The Commission could leave the issue unresolved, or cover it by a reference to *lex specialis*. The other possibility would be to allow the organization to take countermeasures at the request of the member and on its behalf, though clearly within the restrictions imposed by the criterion of proportionality, because the organization might have much more effective means at its disposal than did the State.

23. He wished to stress that the rule he was suggesting was unlikely to be welcomed by the international organizations concerned. It was designed to allow injured member States to respond to the injury by taking indirectly the measures that they were precluded from taking because of the transfer of competence. He therefore expected to receive critical comments on that matter from regional economic integration organizations.

24. Once articles on countermeasures had been adopted, it would be possible to fill a lacuna which had been deliberately left in the chapter on circumstances precluding wrongfulness. A footnote to article 19 stated that the text of that article would be drafted at a later stage, when the issues relating to countermeasures by an international organization would be examined in the context of the implementation of the responsibility of an international organization. That drafting work could be done on the basis of the seventh report, which would have to examine the additional question of whether draft article 19 should cover only countermeasures that an injured international organization might take against a responsible international organization, or whether an injured international organization might also take countermeasures against a responsible State, a question that had not been directly addressed in Part Three, since the draft articles were concerned only with the responsibility of international organizations.

The meeting rose at 10.55 a.m.

2961st MEETING

Tuesday, 13 May 2008, at 10.10 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Al-Marri, Mr. Cafisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kemicha, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Responsibility of international organizations (continued) (A/CN.4/588, sect. E, A/CN.4/593 and Add.1, A/CN.4/597, A/CN.4/L.725 and Add.1)

[Agenda item 3]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to continue its debate on the sixth report of the Special Rapporteur (A/CN.4/597).

2. Ms. ESCARAMEIA noted that draft article 46 (Invocation of responsibility by an injured State or international organization) limited the entities that could invoke the responsibility of international organizations to States and other international organizations. That limitation seemed to stem from the relation between that draft article and draft article 36 (Scope of international obligations set out in this Part), which excluded individuals and other entities from invoking that responsibility. However, that same draft article 36 specified that the obligation breached could also be owed to the international community as a whole, which meant that entities other than States and

³² *Ibid.*, p. 137; see in particular paragraph (7) of the commentary to draft article 54, p. 139.