

Document:-
A/CN.4/2962

Summary record of the 2962nd meeting

Topic:
Responsibility of international organizations

Extract from the Yearbook of the International Law Commission:-
2008, vol. I

*Downloaded from the web site of the International Law Commission
(<http://legal.un.org/ilc/>)*

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.

4. When he had expressed his concern regarding those questions to the Special Rapporteurs on the topics at the conclusion of the Commission's studies on responsibility of States and on diplomatic protection,³⁷ both Mr. Crawford, for responsibility of States,³⁸ and Mr. Dugard³⁹ had replied that those matters would be addressed during the consideration of the topic of responsibility of international organizations. He was aware that Mr. Gaja was reluctant to take them up, but he did not think that special rapporteurs should be able to "pass the buck" in that way. As he saw it, the draft articles under consideration constituted a last chance to fill those glaring lacunae, even though, intellectually, it was true that the issue was no longer the responsibility of international organizations but rather, once again, the responsibility of States, albeit implemented by international organizations. The link with the subject was sufficient. That was what had been planned at the beginning, when the topic had been proposed. The lacuna was all the more striking in that the question did not concern potential or purely hypothetical problems, unlike many others addressed by the Commission; on the contrary: the problems to which he was referring did indeed arise, and practice in the area was considerable, not only concerning functional protection, but also concerning implementation of the responsibility of the State. To cite just one example among many: international organizations that had suffered injury as a result of Iraq's invasion of Kuwait in 1990 had been able to bring claims before the United Nations Compensation Commission in order to obtain compensation; a number had indeed done so. Thus, the lacuna was a considerable problem, one which was justified only on the most abstract grounds. The reasoning behind the Special Rapporteur's proposals held good, regardless of whether an organization brought a claim against another organization or against a State. Enormous intellectual energy had been expended on the rare case in which an organization might bring a claim against another international organization, whereas nothing was said about the much more interesting and important question of claims which an organization might bring against a State.

5. The Special Rapporteur announced at the beginning of the sixth report what subjects he intended to take up in the seventh. The two questions to which he had just alluded needed to be considered as a matter of priority. On the other hand, he was very sceptical with regard to the Special Rapporteur's plan to review, in the light of comments received from States, the draft articles provisionally adopted, before completing the first reading of the draft (paragraph 3 of the report). He had two serious objections to that approach. First, that would make the Commission the executors of the political will of States (and, furthermore, of their supposed political will, since the Commission did not yet even have at its disposal a complete set of reactions by States to the draft articles as a whole, which by definition remained incomplete). It was not the Commission's task to give form to the will of States. Needless to say, the positions of States—as the Commission's "customers"—had to be taken into account, but what counted

most, on first reading at any rate, was for the Commission to submit to States and the Sixth Committee a complete and coherent draft, one that was far removed from the political considerations by which States might—quite legitimately—be guided.

6. Secondly, if, in response to the reaction of the Sixth Committee, the Commission were to revert to draft articles already adopted, there would be no end to the process, which would also lead to a vicious cycle of unhealthy relations with the Sixth Committee. He did not see why, in such circumstances, there would be any need for a second reading. There was also a danger that the Commission might feel obligated to review the draft articles again and again in further readings to accommodate the comments of States. Instead, it should try to present a coherent first draft, before proceeding to a second reading which took account of the comments of States.

7. Turning to chapter II of the report, on the invocation of responsibility, he noted that it was above all draft article 46, as it related to article 51 of the draft articles on responsibility of States, that had given rise to the greatest number of comments by members. The problems were essentially the same, which made sense, since it was there that the most difficult issues of principle arose. First, there was the problem of the competence (or perhaps, more exactly, of the capacity) of international organizations to invoke international responsibility at the international level, one which arose not only *vis-à-vis* other international organizations, albeit very rarely, but also, and above all, *vis-à-vis* States. Secondly, the question had been asked whether that overall capacity was unlimited, as, in the opinion of the previous speakers, the current wording of draft article 46 would show, or whether it was necessary to introduce the principle of the speciality of the organization in one form or another. At the previous meeting, Mr. Nolte had suggested reversing the presumption of capacity, and Mr. McRae—and also Ms. Escameia if he had understood correctly—had proposed specifying that such capacity was restricted to cases in which the international organization had received a mandate to that effect. Initially, he had thought that those proposals were sound: in one form or another, the principle of speciality was relevant, provided that the concept of the "function of an organization" was not made too rigid and it was accepted that there could be an implicit competence in that area, which in his view was inseparable from the principle of speciality.

8. However, on closer reflection, he had had second thoughts, not because he disagreed with the idea behind his colleagues' proposals, but because it did not seem useful to express the idea of the principle of speciality in draft article 46. It was important to bear in mind the object and purpose of the provision: it presupposed that the international organization concerned was the sole beneficiary of the obligation breached or that it was part of the group of injured entities. If the obligation was legally owed to it in either form, it was because the obligation was part of its functions, and he therefore did not see why that should be spelled out in draft article 46. There was no call to theorize on the question of capacity under international law or obligations in general; all that was required was to ascertain when an international organization could invoke the

³⁷ See *Yearbook ... 2000*, vol. I, 2613th meeting, pp. 10–11, paras. 58–60, and *Yearbook ... 2004*, vol. I, 2791st meeting, p. 3, para. 20.

³⁸ *Yearbook ... 2000*, vol. I, 2616th meeting, p. 28, para. 17.

³⁹ *Yearbook ... 2004*, vol. I, 2792nd meeting, p. 9, para. 34.

responsibility of another international organization or a State. If the obligation that was breached was owed to it, it was linked to its functions, and he did not see why something should be stated which was automatically implicit in the provision. Thus, the point made in paragraph 8 was expressed too elliptically, and should be explained in greater detail in the commentary.

9. Likewise, he disagreed with Ms. Escarameia's proposal to insert in draft article 46 a formulation covering other entities, such as the ICRC—or, for that matter, the International Olympic Committee or other major organizations which had a public service function of sorts. Perhaps such entities had the same kinds of rights and obligations as international organizations, though that was debatable. No doubt they had a certain measure of international legal personality, but if, as he believed, they were not international organizations, then it was neither logical nor timely to try to find a formulation that would include them, though it might be possible to refer to them in the commentary. However, it was not a good idea to introduce them at such a comparatively late stage in the work.

10. On the other hand, he agreed with Ms. Escarameia that the word "entity", the legal meaning of which was very unclear, should be deleted from the draft articles in favour of a systematic reference to States and international organizations. He also agreed with her that, while it might be clumsy, at least it was correct; the experience of the Drafting Committee had shown that it was sometimes possible to come up with more economical formulations than those initially envisaged.

11. He had no quarrel with the content of draft articles 47 and 48, although draft article 47, paragraphs 1 and 2, could probably be merged; that was a question of drafting. However, he took issue with paragraphs 11 to 13 of the report, which explained the reasoning behind draft articles 47 and 48. He shared Mr. McRae's concern that the draft articles and their underlying rationale were modelled too closely on the articles on responsibility of States. He did not think it sufficient to say, as the Special Rapporteur did in paragraph 11, that as "the articles on responsibility of States [did] not address the question of which State organ [was] to be regarded as competent for bringing or withdrawing a claim ... [i]t would be strange for the Commission to address the latter question for the first time in the present context". That did not seem to be correct: whereas a State was sovereign and had full legal capacity to organize itself as it saw fit, that was not the case with an international organization. Not only should it be specified that an international organization must respect its own rules, or at any rate its constituent instrument, but it must also be asked whether the problem arose in the same way, first, for international organizations and States and, secondly, for those that were members and those that were not, because members knew how the international organization functioned and who could do what, whereas non-members were not expected to be aware of such issues.

12. Turning to paragraphs 15 to 20, he said he was not persuaded by the Special Rapporteur's argument against including in the draft articles a provision equivalent to

article 44 of the draft articles on responsibility of States, relating to admissibility of claims. Either, as Ms. Escarameia had asked at the previous meeting, it should be concluded that the "mediate" injury suffered by agents of the organization had been excluded from the draft articles (and he did not see why that should be the case), or else the draft articles should be assumed to include that type of injury. It seemed particularly odd to eliminate that situation, since paragraphs 15 to 20 were the only ones in the report which referred to an abundant practice. Yet, while the practice existed, the Special Rapporteur seemed not to want to address it. He was aware that the practice mainly concerned claims of States against international organizations or of international organizations against States, but, as he had already insisted, those cases should not be simply discarded.

13. In any case, the considerations which the Special Rapporteur set out in paragraph 19 were not very convincing. The Special Rapporteur was right to say that the requirement of nationality clearly did not apply, but the link of function did and basically played the same role as the nationality link in the situation envisaged. At the end of paragraph 19, the Special Rapporteur asserted that "the eventuality of this type of claim being addressed by an international organization against another international organization is clearly remote". That was incorrect, in any case for economic integration organizations, and the probability was certainly no more remote than that of most of the other situations contemplated in the draft articles.

14. Thus, he was very much in favour of the inclusion of a provision corresponding to article 44 of the draft articles of 2001 on responsibility of States, but which, given the very specific nature of the problem for international organizations, should be worded very differently. That would also be an excellent opportunity to show that the Commission was not simply slavishly copying the articles on responsibility of States.

15. The most astonishing aspect of the absence of an article corresponding to article 44 was that the Special Rapporteur, after explaining why he ruled out such a provision, had nevertheless concluded in paragraph 20 that "[t]his would not imply that the requirements of nationality of claims and exhaustion of local remedies are always irrelevant when a claim is addressed against an international organization". If they were not always irrelevant, then why were they not discussed?

16. He had nothing to say about the content of draft article 50, but pointed out that, in paragraph 2 of the French version, the phrase "*dommage qu'il ou elle a subi*" sacrificed too much to political correctness in the guise of grammatical correctness. The Drafting Committee should be asked to make the necessary changes.

17. Draft article 51 posed from another perspective the problems of principle which he had addressed with regard to draft article 46. As a fervent defender of article 48 of the draft articles on responsibility of States, he would approach the question with an open mind. Be that as it might, an international organization was an international organization and a State was a State. However, to cite the advisory opinion of the ICJ in the *Reparation for*

Injuries case, “[w]hereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice” [p. 180]. That meant that a State, by virtue of the very fact that it was a part of the international community of sovereign States, could act for the benefit of the international community as a whole, but he agreed with Mr. McRae that it was by no means clear whether the same could be said of an international organization.

18. For the same reasons he had mentioned at the start of his statement, he had no problem with paragraph 1 of article 51, subject to the general provisos that, as Ms. Escarameia had suggested, the phrase “group of entities” should be replaced by “group of States or international organizations” and that an international organization should be entitled to address a claim against a State just as it could against another international organization. If the obligation was owed to a group of which the organization was part, that meant that the situation fell within its functions, and there was therefore no reason to reintroduce the principle of speciality in paragraph 1.

19. The same was not true of paragraph 3. There, the fact that the obligation was owed to the international community as a whole did not mean that the function of the organization defined on the basis of the principle of speciality entitled the organization to invoke responsibility. That said, and although he agreed with those members who had stressed the point, that seemed to him to be the meaning of the words “and if the organization ... has been given the function to protect the interest of the international community underlying that obligation”, at the end of paragraph 3. Paragraph 3 might benefit from being worded differently, but the idea, which must surely be approved, was contained in it. Thus, he would have no objection to paragraph 3, provided that it was made clear that the international organization that had been given that function had the same entitlement *vis-à-vis* States that breached an obligation owed to the international community as a whole. Nor had he any objection to paragraphs 4 and 5.

20. He wished to make a number of comments on the subject of countermeasures. However, in the interests of the smooth running of the Commission’s work, he would defer those remarks until a later meeting.

21. Ms. ESCARAMEIA said that, contrary to what Mr. Pellet had claimed, she did not take a more restricted view than the Special Rapporteur concerning the invocation of responsibility of international organizations; on the contrary, she endorsed the Special Rapporteur’s proposal and was even in favour of extending that capacity to other entities. Her proposal had been to draft a “without prejudice” clause to cover those entities, since, in her view, States and international organizations could not be presumed to represent the totality of the interests of the international community as a whole. Only with regard to countermeasures was she in favour of a more restrictive approach.

22. Mr. DUGARD said that the provisions of the articles on responsibility of States clearly could not be transposed automatically to those on the responsibility of international organizations. The Special Rapporteur was therefore to be commended for the expertise and discernment with which he had adjusted the first set of articles to the requirements of the second.

23. It was common cause that the most controversial provisions in the articles on responsibility of States were contained in articles 42, 48 and 54. It was also a well-known secret that the reason the Commission had preferred not to recommend that the draft articles on responsibility of States should immediately be given the form of a convention was its concern that those particular provisions might be watered down by an international conference convened to examine them. The fact that the Special Rapporteur dealt with those highly contentious provisions in his sixth report made the report particularly important. Although, in general, he was satisfied with the way in which the Special Rapporteur had handled the study, there were a number of points he wished to raise regarding draft articles 46, 51 and 57, which corresponded to articles 42, 48 and 54 of the draft articles on responsibility of States.

24. First, he objected to the omission of a provision corresponding to article 44 of the draft articles on responsibility of States and the Special Rapporteur’s studious avoidance of the issue. He would begin by commenting briefly on the relationship between diplomatic protection and international organizations. According to draft article 46, a State had the right to invoke the responsibility of an international organization not only where direct injury was caused to the State itself, but also in cases involving indirect injury, in which an international organization injured a national of a State and the State brought proceedings on its own behalf in the interest of the individual. There was no need to return to the question whether diplomatic protection was not a fiction, or whether what was being asserted was the right of the State or, ultimately, that of the individual. The fact was that international law accepted that a State could bring a claim on behalf of an individual who had been injured, where the latter was a national. Consequently, one could not avoid the subject of nationality of claims and exhaustion of local remedies in the current draft articles.

25. The Commission had foreseen and addressed that issue in the context of its discussions on diplomatic protection. In his fifth report on diplomatic protection, presented in 2004,⁴⁰ he had proposed a draft article 24, to read: “[t]hese articles are without prejudice to the right of a State to exercise diplomatic protection against an international organization”. However, in paragraph 20 of the same report, he had suggested that “[d]espite the closeness of this subject to diplomatic protection, it seems that it is one that belongs to the Commission’s study on the responsibility of international organizations”. Agreeing with him, the Commission had, in 2004, rejected his proposed draft article 24 and had instead decided to deal with the matter in its study on international organizations. He therefore shared the view expressed by other speakers that the Commission could not simply avoid all mention

⁴⁰ *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/538.

of article 44 of the draft articles on responsibility of States and that it was imperative to address the issues it raised.

26. Another difficulty concerned the apparent conflict between articles 44 and 48 of the draft articles on responsibility of States, to which the Special Rapporteur had alluded briefly when introducing his report. The question was whether article 48, paragraph 1 (b), which appeared to allow a State to protect a non-national in cases in which the obligation breached was owed to the international community as a whole, was trumped by article 44 and by the draft articles on diplomatic protection. A number of scholars, notably Enrico Milano,⁴¹ had argued very forcefully that the innovative provision contained in article 48 was flawed because the draft articles on diplomatic protection and article 44 of the draft articles on responsibility of States entitled States to protect only nationals, not non-nationals. That problem had been considered by Judge Simma in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, in which, relying on the articles on responsibility of States, Judge Simma had argued cogently that a State had the right to protect a non-national. The issue had also been addressed by the Commission during its consideration of the final group of draft articles on diplomatic protection. In his seventh report on diplomatic protection,⁴² he had drawn attention to the allegations by some scholars that the Commission had conferred a right on States to protect non-nationals in cases in which the interests of the international community as a whole were involved, while simultaneously taking away that right. The truth of the matter was that the Commission had made a mistake. He had discussed the problem raised by those articles with the Special Rapporteur on State responsibility and they had agreed that it had not been addressed by the Commission when adopting draft articles 44 and 48. The issue had, however, been expressly dealt with in footnote 240 to paragraph (2) of the commentary to draft article 16 on diplomatic protection adopted on second reading, which stated that “[a]rticle 48, paragraph 1 (b) is not subject to article 44 of the articles on responsibility of States for internationally wrongful acts, which requires a State invoking the responsibility of another State to comply with the rules relating to the nationality of claims and to exhaust local remedies. Nor is it subject to the present draft articles”.⁴³ That footnote left absolutely no doubt as to the Commission’s position with regard to articles 44 and 48 and its wish to avoid any confusion. While article 44 appeared to take away the right conferred in article 48, paragraph 1 (b) of the articles on responsibility of States, the draft articles on diplomatic protection made it clear that this was not the case. The Commission was under some obligation to uphold that position with respect to the current draft articles. If the Special Rapporteur did not wish to address the issue in a special provision, it must at least be very clearly spelled out in the commentary.

⁴¹ E. Milano, “Diplomatic protection and human rights before the International Court of Justice: re-fashioning tradition?”, *Netherlands Yearbook of International Law*, vol. 35 (December 2004), pp. 85–142, at pp. 103–108.

⁴² *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/567.

⁴³ *Yearbook ... 2006*, vol. II (Part Two), p. 51.

27. Turning to the question of whether a non-injured international organization, or a non-injured State for that matter, would be entitled to bring a claim against another international organization for the breach of an obligation owed to the international community as a whole, he noted that although the Special Rapporteur had qualified that as a difficult issue in paragraph 32 of his report, the question was not too far-fetched to contemplate. He would venture to say that perhaps the dust had settled sufficiently on the 1999 NATO intervention in Kosovo for the Commission to discuss it dispassionately as an example of a case in which the United Nations might have brought a claim against NATO for overstepping its powers in respect of the maintenance of international peace and security. The Russian Federation, as a non-injured State, could also have contemplated instituting such proceedings, a scenario discussed in paragraph 31 of the report.

28. Whether it was desirable for a non-injured international organization, or a non-injured State, to bring a claim against another international organization, was another question. He tended to the view that such a right should be reserved for the United Nations, which would involve conferring a special status on the Organization. The Commission had already discussed that issue in respect of the present draft articles and had decided that the United Nations should not be given a special status. However, as the ICJ did not have jurisdiction over international organizations, it was unlikely that such an issue would ever come before it, as was illustrated by the fact that Yugoslavia had had to bring its claims against the member States of NATO. It was therefore not beyond the bounds of possibility that such instances might occur. On the other hand, the Special Rapporteur had handled the question very effectively in article 51, paragraph 3, by establishing that the organization invoking responsibility must have been given the function to protect the interest of the international community underlying that obligation.

29. On the subject of countermeasures, he agreed with the Special Rapporteur that it would be difficult to find a convincing reason for exempting international organizations from being possible targets of countermeasures. He was not entirely convinced by the objections raised by José Alvarez, cited in the footnote to paragraph 41 of the sixth report. It was common knowledge that, even at the present time, Member States of the United Nations that disliked certain actions of the Organization expressed their dissatisfaction by withholding funds. One need only recall the refusal by France and the former Soviet Union to pay their dues after the establishment, by resolution 1000 (ES-1) of 5 November 1956, of the first United Nations Emergency Force (UNEF 1) in 1956. He supported the Special Rapporteur’s approach to that matter in draft article 52. As to the difference of opinion between Mr. Nolte and the Special Rapporteur at the previous meeting over paragraphs 4 and 5 of that draft article, he tended to take the view of the Special Rapporteur that there was no presumption contained in paragraph 4 or paragraph 5. On the other hand, there was much to be said for Mr. Nolte’s reformulation of those paragraphs; that, however, was essentially a matter for the Drafting Committee.

30. Draft article 57 corresponded to article 54 of the draft articles on responsibility of States, which, at the time

of its adoption, had been regarded as a highly innovative provision by the Commission and had therefore been formulated as a saving clause. In paragraph (6) of the commentary to article 54 of the draft articles on responsibility of States, the Commission noted that “there appears to be no clearly recognized entitlement of States referred to in article 48 to take countermeasures in the collective interest”. Paragraph (7) noted that, for that reason, “[t]he article speaks of ‘lawful measures’ rather than ‘countermeasures’”. Paragraph (6) further noted that the provision was drafted as “a saving clause which reserves the position and leaves the resolution of the matter to the further development of international law”.⁴⁴ He wished to conclude by asking the Special Rapporteur whether international law had indeed developed further in that regard since 2001. Although he suspected that it had not, he was of the view that the matter should at least be addressed in the current draft. He disagreed with the Special Rapporteur’s conclusion in paragraph 57 of his report that the Commission’s only option was to restate article 54 on responsibility of States: the Commission also had the option of reconsidering article 57 and determining whether to treat it as a saving clause or whether it was ready to employ the term “countermeasures” instead of “lawful measures”.

31. Mr. GAJA (Special Rapporteur) welcomed the background provided by Mr. Dugard to the draft articles on responsibility of States, in relation to the question whether a provision concerning nationality of claims and exhaustion of local remedies should be included in the present draft articles. He agreed with Mr. Dugard that a mistake in drafting had been made with regard to the relationship between articles 44 and 48 of the draft articles on responsibility of States. The reference to article 44 in article 48, paragraph 3, could appear to deprive States other than the State of nationality of the capacity to invoke responsibility for breaches of *erga omnes* obligations pursuant to article 48, paragraph 1 (b). Consequently, he endorsed the position taken by Mr. Dugard and the Commission in footnote 240 to paragraph (2) of the commentary to draft article 16 on diplomatic protection,⁴⁵ which explained that article 48, paragraph 1 (b) of the draft articles on responsibility of States was not subject to article 44. A clarification could be incorporated in the current draft, if the Commission decided to draft a provision that paralleled article 44. His reason for not including such a provision had been that nationality of claims and exhaustion of local remedies requirements applied only to certain, limited categories of claims, and only rarely in cases in which an international organization was the responsible entity; he had never sought to deny the applicability of those requirements in certain circumstances. The question currently facing the Commission was whether, in principle, a draft article on the lines of article 44 of the draft articles on responsibility of States was needed. If the majority of members considered it necessary, then drafting such a provision would be a straightforward matter, as he had already completed the necessary research into practice concerning the issue.

32. Mr. NOLTE, clarifying the statement he had made at the previous meeting, said that he had commented not on draft article 46, but solely on draft article 52, paragraphs 4 and 5, and the possible entitlement of member States of an international organization to take countermeasures against that organization. The principle of speciality had to be borne in mind in that context and he therefore proposed that draft article 52 should make it clear that it did not create a presumption in favour of countermeasures being taken against the allegedly responsible international organization.

33. Turning to draft article 51, paragraph 3, and the question of whether an international organization was entitled to invoke the responsibility of another international organization for the breach of an obligation owed to the international community as a whole, he noted that, in support of the argument that it could, paragraph 36 of the sixth report had quoted the contention of the Commission of the European Communities that “it is hardly conceivable that a technical transport organization should 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”.

34. In his own view, however, certain considerations militated in favour of the possibility that a technical transport organization might, under certain circumstances, be allowed to take countermeasures against a military alliance. The first was that the member States of that organization might have transferred the exclusive power to take certain decisions concerning transport to the organization. If those member States had thereby deprived themselves of the right to take unilateral measures, then why should the fact that they had delegated their power to a technical organization result in neither the member States nor the organization being able to take countermeasures in the area of transport? Paragraph 60 of the report discussed that point in the context of draft article 57, but limited the possibility of taking countermeasures in an area over which competence had been transferred to an international organization to regional economic integration organizations. An air traffic control organization, for example, might not be linked to a regional economic integration organization but might still have certain exclusive powers which would have to be used in order to implement certain countermeasures.

35. There was, however, a more general issue involved and, for that reason, the answer that a technical transport organization had not been empowered to apply countermeasures was too simplistic. Of course, if the organization had not been given such powers, it could not take countermeasures against a military alliance. But the real question was what considerations determined whether the technical transport organization had been empowered to take countermeasures for violations of peremptory norms by other organizations. The answer seemed not to depend primarily on the technical scope of the organization’s activity, but rather on whether its members had conceived it as an instrument for many purposes, including the adoption of countermeasures for violations of peremptory norms, or whether they had intended to neutralize, or depoliticize, the management of a technical area by entrusting it to a specific organization. It was unlikely

⁴⁴ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 139.

⁴⁵ See footnote 43 above.

that the reply could be found simply by referring to the organization's rules—since they usually said nothing on the issue—or to the organization's technical nature. Once again, the draft articles should leave room for an interpretation of an international organization's character.

36. He was unsure whether the draft articles dealt adequately with the complexities of the eventuality of one international organization invoking the responsibility of another international organization. The mere fact that the injured organization was not a member of the responsible organization did not seem to be a sufficiently determinative factor. The European Community was not a member of the Southern Common Market (MERCOSUR) and NATO was not a Member of the United Nations, yet the position with respect to invoking responsibility seemed to be different in the two cases. The fact that all members of NATO were Members of the United Nations suggested that, for the purposes of invoking responsibility, NATO should be treated more like a Member of the United Nations, whereas the European Community must clearly be treated as a non-member of MERCOSUR.

37. Secondly, although it was hard to disagree with the Special Rapporteur's cautious statement in paragraph 46 of his report that "should an organization fail to apply its own rules when taking countermeasures, the legal consequence is not necessarily that countermeasures would have to be regarded as unlawful", it might nonetheless give the wrong impression, especially if it was read in the light of the Special Rapporteur's comments on draft article 46 in paragraph 11 of the report, which suggested that the rules of an international organization were comparable to the internal law of States. The internal law of States was normally disregarded, for good reasons, when assessing the international legality of a State's action, whereas the rules of international organizations tended to be of greater consequence when evaluating the legality under international law of the activities of the organizations concerned. That was because those rules also determined the scope of an international organization's competence, *inter alia*, so as to enable third parties to rely on them, and were more directed towards the international public, including non-members. Hence it was necessary to distinguish between various types of rules.

38. Lastly, he endorsed previous speakers' views concerning the exhaustion of local remedies and questions of admissibility, and said he would welcome more explicit treatment of those issues in the draft articles.

39. Mr. PERERA thanked the Secretariat for its invaluable services, and in particular for its preparation of topical summaries of the Sixth Committee's debates on the items before the Commission, and of comprehensive documentation on the new topics that the Commission would be considering in the latter part of the session.

40. In his sixth report, the Special Rapporteur had highlighted some key issues regarding the invocation of the responsibility of international organizations. The first was the question whether there was a need for a draft article on the admissibility of claims along the lines of article 44 of the draft articles on responsibility of States, which would define the conditions for establishing the international responsibility of an international organization and for the

invocation of that responsibility by a State or another international organization. Such a provision would involve the well-known principles of the nationality of claims and the exhaustion of local remedies, which were intrinsic in the context of diplomatic protection.

41. The Special Rapporteur made the pertinent point that the question of conditions for the exercise of diplomatic protection arose essentially in relation to State responsibility in the context of relations among States, and that the practical relevance of diplomatic protection did not find a parallel in the context of the responsibility of international organizations except, perhaps, in the case of a claim by a State against an international organization. Nevertheless, having listened to Mr. Dugard's remarks, he personally had come around to the view that there were good grounds for examining the applicability of the principle of the nationality of a claim in the context of a State making a claim on its own behalf in respect of a direct or indirect injury caused to one of its subjects.

42. Having considered the widely diverging views on the applicability of the rule of the exhaustion of local remedies, he was of the opinion that the critical issue was whether an international organization, like a State, possessed a judicial system and jurisdictional powers, or other means of providing redress. He was inclined to respond in the negative, having regard to the character of international organizations in general. If a decision were taken to omit a draft article along the lines of article 44 of the draft articles on responsibility of States, he would suggest that the commentary should deal in detail with the customary character of both principles as set forth in a number of judgements, for example in the *Mavrommatis* case in relation to the nationality of claims and in the *ELSI* case in relation to the principle of the exhaustion of local remedies.

43. The second key issue was whether an international organization other than an injured organization was entitled to invoke the responsibility of another international organization for the breach of an obligation owed to the international community as a whole. As the Special Rapporteur had pointed out, practice in that regard was not very indicative, the most significant example being that of the European Union, which must be seen as a precedent of an exceptional nature. Debates in the Sixth Committee and the written views of international organizations had underlined the fact that the ability of an international organization to invoke responsibility for violations of obligations owed to the international community as a whole would be determined by the specific mandate of that organization, as defined by its constituent instrument. He would therefore be in favour of including an express reference to the need for a constitutional mandate, as determined by the constituent instrument and the rules of the organization, as the determining factor in that respect in both draft article 51, paragraph 3, and draft article 46.

44. The chapter on countermeasures related to an area where practice was virtually non-existent, save for that involving the European Union in procedures under the Understanding on Rules and Procedures Governing the Settlement of Disputes annexed to the Marrakesh Agreement Establishing the World Trade Organization. He agreed with Mr. McRae that retaliation measures in the

context of the WTO, such as the withdrawal of concessions, were essentially a contractual remedy under that special treaty regime, and that it would be difficult to draw a general inference of broader application. As several previous speakers had noted, the European Union constituted an organization with a high degree of regional integration and the WTO dispute settlement procedures were of a complex and specialized nature. It would therefore be difficult to rely on that limited practice for the purposes of the draft articles. Therefore, a cautious approach to countermeasures was required. The suggestions made by Mr. Nolte and Ms. Escameia in respect of draft article 52, which had emphasized the centrality of the overall character and the rules of the organization, were a step in the right direction and therefore deserved further consideration.

45. Draft article 57 ventured into an area in respect of which the Commission had observed in paragraph (3) of the commentary to the corresponding draft article 54 on responsibility of States that “practice is limited and rather embryonic”.⁴⁶ Paragraph (6) stated: “As this review demonstrates, the current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of States. At present there appears to be no clearly recognized entitlement of States referred to in article 48 to take countermeasures in the collective interest.”⁴⁷ Hence the Commission made the decision to draft the provision as a saving clause. Those observations applied with equal if not greater force to the responsibility of international organizations, not only in the specific context of draft article 57, but also in the overall context of the chapter on countermeasures. It was therefore necessary to proceed with the utmost caution in that area, which was uncharted territory. For that reason he supported the suggestion that a working group should be set up to further examine the draft articles on countermeasures. He had no objection to draft articles 46 to 51 being referred to the Drafting Committee.

46. Mr. HMOUD said that a set of draft articles on the invocation of the responsibility of international organizations and on countermeasures, which would apply to the different types of international organization—as defined in the draft articles—seemed appropriate. The adaptation of the articles on responsibility of States to the case of international organizations would be logical, provided that the independent legal personality of an organization operated in the same manner as that of a State. However, more careful consideration should be given to the question of whether the widely varying natures and characters of international organizations warranted the application of different rules to different organizations. In addition, the lack of precedents relating to international organizations meant that further analysis might be required before concluding that an article on responsibility of States applied *mutatis mutandis* to the responsibility of international organizations.

47. Certain policy considerations would also have to be taken into account before adopting principles on

countermeasures in the draft articles, although from a legal perspective there was nothing standing in the way of the adoption of such principles.

48. Regarding draft article 46, on invocation of responsibility by an injured State or international organization, he concurred with the opinion expressed in the report that it might be difficult to provide examples of injury to an international organization when the obligation breached was owed to several entities or to the international community as a whole and the breach specially affected the organization or radically changed the position of all the injured entities. It should, however, be stressed that it was the nature and character of an organization that led to its being injured in such cases. In that respect, it was unlike a State and that aspect of the matter might require further elaboration.

49. On the admissibility of claims, he took the view that, even though the report provided reasons for excluding an article setting out rules on the nationality of a claim and the exhaustion of local remedies, the fact that practice was not settled in relation to the exhaustion of local remedies did not preclude the inclusion of such an article. Whether it was reasonable to require the exhaustion of the internal remedies of an international organization would depend on the structure and rules of the organization. While States’ local remedies usually involved judicial or administrative mechanisms, international organizations had more diverse mechanisms for local remedies, which might or might not be effective and adequate. He therefore suggested the incorporation of a draft article providing for the nationality of the claim, which would also require the exhaustion of the internal remedies of the responsible organization, with the proviso that those remedies must be effective and adequate. The commentary should then provide examples of international organizations’ mechanisms offering effective and adequate remedies.

50. As for draft article 51, he agreed that it was essential to qualify the right of a non-injured international organization to invoke the responsibility of another organization for a breach of an obligation owed to the international community as a whole. Yet that right should not be confined to organizations whose functions were to protect the interests of the international community. Any organization should be able to invoke such responsibility when it was acting within its mandate to protect common interests of its members, where such interests were undermined by the obligation breached. The standard whereby an international organization’s function was the protection of the common interests of the international community was very high, and it was disputable whether any existing international organization had the sole function of protecting the common interests of the international community as a whole. Thus, wider parameters for the right to invoke responsibility should be set.

51. Countermeasures continued to be a controversial legal concept for various reasons. Historically, reprisals had involved the use of force and that was why there had been opposition to the formulation of rules on countermeasures, even though it had since been accepted that such measures must not involve the use of force. Another reason was that any suggestion that it might be possible to

⁴⁶ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 137.

⁴⁷ *Ibid.*, p. 139.

take the law into one's own hands should be repudiated. However, if there was a dispute settlement forum with jurisdiction over the dispute, the rules governing the dispute settlement mechanism as they applied to the parties might restrict the right to resort to countermeasures and supersede any other rules to the contrary. The same could be said of *lex specialis* rules, as in the case of the WTO, which had its own system of countermeasures applicable within that organization's framework.

52. However, opposition to the doctrine of countermeasures was necessarily related to the concept itself and the question of whether it should be part of international law. If countermeasures were accepted, then there would be no legal reason to confine the possibility of adopting them to States, and it would then be necessary to ascertain whether any particular conditions had to be met when applying the doctrine to international organizations.

53. The rules of the international organization were undoubtedly pertinent. If such rules allowed or prohibited a member of the international organization from taking countermeasures against the organization, then obviously such rules had to be respected. Nevertheless, the situation was more complex when the rules were silent, as was generally the case. The threshold should then be higher and it should not be possible to resort to countermeasures if they would have a significant effect on the position of the international organization or would threaten its proper functioning. Similarly, if the responsible organization was a member, the injured international organization should be allowed to take countermeasures only if they were consistent with the organization's rules and did not significantly prejudice the position of the responsible organization or threaten its existence. Those qualifications should be added to article 52, paragraphs 4 and 5.

54. He failed to see the logic of exempting an international organization applying countermeasures against a non-member State from the requirement to adhere to its own rules. Since a State was presumed to act in accordance with its internal legal procedure when it took countermeasures, there was no reason not to consider the legality of countermeasures taken by an international organization when it acted against its own rules. If its functions did not allow it to take such measures, or if the organ taking it had acted *ultra vires*, the targeted party should be able to contest the legality of such measures on the basis of the international organization's rules. That was particularly important in view of the fact that the Commission was trying to assert the principle of legality in the implementation of countermeasures in order to make the doctrine more defensible. Accordingly, a paragraph to that effect should be added to draft article 52.

55. Lastly, on the issue of an international organization taking countermeasures on behalf of a member, he noted the addition to the draft articles of a special provision concerning regional economic organizations whose members had delegated to them competence over certain matters and the right of such organizations to act on behalf of their members. He did not understand why the provision restricted the scenario to regional economic integration organizations and seemed tailored to one specific organization. Organizations of that kind did not

claim to be federal States by virtue of their economic integration. Secondly, since competence had been delegated by the member to the organization, the latter should act only within the confines of the member's original competence, having regard also to the extent of the countermeasures that the member would have been able to take had it acted by itself and not through the international organization. That principle meant that the organization could avail itself only of such countermeasures as could have been taken by the member. For instance, the organization could not take countermeasures that involved the whole organization *vis-à-vis* the injuring entity, because the member, not the organization, was the injured party. He therefore suggested that the phrase "only to the extent that such measures would have been lawfully possible for the member had it taken those measures itself" should be added at the end of draft article 57, paragraph 2. The paragraph should also be general in scope and not confined to regional economic integration organizations.

56. In conclusion, he recommended that the draft articles should be referred to the Drafting Committee.

The meeting rose at 11.45 a.m.

2963rd MEETING

Thursday, 15 May 2008, at 10.10 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Al-Marri, Mr. Brownlie, 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. 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 members of the Commission to continue their consideration of the sixth report of the Special Rapporteur (A/CN.4/597).

2. Mr. PELLET said that after having dealt, at the previous meeting, with the question of "amicable" invocation of responsibility through a claim, including in the guise of diplomatic or functional protection, it remained for him to consider the question of the other, less "gentle" means of implementing responsibility, namely the application of countermeasures—of which he was not a fervent advocate, even though he acknowledged that it was necessary to come to terms with them.