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Summary record of the 2961st meeting

Topic:
Responsibility of international organizations

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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.

international organizations (for example the International Committee of the Red Cross (ICRC), which was not an international organization, but which had a role to play in situations involving a breach of international humanitarian law) should be able to invoke that responsibility. She therefore urged the Special Rapporteur to revise draft article 46 so as to include other entities that could invoke the responsibility of international organizations.

3. In her view, a new draft article should be added between draft articles 47 and 48, similar to article 44 of the draft articles on responsibility of States for internationally wrongful acts,³³ concerning admissibility of claims. That article would deal with the requirement for a State to exercise diplomatic protection if one of its nationals was injured. According to the report, that omission was attributable more to the difficulty of accepting the requirement to exhaust local remedies than to any dearth of claims by States against international organizations on account of injury caused to their nationals. However, the requirement to exhaust local remedies did not apply only to diplomatic protection, but to almost all international claims. If nothing was said on that matter, what would be the consequence when a national of a State was injured by an international organization? Since the draft article referred only to States and international organizations, that would mean that only direct injuries were covered, and not those caused to nationals of a State. In short, and taking account also of the provisions of draft article 46, that would effectively mean that injuries caused by international organizations to persons other than States or other international organizations were totally excluded from the scope of the draft articles, which was rather unsatisfactory, indeed artificial, given the real state of affairs.

4. The term “entities”, used in draft articles 49 to 51, appeared to refer exclusively to States and international organizations. That terminology was rather confusing, especially because draft article 36, paragraph 2, on the scope of obligations, used the term “entity” with a different meaning; accordingly, that term should be replaced throughout by the expression “States or international organizations”.

5. With regard to countermeasures (draft articles 52 to 57), the Special Rapporteur seemed to admit as a general principle not only that international organizations could be the target of countermeasures by States and other international organizations (with the caveat that, if they were members of the international organization, such action must not be inconsistent with its internal rules), but also that they could themselves impose countermeasures. In her view, those premises raised some difficulties. They seemed to stem mainly from the practice of the European Union and its relations with the WTO. However, the European Union was a very special type of international organization, whose members did not have the capacity to impose most economic countermeasures, or even to react to countermeasures imposed on them. No general rule could be inferred from such a case. Unlike States, international organizations were legally created entities, which had specific mandates spelled out in their

constituent instruments. It was very questionable whether such powers would include, even implicitly, the power to apply countermeasures, a possibility that was in any case increasingly criticized in respect of States themselves. Furthermore, it could be seen from the judgment of the Court of Justice of the European Communities of 13 November 1964, in *Commission of the European Economic Community v. Grand Duchy of Luxembourg and Kingdom of Belgium*, cited in paragraph 43 of the report, that resort to countermeasures was possible only when specifically authorized.

6. In paragraph 46 of his report, the Special Rapporteur stated that the rules of the organization determined the nature of the countermeasures that could be taken, and that if they were unlawful, they carried consequences only if they were taken against its members and not against entities other than its members. In her view, if an international organization acted in breach of the mandate conferred upon it, that affected not only its members, but also the international community as a whole, and countermeasures could never be considered lawful in such a case. Draft article 52 should therefore be reformulated; she also proposed replacing, in its paragraphs 4 and 5, the phrase “only if this is not inconsistent with the rules of the ... organization” with “only if this is permitted by the rules of the ... organization”. Furthermore, it would be useful to add a paragraph 1 *bis* providing that the power of an injured international organization to take countermeasures was limited to the express capacity given to it by its rules.

7. With regard to draft article 55 (Conditions relating to resort to countermeasures), she proposed adding, in paragraph 3 (b), after the words “a court or tribunal”, the words “or any other body”. In draft article 57 (Measures taken by an entity other than an injured State or international organization), she suggested adding, at the end of paragraph 2, a phrase along the lines of “only when the international organization’s mandate expressly so permits”. As for the other draft articles, they could be referred to the Drafting Committee.

8. Mr. McRAE said that the Commission’s unwillingness to distinguish between different types of international organization, with which he had already taken issue at the previous session, was the reason why a number of Governments did not approve of its work on responsibility of international organizations. Furthermore, as long as the Commission gave the impression that it was content simply to adjust the present draft articles to the articles on responsibility of States, it would continue to draw criticism.

9. Thus, the analogy between responsibility of States and that of international organizations encountered a difficulty in draft article 46, which provided that “[a] State or an international organization is entitled as an injured party to invoke the responsibility of another international organization ...”. In his view, if States were entitled to invoke responsibility by virtue of the very fact that they were States, the same was not true of international organizations, which could do so only if they were expressly so authorized, or if that power derived from their constituent instruments. Draft article 46 seemed to be saying

³³ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 29, para. 76.

that international organizations had an autonomous right, which would place them on the same footing as States. It should in fact state that only international organizations with the constitutional mandate to do so could invoke the responsibility of another international organization. If that principle was not expressly stated, the Commission would be perceived to be granting to certain international organizations powers that they did not possess.

10. In fact, in draft article 51 (Invocation of responsibility by an entity other than an injured State or international organization), the Special Rapporteur had done what had not been done in draft article 46. Thus, draft article 51, paragraph 3, made the right of an international organization to invoke responsibility, where the obligation breached was due to the international community as a whole, dependent on whether the organization “has been given the function to protect the interest of the international community underlying that obligation”. While he welcomed that qualification, he considered that in all cases the ability of an international organization to invoke responsibility depended on whether that function had been entrusted to it by its member States. That, in his view, was what could be inferred from the quotation from the advisory opinion of the ICJ on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* given in paragraph 37 of the report. Consequently, it was the rules of the international organization that determined whether it was entitled to invoke responsibility, and that must be made clear in draft article 46, if the Commission wished to avoid giving the impression that it regarded international organizations as being identical to States.

11. With regard to draft article 50, on plurality of responsible entities, he felt that the Special Rapporteur’s economy of language had perhaps led to some confusion. When the Special Rapporteur spoke of the responsibility of a subsidiary entity, it needed to be made clear that what was at issue was the independent responsibility created in accordance with draft article 29, so as to ensure that no confusion arose between the responsibility of an organization and the potential responsibility of its members.

12. On countermeasures, in paragraph 41 of his report the Special Rapporteur took the view that they were an important aspect of implementation of international responsibility, and that it was hard to find a convincing reason for exempting international organizations from being targeted by such measures. The draft articles went further, however, because they dealt with the right of international organizations to take countermeasures, not simply with the fact that they could be the target of them.

13. *Pace* the Special Rapporteur, one might take the view that countermeasures were the relic of a primitive system based solely on the use of force, and that their expansion through a process of progressive development of international law was to be discouraged rather than promoted.

14. It was a process of progressive development, because there was no existing law on that matter and practice was virtually non-existent. The Special Rapporteur referred to cases involving WTO and the European Communities, but those examples were suspect in two respects.

15. First, although there was much debate on the issue, retaliation under WTO rules was not exactly the same as countermeasures under international law, and had not been designed as a treaty-based form of countermeasure. It had its own unique origins and characteristics. Under the WTO rules, withdrawal of concessions from a party that had failed to fulfil its obligations was essentially a contractual remedy, and not a measure imposed in reprisal for non-compliance with an international obligation. To take WTO practice as illustrative of the operation of countermeasures was to generalize a quite specific regime.

16. Secondly, to consider WTO practice in the context of cases involving the European Communities was even more problematic. In the *Hormones* case, for example, retaliation against the European Communities had been authorized, not because the European Communities was an international organization, but because it was a party to the WTO agreement. Such a case could therefore not tell one anything about the application of countermeasures to an international organization.

17. Furthermore, in many cases, and in particular in the context of WTO, the European Communities acted more like a federal State than an international organization. There was really no parallel with international organizations such as the United Nations, the North Atlantic Treaty Organization (NATO), or even WTO itself. There again, the approach of considering international organizations as a single phenomenon could lead the Commission into difficulty.

18. In order to examine more fully the way in which the European Communities functioned within WTO, both as an entity invoking the responsibility of other States and as one against which responsibility was invoked, a much more detailed analysis would be required of its relations with its member States in that context. In many cases, the European Communities was defending, not measures it had itself taken as an international organization, but measures taken by its member States.

19. The practice of the European Communities within WTO had led to considerable confusion: WTO members frequently brought complaints both against the European Communities and against a given member State, although the European Communities asserted the right to defend the State concerned in WTO proceedings and had tried to avoid decisions that might seem to impose obligations directly on the member States themselves.

20. The Special Rapporteur had acknowledged that the European Communities practice within WTO was complex when he suggested having a particular rule for regional economic integration organizations in the case of draft article 57, but, in his own view, that too was a question which needed to be considered in greater detail.

21. In view of the absence of relevant practice, he suggested that the Commission should consider what kinds of countermeasures an international organization could take. As the use of force and economic measures were ruled out, for obvious reasons, there remained only the withholding of contractual obligations under some treaty arrangement. That narrower frame of reference should perhaps constitute the starting point for consideration of the question.

22. Mr. GAJA (Special Rapporteur) sought clarification from Mr. McRae concerning his first argument, namely that one could not consider an international organization as an injured party when there was a breach of an obligation. He wondered whether, for example, in the case of a headquarters agreement between an international organization and a State, the organization would not have the possibility of invoking the responsibility of the host State that had breached that agreement unless its constituent instrument contained a rule authorizing such a claim to be preferred.

23. Mr. McRAE replied that it would in any case be necessary to decide in the light of the particular characteristics of the organization concerned and of its particular rules, rather than starting from the general proposition that all international organizations would have such a possibility, and then applying it to the particular case.

24. Mr. NOLTE said that the warning quoted in the footnote to paragraph 41—namely that the work of the Commission would become “a train wreck” if the provision that it was to elaborate concerning countermeasures directed at an internationally wrongful act of an international organization were to provide new justifications for those who had long been inclined to “sanction” the United Nations—expressed an entirely legitimate concern. For that reason, he disagreed with draft article 52, paragraphs 4 and 5, pursuant to which an injured member of a responsible international organization could, as a general rule, take countermeasures against the organization—countermeasures being excluded “only if this is not inconsistent with the rules of the ... organization”. In his view, that presumption should be reversed.

25. He therefore proposed that draft article 52, paragraph 4, should read: “A member of an international organization which claims that it has suffered an injury for which the organization is responsible may not take countermeasures against the organization except if this is consistent with the character, the law and the rules of that same organization.”

26. International organizations constituted special regimes, specific communities whose members had renounced, usually implicitly, the possibility of taking the law into their own hands, in the conviction that the rules of the organization would enable disputes to be resolved, should they arise. Even if they did not, the existence and operation of international organizations should not be jeopardized by the application of unilateral countermeasures. The Charter of the United Nations, for example, had created a legal framework and procedures that might be fatally undermined if the secondary rules, which made sense in the context of responsibility of States that recognized each other’s sovereignty, were transposed into the context of relations between the United Nations and its Member States. It was not a question of ruling out the possibility that the United Nations could act illegally and that Member States could respond to such acts, but of determining whether Member States could react by taking countermeasures.

27. How was it possible to determine whether the law of an organization excluded resort to countermeasures by

its members? The problem was that the constituent treaty of most organizations contained no explicit rules on that issue, and that a presumption in favour of the possibility of members taking countermeasures, as suggested by the Special Rapporteur, thus risked serving as a blanket authorization. However, that would be inappropriate if it was the character of an international organization, or the nature of the community that had created it, that determined whether countermeasures were or were not permissible. In such a case, merely to state that the “rules of the organization” determined the issue was somewhat misleading. It was not any specific rule, nor a group of specific rules, but the rules of the organization as a whole, including their purpose, that constituted the character of the organization and determined whether countermeasures were permissible. It was therefore important that reference should be made not only to the “rules” of the organization, but also, more generally, to the “character” and “law” of the organization.

28. Nor should the question whether the members of an international organization could resort to countermeasures be answered by way of formal analogies. It was a question of interpreting existing practice and identifying the policy choices contained in the constituent treaties of the international organizations. As far as past practice was concerned, the lack of precedents spoke in favour of an *opinio juris* of States that countermeasures, as a general rule, were not permissible. In his opinion, the onus was on the Special Rapporteur to show that there should be a presumption in favour of member States taking countermeasures—a requirement that the report had not met. As for the policy choice expressed in a constituent treaty, the Charter of the United Nations, in particular, was designed as a special regime in which States targeted by binding decisions of the Security Council and recommendations of the General Assembly were not supposed to challenge them other than through recourse to United Nations bodies or by claiming that the decisions in question had been taken *ultra vires*. Admittedly, those possibilities of recourse were perhaps unsatisfactory in certain respects, but that did not justify an invitation by the Commission to targeted States to use the law of responsibility of international organizations to legitimize challenging the outcome of common deliberations by applying unilateral measures.

29. Lastly, he affirmed his conviction that the general approach to the question of countermeasures was extremely important, and supported the suggestion by Ms. Escameia that the issue should be discussed in a working group.

30. Mr. GAJA (Special Rapporteur) said he was surprised to hear that paragraphs 4 and 5 of draft article 52 contained a presumption in favour of a member State of an international organization taking countermeasures against that organization, or vice versa. That had certainly not been his intention. Furthermore, he saw no real difference between draft article 52, paragraph 4, as drafted by himself and the formulation proposed by Mr. Nolte.

31. Mr. NOLTE said that even though it was slight, the presumption existed, insofar as, pursuant to draft article 52, it was only if it had been established that the

rules of the organization prohibited it from so doing that a member State was precluded from taking countermeasures. He would prefer the emphasis to be placed on the opposite presumption, namely that it must first be established that, in a given international organization, the taking of countermeasures by member States was permitted.

32. Mr. GAJA (Special Rapporteur), responding to members who had disputed the relevance of WTO practice to the topic under consideration, said that many examples existed of measures taken by an international organization against a responsible State. He had referred to some of them in paragraph 58 of his sixth report, but he could add other examples. The reason why he referred to them at that point of his report was that the matter at issue was not measures taken by an injured international organization within the meaning of draft article 46, but rather within the meaning of draft article 51. Furthermore, there was no point in going into the details of that practice if there was to be a “without prejudice” clause concerning cases in which the organization had taken measures in reaction to a breach of an obligation owed to the international community as a whole. In any case, whether or not one approved of the existing practice, one could not say that such practice was totally lacking.

33. Lastly, he stressed that none of the States that had formulated comments had expressed the view that an international organization could not take countermeasures.

The meeting rose at 11.10 a.m.

2962nd MEETING

Wednesday, 14 May 2008, at 10.05 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Al-Marri, Mr. Caffisch, Mr. Candiotti, 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. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vas-ciannie, 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 consideration of the sixth report of the Special Rapporteur on responsibility of international organizations (A/CN.4/597).

2. Mr. PELLET said he would begin with a number of general comments and then turn to the first part of the report. To begin with, he had a problem with the overall approach to the draft articles, particularly as it affected Part Three. Draft article 1 indicated that the draft articles applied to the international responsibility of an international organization or of a State for the internationally wrongful act of an organization, but the result of that restrictive approach was that nowhere, and, in particular, neither in chapter I nor in chapter II of Part Three, did the Commission deal with the question of the right of an international organization to invoke the responsibility of a State, despite the fact that the problem arose very concretely and relatively often. It had not been taken up in the articles on responsibility of States for internationally wrongful acts of 2001,³⁴ although it had been envisaged that all questions relating to the responsibility of international organizations would be grouped together in the draft articles under consideration. That seemed entirely logical, because there could be no question of the Commission placing on its agenda a new topic on the competence of an international organization to implement the international responsibility of a State. The Commission had the possibility of addressing the issue, as envisaged in the syllabuses on topics recommended for inclusion in the long-term programme of work of the Commission adopted in 2000 (and which he himself had prepared), in which, with regard to the topic of responsibility of international organizations, it had indicated that: “One of the problems of the topic is that the draft on State responsibility is silent on the rights of an international organization injured by an internationally wrongful act of a State. This gap should be filled during the consideration of the responsibility of international organizations. This might be done either in a separate part or, as proposed in this paper, in connection with questions relating to the ‘passive responsibility’ of international organizations. Both of these solutions offer advantages and disadvantages.”³⁵ The same was also true in respect of the protection which an international organization could exercise in the event of injury caused to one of its agents, which was known as functional protection. He noted in passing that functional protection was not the equivalent of diplomatic protection: the injury calling for reparation was suffered by the organization, because it was in the exercise of its mandate that the agent had suffered it.

3. In paragraphs 15 to 20 of the report, the Special Rapporteur considered at length the possibility of transposing article 44 of the draft articles on responsibility of States, before coming to a conclusion with which he personally disagreed and to which he would return later in his statement. What, though, had become of the protection that the organization could exercise on behalf of one of its officials or beneficiaries? The famous functional protection referred to in the 1949 advisory opinion of the ICJ in the *Reparation for Injuries* case, which showed that there was nothing theoretical about it, was mentioned nowhere in the draft articles under consideration, just as it was mentioned nowhere in the 2006 draft articles on diplomatic protection.³⁶

³⁴ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 29, para. 76.

³⁵ *Yearbook ... 2000*, vol. II (Part Two), pp. 135–150, at p. 136.

³⁶ *Yearbook ... 2006*, vol. II (Part Two), pp. 24–26, paras. 49–50.