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Summary record of the 2963rd meeting

Topic:
Responsibility of international organizations

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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.

3. One of his principal concerns, which held good for countermeasures as well as for the invocation of responsibility, concerned the fact that the opposite scenario, that of countermeasures that a State could take against an international organization, was not envisaged in the draft articles; he very much hoped that the Special Rapporteur or, if the Special Rapporteur preferred, a working group, would come up with some additional draft articles devoted to that scenario.

4. The Special Rapporteur took various examples as his starting point in order to demonstrate his contention that the draft articles could not disregard countermeasures. While he agreed with that conclusion, he was not entirely convinced by the reasons given. Mr. McRae and Mr. Perera had been right to stress that the decisions of the WTO Dispute Settlement Body did not constitute a very convincing starting point for that demonstration, since the “countermeasures” in question were authorized by the Appellate Body, sometimes with the participation of an arbitral tribunal. The example of the Dispute Settlement Body was strictly limited to international economic integration organizations and, for the moment, to the European Communities. With regard to other types of organization, WTO law was not edifying, even by analogy, and it was difficult to extend its applicability to those other organizations. The question then arose as to what kind of countermeasures the organizations could actually take. It was there that the shoe pinched: if the injured organization did not have the competences that would allow it to take effective countermeasures, it might be asked whether in that case States should take up the challenge. That was the view taken by a number of legal writers, including Ehlermann.⁴⁸ That could constitute a logical pendant to draft article 43, but if such were the case, those countermeasures “by substitution” would of course have to be very rigorously delimited.

5. In actual fact, two questions arose, between which the preceding speakers had not clearly distinguished. The first was whether an international organization had the competence to take countermeasures and whether it had the capacity to do so. If it did, the second question was what kind of countermeasures it could take. Mr. McRae was right to say that one should probably begin with the second question, but that did not mean that the first need not be considered.

6. An international organization could undoubtedly only take measures that were explicitly or implicitly permitted by its constituent instrument: on that point almost all the speakers had been in agreement. Yet, to begin with, such possibilities were extremely rare; and, secondly, they belonged, under the rules of the organization, to the internal sphere (suspension of voting rights or membership, expulsion from the organization, etc.). In that case they were sanctions, not countermeasures in the strict sense of the term. Furthermore, the purpose of those measures was not necessarily to restore international lawfulness, still less to induce those targeted to make reparation for the injurious consequences of their acts; they had a clear

punitive connotation that countermeasures did not—or at any rate should not—have. And it was because they should not be punitive in character that, although he had not much sympathy with countermeasures even in principle, he would not go so far as to agree with Mr. McRae and Mr. Nolte, who wished to start from a presupposition or a presumption that was hostile to them. Even though they needed to be strictly delimited, countermeasures had the very commendable function of inducing the State or international organization targeted by them to fulfil its obligations in the area of responsibility.

7. International organizations had very few means, *de jure* but also *de facto*, of taking countermeasures. Was the conclusion to be drawn that the entire chapter on countermeasures should be abandoned? That would surely be going too far, in view of the existence of regional economic integration organizations and, more generally, of organizations that behaved like States and were entitled to do so under their statutes, States having delegated important competences to them. In fact, many of the Commission’s (or the Special Rapporteur’s) difficulties stemmed from the existence of the European Union. Had it not existed, it would probably never have occurred to anyone to come up with the peculiar idea that the responsibility of international organizations could be incurred in the same way as that of States, still less that international organizations themselves could actively invoke the responsibility of other States. The fact remained that the European Union did exist, and one of the main questions raised by the draft articles was not countermeasures as such, but whether the Commission should adopt general formulations (knowing as it did that, essentially, only the European Union was specifically concerned), or whether the European Union—or rather, regional economic integration organizations—should be singled out for special treatment. While in practice it was the European Communities that had given rise to problems thus far, there was every reason to suppose that the same problems would arise in the future as more and more regional economic integration organizations elsewhere than in Europe (in Latin America, Africa, the Arab world and Asia) acquired increasingly wide-ranging powers. It was important to guard against “eurocentrism” and “europhobia”, both of which would be over-reductive and counterproductive.

8. It seemed that the Special Rapporteur was uncertain how to reply to that question. From a reading of the draft articles he had proposed to the Commission, one might suppose that the Special Rapporteur had unambiguously sided with the adherents of non-differentiation—which he himself supported *prima facie*—even though his reports and his comments on the draft articles accorded a special place, quantitatively at any rate, to the European Communities and the European Union. However, in his sixth report, in paragraph 2 of draft article 57, the Special Rapporteur suddenly introduced the concept of regional economic integration organizations. That was justifiable, provided that the formula was broadened to include all cases in which there had been a transfer of competences; in other words, provided that once organizations could exercise State powers, there was no reason for the Commission to confine its consideration to regional economic integration organizations—a point on which he endorsed Mr. Nolte’s remarks made at the previous meeting. It

⁴⁸ See C.-D. Ehlermann, “Communautés européennes et sanctions internationales—une réponse à J. Verhoeven”, *Revue belge de droit international*, vol. 18 (1984–1985), pp. 96–112.

remained to be seen whether that broad limitation, which would make it possible to consider that there was a general category of organizations with powers delegated by States, should perhaps be included in the part of the draft articles dealing with countermeasures. For, once an international organization had international legal personality and had received a transfer of competences from the State, there was no reason not to transpose to the organization the rules applicable to the State.

9. In any case, that extremely thorny question deserved a more complex treatment than the one accorded to it by the Special Rapporteur, which he found too hasty and which drew the overly broad conclusion that it was possible for an international organization to take countermeasures. In his own view, international organizations could take measures only if they were acting “as States”, following the delegation by the latter of some of their competences, and in the exercise of those competences. Furthermore, he was not convinced by the argument, put forward in paragraph 53 of the report, that “a uniform regime of the questions dealt with in these articles, whether they are taken against a responsible State or a responsible international organization, would have a practical advantage”. It was through statements of that kind that the Commission left itself open to the criticism that it was content to transpose the law of State responsibility to the topic of responsibility of international organizations. One should not take a given course of action merely because it was more practical, but because it was more logical or more effective.

10. Needless to say, what he had just said led him to propose a substantial recasting of draft article 52 (Object and limits of countermeasures), but it was above all draft article 57 (Measures taken by an entity other than an injured State or international organization) that posed problems for him. It consisted of two paragraphs that, though they were to be found under the common title that the Special Rapporteur had borrowed from article 54 of the draft articles of 2001 on responsibility of States for internationally wrongful acts,⁴⁹ dealt with matters too disparate to be the subject of a single article. The main change to paragraph 2 should be to extend it to cover a broader category of organizations, those to which member States or member international organizations had transferred a competence—and perhaps one should also add, to be realistic, a competence to act in their place and stead. On the other hand, he was not sure he agreed with Ms. Escarameia that the competence needed to be expressly provided for in the organization’s mandate. If members had transferred their competences to the organization, it seemed to him that they must necessarily also have transferred the competence of ensuring respect for those same competences. In other terms, once a State or international organization had transferred to an international organization, in certain matters, substantive competences, that organization could “act as a responsible entity”, including by taking countermeasures.

11. The problems posed by paragraph 1 of draft article 57 were much thornier and, in his view, more serious. A fervent advocate of draft article 54 of the articles on

responsibility of States, he would have preferred a stronger formulation and one that, at the least, corresponded to the preliminary draft text adopted by the Drafting Committee in 2000.⁵⁰ Yet, contrary to what the Special Rapporteur wrote, he did not see why the only course to be taken in that regard was to reproduce the content of that article in the current draft. Once again, because it was sovereign, the State possessed all the international rights and duties recognized by international law and compatible with the equal rights of other States. That was not the case with international organizations, whose powers were limited, not only by the rights that other entities might possess, but first and foremost by their constituent instruments. There could be no doubt that an international organization should have the right to take lawful measures to put an end to breaches of obligations owed to the international community as a whole, and it would even be desirable to use a more robust formulation than the one currently to be found in paragraph 1 of draft article 57. On the other hand, it seemed indispensable to reproduce in that provision the phrase appearing in draft article 51, paragraph 3, and to say that, when that was the case, the international organization could act only if it “has been given the function to protect the interest of the international community underlying that obligation”. Unless that was spelled out, it would be tantamount to placing international organizations on the same footing as States.

12. While commending the Special Rapporteur’s skill and learning, he was inclined to deplore the former’s excessively narrow conception of the topic, a narrowness that was all too crudely apparent in Part III, and he strongly urged the Special Rapporteur not to confine himself to the question of the “passive” responsibility of international organizations, but instead to deal also with their active responsibility *vis-à-vis* not only other international organizations, but also States.

13. Turning to the question of the new practice of the Commission, which since 2007 had held a debate with outside actors (the human rights treaty bodies in 2007 and the legal advisers of States in 2008), he proposed that in 2009 that exchange of views should be held with the legal counsels of international organizations, who took a keen interest in the set of draft articles under consideration.

14. The CHAIRPERSON said that Mr. Pellet’s proposal was a very interesting one, which merited consideration by the Planning Group.

15. Ms. XUE said that, given the limited practice of international organizations with regard to responsibility, she fully understood the difficulties the Special Rapporteur had faced in finding empirical evidence to support his work. Although draft articles 46 to 57 seemed fairly similar to the corresponding articles on responsibility of States, the analysis in the report was very useful for an understanding of the approach taken by the Special Rapporteur. Part III was clearly the most difficult and controversial section, as the applicability of the draft articles to international organizations was a much more complex and problematic issue than in the case of the articles on

⁴⁹ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 137.

⁵⁰ *Yearbook ... 2000*, vol. II (Part Two), annex to chapter IV, pp. 69–71.

responsibility of States. The Commission should, as recommended by the Special Rapporteur in his introduction, review the texts provisionally adopted in the light of all the available comments before completing the first reading. Indeed, when it was about to conclude its work, international organizations and Governments would be in a better position to reflect on the draft articles as a whole and to see whether they were appropriate for international organizations.

16. With respect to the implementation of international responsibility, Part III contained a number of elements that should be deemed to be normative claims for the progressive development of international law: for instance, the definition of the injured party, the individual claim formulated for a collective interest, the representative claim by a third party and the concept of “the international community as a whole”, which departed from the classical terminology used in the Vienna Convention on the Law of Treaties (hereinafter “1969 Vienna Convention”). Controversial or not, those draft articles were based on certain interpretations of the current practice of States and individual claims. With regard to international organizations, very few cases could be discerned as having an empirical basis. Although, in theory, there seemed to be no reason not to adopt the same rules for international organizations as for States, in practice those rules might not be applicable or suitable for certain types of organization.

17. In paragraph 9 of his report, the Special Rapporteur affirmed that “[t]he criteria for defining when an entity is injured by an internationally wrongful act of a State or an international organization do not appear to depend on the nature of that entity”, a statement that was unquestionable in the context of international claims. However, when considering the legal relations deriving from secondary rules of international responsibility in order to decide who had the legal capacity to invoke that responsibility, the Special Rapporteur’s assertion was no longer tenable, because the nature of the injured party had effects on the formulation of an international claim under the rules of international responsibility, for example if the injured parties were individuals or entities other than States or international organizations. Although the Special Rapporteur made that principle quite clear at the beginning of paragraph 6 of his report, the first sentence of paragraph 9 could lead to misunderstanding.

18. Draft article 46 (Invocation of responsibility by an injured State or international organization) mainly concerned the question of who had the legal capacity to bring a claim for an internationally wrongful act committed by an international organization. When the obligation breached was owed to a State or international organization individually, the legal relationship derived from secondary rules under draft article 46 (a) seemed quite clear. It was appropriate to put the international organization and the State on the same footing, as both were held directly accountable for their acts at the international level under international law and both were capable of bringing claims on an international plane, as had been confirmed by the ICJ in the *Reparation for Injuries* case. Subparagraph (b), on the other hand, raised a number of questions for Ms. Xue, all the more so because she still had serious reservations with regard to the corresponding rules

in the context of responsibility of States. In multilateral treaty relations or under customary international law, if an individual State was allowed to invoke international responsibility on behalf of the international community or a group of States, there was a risk of certain States taking self-appointed police action. Likewise, if international organizations were permitted to act on behalf of States or other international organizations, or even on behalf of the international community as a whole, the result might be even more serious interventions without proper authorization. The formulation of subparagraph (b) was too general and vague to prevent possible abuses of rights in practice. While recognizing that the possibility of international organizations being injured in the circumstances set out in subparagraph (b) could not be ruled out, the Special Rapporteur failed to explain why, in practice, pertinent examples of representative claims by international organizations were rare. Obviously, when a group of parties including some international organizations was injured, the organizations concerned would in practice be in a stronger position than States parties to formulate an international claim against the author of the wrongful act. Thus, for instance, when member States and the European Union were all considered as affected by the breach of an international obligation owed to them, the European Union would be in a much stronger position as a party to exercise the right to invoke the international responsibility of another international organization. Consequently, such actions were determined first and foremost by the internal rules of the organization, rather than by the rules of international responsibility. In most cases, an international organization invoked the responsibility of another international organization only when such breach directly affected its own right or interest. It should thus be clearly stated in the commentary that when a State or international organization invoked the responsibility of another international organization in the context of multilateral legal relations under draft article 46 (b), the breach of the international obligation must affect the State or international organization and it must be within the latter’s mandate to preserve such interest. The conditions regarding the standing of the injured party were aimed at maintaining a legal balance between the parties.

19. With regard to draft articles 47 (Notice of claim by an injured State or international organization) and 48 (Loss of the right to invoke responsibility), the Special Rapporteur, in deciding which was the organ competent to invoke the responsibility of the wrongdoer, drew a comparison between national law and the internal rules of international organizations and considered it unnecessary to make a specific reference to those rules. That argument was not entirely convincing because, in the case of an international organization, it was often the agents of the organization who were the injured party, rather than the organization itself. That dual personality might lead to practical difficulties in determining when a claim could be made and who must make it. If the competent organ of the international organization did not intend to bring a claim, whereas the injured individual insisted on a claim being brought, the current wording did not provide a solution, as both parties might have standing in international law. On that point, the Commission should seek further views from international organizations, in order to learn more about the general practice.

20. She supported the Special Rapporteur's proposal not to include an article on admissibility of claims, although she did not rule out the possibility that a State might in certain circumstances exercise diplomatic protection on behalf of its nationals against an international organization, whether or not the injured individual worked for the organization. When the Commission had considered the topic of diplomatic protection, it had agreed that functional protection by an international organization was a separate issue; however, some members had raised the matter again at the previous meeting. The issue of functional protection, like that of diplomatic protection in the context of State responsibility, was a special one, in that not only did the general rules of international law apply, but the internal rules of each international organization also applied. On the issue of exhaustion of local remedies, the example of the *United States and 15 European States (2000)* dispute before the Council of the International Civil Aviation Organization (ICAO) cited in paragraph 17 of the report was interesting, and it would be helpful to learn what had been the response of that Council on that question.⁵¹ The Special Rapporteur seemed to have accepted the view that the local remedies rule applied when adequate and effective measures were provided within the organization concerned, but that was a tailor-made rule applicable only to organizations such as the European Union. Logically, if the organization *per se* was the alleged wrongdoer against a non-member State or another international organization, it should not be the judge in its own case. It would be a different matter if the claim were brought by a member State.

21. On draft article 49 (Plurality of injured entities), she agreed with the general thrust of the article and the Special Rapporteur's analysis, but queried its relationship with draft article 46 (b). In paragraph 22 of the report, the Special Rapporteur pointed out that when an international organization was injured together with certain States, those States would probably be members of the organization but might conceivably be non-members. In the latter case, article 49 would apply directly, but in the former, the rules and practice of the organization could be applied in order to determine whether its members could invoke separately the responsibility of the wrongdoer for the same internationally wrongful act. The Special Rapporteur was no doubt only trying to leave enough room for manoeuvre to allow account to be taken of the various possible cases, but that point should be explicitly mentioned in the commentary.

22. With regard to draft article 50 (Plurality of responsible entities), she agreed with the Special Rapporteur on the principle that the injured party was not entitled to receive compensation higher than the damage it had suffered, but she did not understand why a claim for reparation could not be made against both the primary and the subsidiary responsible entity, when a member State was

identified as a subsidiary responsible party. The two parties could be held responsible on different accounts, and there seemed to be no need for separate legal actions.

23. Draft article 51 (Invocation of responsibility by an entity other than an injured State or international organization), which was new and as controversial as article 48 of the articles on responsibility of States, would require the test of future international practice. First, under the terms of its paragraph 1, it became difficult to draw the line between an injured and a non-injured party. When the notion of collective interest could give rise to a variety of loose interpretations, it became meaningless to try to define an injured party in a multilateral situation. The example given in paragraph 33 of the report, referring to Burma, concerned a unilateral political act, and the matter was much more complicated than it looked. Perhaps it was exactly in such complex cases that sanctions imposed by regional organizations should be treated with caution and not given any general characterization. Paragraphs 2 and 3 raised the same policy consideration with regard to actions taken by the non-injured State and international organization. Moreover, if one were to characterize actions taken by international organizations within their mandate as coming under the rules of responsibility, it would be hard to maintain the theory of primary and secondary rules. The comment by the Organization for the Prohibition of Chemical Weapons, cited in paragraph 36, could not be interpreted as invoking secondary rules of international responsibility, because it was that organization's mandate, under the Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction, to prohibit and prevent any breach of the Convention. Even if that Organization's actions served the interest of the international community as a whole, they were a consequential effect and not the legal basis for its action—in other words, they were governed by primary rules rather than by secondary rules. Lastly, with regard to possible police action and abuse of rights, the draft articles constituted an extremely ambitious drafting exercise in the progressive development of international law, but one that was highly controversial and contentious in practice, because such wide scope for standing had always given rise to international disputes. How to find a means of remaining coherent when inserting such a clause in the draft articles on responsibility of international organizations was not a purely theoretical question.

24. With regard to countermeasures, she was of the view that, in the current state of international law, States or international organizations should not be encouraged to use countermeasures in international relations. Unless otherwise explicitly provided for by the States parties, such unilateral acts should be allowed only under strict conditions intended to ensure the protection of essential rights and interests as a means of dealing with internationally wrongful acts. When the use of force was ruled out, economic and other sanctions were the main way of exerting pressure on the wrongdoer to comply with its international obligation. While countermeasures were urgent, temporary and interim measures, subject, *inter alia*, to the principles of necessity and proportionality, they were also coercive, unilateral and power-based in character. To a certain extent they reflected the reality of current international relations, which were based on power politics.

⁵¹ Decision of the ICAO Council on the Preliminary Objections in the Matter "United States and 15 European States (2000)" of 16 November 2000 (www.state.gov/documents/organization/6841.doc). For the preliminary objections, see www.state.gov/documents/organization/6839.doc. For the response of the United States of America to the preliminary objections presented by the Member States of the European Union, see www.state.gov/documents/organization/6840.doc (accessed 9 October 2012).

25. As international organizations were composed of States, they derived their strength not from their own power but from the collective will of their members. Unlike national decision-making, which was both governed by national law and limited by international obligations, decision-making in an international organization was governed by its constituent instrument and its internal rules, which were largely deemed to be international law. When an international organization was alleged to be in breach of an international obligation *vis-à-vis* a member State, a non-member State or another international organization, there were always political and legal processes for negotiation and settlement, one way or another. As international organizations were procedurally bound to take action by virtue of their internal rules, they had little scope for taking individual actions such as countermeasures, and it was hard to imagine them adopting unlawful measures to press their interests. In that regard, Mr. Pellet's analysis of the capacity of international organizations to take countermeasures was very convincing, even though she did not agree with his conclusions. On the other hand, she did not understand the Special Rapporteur's position set out in paragraph 46 of the report. First, such a characterization would have the effect of changing the nature of countermeasures under the rules of international responsibility; and secondly, the distinction between relations with members and non-members seemed arbitrary in terms of the lawfulness of such measures. Furthermore, that position did not seem consistent with the Special Rapporteur's analysis in paragraph 49, to the effect that if a conduct was *per se* lawful, it could not be considered to be a countermeasure. If an international organization acted within its rules, such actions were then not countermeasures and were governed by primary rules rather than secondary rules. Furthermore, from a practical point of view, it was hard to envisage that an international organization would fail to implement the dispute settlement procedures in good faith, as provided for in draft article 55, paragraph 4.

26. With regard to the international organization's contractual relations, it was the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter "1986 Vienna Convention") and the rules of international customary law regarding treaties that should be applicable. For example, if a contracting international organization failed in its international obligation to pay a State for the delivery of certain goods, the contracting State could suspend its obligation to deliver those goods—an action which could hardly be characterized as a countermeasure, but clearly fell within the treaty, as Mr. Pellet had also pointed out. That explained why there were almost no pertinent empirical examples on which to rely. The example cited in the footnote to paragraph 41 clearly showed that any provision on countermeasures against an international organization could be used, or indeed abused, by powerful member States that did not approve of the organization's policy or operations. Even if it was established that the international organization had breached its international obligation, it would be unacceptable for member States or other international organizations to take countermeasures in order to paralyse its operations. For example, if a United Nations peacekeeping operation unit committed an internationally wrongful

act by breaching its international obligations to the host country, could the host country take countermeasures to hinder the operation or make it impossible, with a view to inducing it to comply with those obligations? One could argue that the countermeasure was not in accordance with draft article 53, paragraph 1, but one could also make the counterargument that those measures were legitimate under that draft article. That kind of situation could obviously occur in reality, but it was not necessary to justify it, particularly as legal rules were supposed to promote the institution of international organizations, not to weaken it. With regard to countermeasures taken by an international organization against another international organization, the example given by Mr. Dugard of possible countermeasures by the United Nations against NATO seemed a bit far-fetched. International law was only one aspect of the political decision-making process. One could very well imagine possible cases for future law, but it was always necessary to act within the basic structure of international relations.

27. When the Commission had initially touched on the question of countermeasures in the context of the present topic, she had not been sure how those rules would apply to international organizations. Having considered draft articles 52 to 57, she was convinced that those provisions should not be included in the draft articles, for they did not serve the Commission's policy goals either in theory or in practice. She therefore supported the referral of draft articles 46 to 51 to the Drafting Committee, but not of the provisions concerning countermeasures. However, if the Commission were to decide to set up a working group to study the matter further, she would like to join in that effort.

28. Mr. FOMBA said that one of the questions left pending by the Special Rapporteur was the existence of special rules to take account of the particular characteristics of certain organizations, which contradicted the assumption of the principle of equality of international organizations.

29. Draft article 46 (Invocation of responsibility by an injured State or international organization) was satisfactory on the whole, even though its wording could be improved. Draft article 47 (Notice of claim by an injured State or international organization) differed slightly from its counterpart in the articles on responsibility of States, but those drafting changes raised no particular problem.

30. Draft article 48 (Loss of the right to invoke responsibility) also had a minor modification, one that was acceptable. The Special Rapporteur rightly noted that a State could exercise diplomatic protection against an international organization, for instance an organization that administered a territory or resorted to force. Likewise, it was true that the exhaustion of local remedies rule was valid only if such mechanisms actually existed. Moreover, the Special Rapporteur thought it unlikely that an international organization would address a claim to another international organization. He himself wondered whether a positive or a negative conclusion was to be drawn from that. He had no clear-cut position on the matter.

31. Draft article 49 (Plurality of injured entities) had been adapted from the corresponding article on responsibility

of States to cover additional cases, which was a welcome move. The same was true of draft article 50 (Plurality of responsible entities), the principal innovation of which was the addition of a sentence setting forth the principle of the subsidiary responsibility of a member State of an international organization. Draft article 51 (Invocation of responsibility by an entity other than an injured State or international organization) also contained some innovations, including its paragraph 3, which rightly set forth the idea that the entitlement of international organizations must be considered as specific and limited in comparison to that of States, as the logical consequence of their nature and legal personality.

32. The question of countermeasures was important and the Commission could not afford to overlook it. There again the rule of analogy should be applied, while taking into account the specific characteristics of international organizations. In draft article 52 (Object and limits of countermeasures), the Special Rapporteur proposed two new paragraphs to deal with the question of the effects of the rules of international organizations on countermeasures. The drafting of that provision might be reviewed, either by the Special Rapporteur or by a working group.

33. Draft article 53 (Obligations not affected by countermeasures) contained no major changes, except for the last subparagraph, which rightly proclaimed the rule of the inviolability of the local agents, archives and documents of a responsible international organization. However, one might wonder what the legal basis of that rule was—*lex lata* or *lex ferenda*—and whether it applied to all international organizations without distinction.

34. In draft article 55 (Conditions relating to resort to countermeasures) it was not desirable, in the French text, to replace with the expression “*les mesures déjà prises*”, the expression used in the corresponding provision of the draft articles on responsibility of States (“si [les contre-mesures] sont déjà prises”).

35. In draft article 57 (Measures taken by an entity other than an injured State or international organization), the Special Rapporteur proposed several changes of form that posed no problem. At the very most one could replace the phrase “*tout État et toute organisation*” by “*tout État ou toute organisation*” in the first sentence of the French version. On the substance, however, paragraph 2 was an innovation that raised some questions, the first of which was whether the provision was necessary, and, if so, what its content should be. Three solutions were possible: the Commission could retain only paragraph 1, which regulated the problem in the case of international organizations in general; it could leave open the question of regional economic integration organizations, limiting itself, for example, to a “without prejudice” clause; or it could also retain paragraph 2, while coming up with a wording that commanded consensus. At first sight, the first two options seemed preferable, either separately or together.

36. In conclusion, he supported the referral of Part II of the draft articles to the Drafting Committee. He was inclined to do the same for the part referring to countermeasures, but remained open to some other solution, such as the creation of a working group.

37. Mr. AL-MARRI welcomed the presentation by the Special Rapporteur of a detailed account of each stage of the draft articles, in which he stressed the analogy with the articles on responsibility of States adopted in 2001. The topic currently under consideration was much more complex, for while relations between States and international organizations were, in the last analysis, fairly limited, those between international organizations themselves continued to evolve, particularly in the area of peacekeeping, where their functions and *modus operandi* were increasingly often called into question. It was useful to refer to the experience of States with regard to “the implementation of the international responsibility of the State”, but it was also necessary to proceed with great caution, for it was not possible to tackle responsibility of States and that of international organizations in the same manner. It would also be useful to incorporate the views of Governments on the question, particularly those of States that were not members of an international organization at the European level. The practice of the European Union did not seem relevant, for, as was well known, that entity was far more than simply an international organization, and had rights and obligations comparable to those of a federal State.

38. Draft articles 46, 47 and 48, based respectively on articles 42, 43 and 45 of the draft articles on responsibility of States, posed no major problem. The Special Rapporteur had wisely decided not to reproduce article 44 of the draft articles on responsibility of States, concerning admissibility of claims, which raised issues of diplomatic protection and exhaustion of local remedies. It would be unwise to set two international organizations at odds.

39. Draft article 50 (Plurality of responsible entities), also drawing on the corresponding draft article on responsibility of States, referred to the possible responsibility of an international organization, but also to that of other international organizations or States, whether or not members of an international organization. Yet it was logical that if a State incurred responsibility because it was a member of an international organization, responsibility should be limited to that of the organization. Draft article 51 dealt with a more complex question, namely the right of a non-injured international organization to invoke the responsibility of another international organization. That was a particular case; one, furthermore, to which the Commission had devoted a great deal of time when finalizing the corresponding provision (article 48) in the articles on responsibility of States.

40. As for countermeasures, there again great caution was necessary. The question had already given rise to lively controversy in the context of the articles on responsibility of States. Nor should it be forgotten that most international organizations had a charter, like that of the United Nations, regulating their activities. There, too, the practice of the European Union was not useful, as it was too specific. Although draft articles 52 to 57 also drew on the draft articles on responsibility of States, they nevertheless differed from them, particularly draft article 57, which referred to the very particular case of an organization taking countermeasures in the interests of one of its injured members. Paragraph 2 of that draft article was not clear: it was hard to see how the State could be alleged to

be injured if it no longer had competence, having transferred it to the organization. The Commission should therefore take its time before reaching a final decision on the question of countermeasures.

41. Mr. WISNUMURTI said he approved of the general approach adopted by the Special Rapporteur. It seemed appropriate to draw heavily on the articles on responsibility of States while also taking into account the special character of international organizations. However, he did not agree with the Special Rapporteur's decision not to include a provision on admissibility of claims along the lines of article 44 on responsibility of States, which addressed questions relating to diplomatic protection and imposed conditions regarding nationality of claims and exhaustion of local remedies. The Special Rapporteur thought that such a provision would be redundant because, in the context of international organizations, diplomatic protection did not have the same practical relevance as it had with regard to State responsibility, and that, furthermore, the nationality condition did not apply to international organizations, and the exhaustion of local remedies rule could be relevant only where the claim by the organization also concerned injury caused to one of its agents as a private individual. Like other members who had spoken on the matter, he personally thought that the Commission should anticipate cases where a claim of responsibility would be invoked against an international organization requiring nationality of the claim and exhaustion of local remedies.

42. On a drafting point, he agreed with the suggestion made by Ms. Escarameia that, in the interests of consistency, the word "entity" or "entities" should be replaced, in draft articles 49 to 51, by "State or international organization". Draft article 51 was a welcome adaptation of article 48 of the draft articles on responsibility of States. On breaches of an obligation owed to the international community as a whole, the Special Rapporteur distinguished, in two separate paragraphs, between a State's entitlement to invoke responsibility and that of an international organization, pointing to the distinct character of international organizations, and specifying that in order to exercise that right, they must be mandated to protect the interest of the international community underlying that obligation.

43. He agreed that the draft articles must deal with countermeasures, which were an important aspect of the implementation of international responsibility. It was interesting to note that the Special Rapporteur had addressed the situation in which the rules of a responsible or injured international organization restricted or precluded countermeasures. Those two situations were the subject of new paragraphs 4 and 5 of draft article 52, which the Drafting Committee could perhaps reformulate in positive language, as suggested by Mr. Nolte. Draft articles 53 to 56, which were rightly modelled on the corresponding provisions of the articles on responsibility of States, posed no problem.

44. Draft article 57 covered two important issues: first, the fact that the provisions on countermeasures were without prejudice to the right of any State or international organization to invoke the responsibility of an international

organization and to take lawful measures against it; and secondly, the possibility for an international organization to take countermeasures against a responsible international organization on behalf of one of its injured members—whether a State or an international organization—that had transferred competence over certain matters to it. It would however be preferable, in paragraph 2, to refer to international organizations, as the reference to regional economic integration organizations might limit the utility of the provision, particularly as the reference to transfer of competence over certain matters would be sufficient to limit its scope. The paragraph should be reformulated so as to begin with the right of an international organization that was not an injured party to invoke responsibility on behalf of one of its injured members; that would be more consistent with the title of the article. In any case, the provisions on countermeasures should be further discussed in a working group.

45. Mr. KOLODKIN said that the question of the inclusion of a provision analogous to article 44 of the draft articles on responsibility of States merited further reflection, possibly in a working group. If the Commission decided to include such a provision, it would have to consider two questions, namely: the exercise, by the State, of diplomatic protection against the responsible international organization; and the exercise, by an international organization, of functional protection against the responsible international organization or State. In the first case, the nationality condition remained relevant. On the other hand, the requirement of exhaustion of local remedies in order to bring a claim against an international organization was not really admissible. In that regard, Mr. Perera had already pointed out that, as international organizations did not generally have jurisdiction over a territory, they did not have access to legal mechanisms that could be considered as domestic remedies that must be exhausted. The example of the European Union was not convincing as it was a very special kind of international organization, one whose practice was not relevant to an analysis of international organizations in general. On the other hand, the question of exhaustion of local remedies could arise when the international organization exercised administrative functions over a given territory.

46. As for the provisions concerning the exercise of functional protection by the international organization itself, the exhaustion of local remedies rule was admissible if the protection was exercised *vis-à-vis* a State, but not if it was exercised *vis-à-vis* another international organization, unless that organization administered a territory. In his view, if the remarks he had just made were incorporated in the draft articles, and bearing in mind what had been said on article 48 of the draft articles on responsibility of States, there would be no need to refer to those provisions in draft article 51. It would be more useful to specify that the admissibility of claims rule was not applicable to the situation covered by draft article 51.

47. He had the gravest doubts as to the possibility that non-governmental organizations (NGOs) could invoke the responsibility of an international organization. He failed to understand why the ICRC, for example, to which Ms. Escarameia had referred, would be entitled to intervene on behalf of the international community. That

would, in his view, be far too radical a step in the direction of the progressive development of international law. Perhaps ICRC itself should be asked whether it would wish to be empowered to invoke the responsibility of an international organization that had breached international humanitarian law. That seemed unlikely, for it would entail a drastic change to the *modus operandi* of the organization, which would then be denied the possibility it currently enjoyed of acting in full confidentiality and impartiality.

48. Reference needed to be made to the questions of the taking of countermeasures both by and against an international organization. He was therefore in favour of the inclusion of the relevant provisions in the draft articles. On the practice concerning countermeasures applied by international organizations, it would be useful to study the relevant practice of the United Nations in the form of measures taken by the Security Council. In Mr. Pellet's view, measures taken by the Security Council were not countermeasures but sanctions. He himself was not totally convinced that this was the case. In his own view, in certain situations the Security Council could indeed be deemed to adopt countermeasures. When, for example, it took measures against a State that had breached international law, they were intended to induce it to cease its unlawful conduct and resume compliance with its international obligations. In the event, those countermeasures could be associated with non-compliance with international legal obligations, entailing, for example, suspension of international treaties *vis-à-vis* the State targeted. Besides, if breaches of treaty obligations were totally excluded from the scope of countermeasures, did that mean that countermeasures were applicable only in cases of a breach of customary international law? What would happen in cases in which the rule breached was one both of customary and of general international law? At the very least, the question of the Security Council merited consideration in the context of countermeasures. Yet the Special Rapporteur had made no mention of that issue in his report.

49. One of the factors limiting countermeasures applied by international organizations related to their competence—not simply in terms of their constituent instrument but also, more precisely, of their mandate. It would be useful to consider inserting in draft article 52 a provision comparable to the one rightly included in draft article 51, paragraph 3.

50. He sided with the Special Rapporteur in the latter's disagreement with Mr. Nolte concerning draft article 52, paragraph 4. In his view, it was not justifiable to increase the restrictions on the right of a member State to take countermeasures against international organizations that had breached their international obligations. Thus, in the example of a breach by an international organization of a headquarters agreement, it would be difficult to imagine a situation in which the host State would not have the right to take countermeasures against the organization unless such a right was provided for in the rules of the organization. From a practical standpoint, in such a situation it would be normal for the question of non-compliance with its obligations by an international organization to be considered first by its competent organ. Only thereafter might countermeasures be taken, if no result was obtained.

However, that was more a policy issue than a point of law. That headquarters agreements generally provided for dispute settlement procedures was one thing; the question of the relationship between the right to take countermeasures and obligations owed in the context of dispute settlement was quite another. That problem was reflected in paragraph 2 of draft article 53.

51. He endorsed the criticisms expressed by Mr. Hmoud, Mr. Nolte, Mr. Pellet, and Ms. Xue concerning the expression "regional economic integration organization" to be found in draft article 57, paragraph 2. Although frequently used in international legal instruments, the expression was inadequate. He was not opposed to the referral of that draft article to the Drafting Committee. He considered, however, that other questions, such as that of countermeasures, might usefully be discussed in a working group.

52. Mr. PELLET said it was regrettable that the Special Rapporteur's report made no mention of the distinction that should be drawn between countermeasures and sanctions. Furthermore, he was uneasy with Mr. Kolodkin's position concerning certain decisions adopted by the Security Council, which it would be hard to describe as countermeasures. In his own view, the purpose of countermeasures was to induce a State that had breached certain obligations to comply with those obligations. The Security Council was not the guardian of the law, its mission was not to restore international lawfulness, but, in the words of Article 39 of the Charter of the United Nations, "to maintain or restore international peace and security", which could even cover non-compliance with international law.

53. Moreover, it could not be said that the Security Council intervened to ensure that an obligation owed to it was respected. It was not to the Security Council that States' obligations in matters of international peace and security were owed. There, then, a different set of issues was at stake, concerning which one could not speak of countermeasures.

54. Lastly, he considered that a distinction should be drawn between the framework of general international law and that of the internal legal order of international organizations. After much hesitation, he had finally come to the conclusion that, under general international law, international organizations could, in some very rare circumstances, take countermeasures, but that was not a question of any great interest. It would be more interesting to analyse the measures that international organizations could take under their internal legal order against their member States—measures that were not countermeasures.

55. Mr. GAJA (Special Rapporteur) pointed out that measures taken by the Security Council were taken against States Members of the United Nations, in other words, against States. The question just raised by Mr. Pellet was therefore not pertinent, as the report dealt with measures taken against international organizations.

56. Mr. KOLODKIN said that Mr. Pellet's remarks were strange, in that the measures taken were countermeasures adopted by organizations against other international organizations, not against States. Not so very long

before, Mr. Pellet had invited the Commission to adopt a more active position and to consider not only the question of the relation of responsibility between international organizations, but also that between international organizations and States. The report of the Special Rapporteur contained a number of theoretical suppositions, including the supposition that this type of relation existed. He considered that, theoretically speaking, the question of measures likely to be taken by the Security Council arose not only with regard to States but also with regard to regional, subregional and other international organizations.

57. The problem that arose with international organizations was that of the relation between the rules of the organization, its constituent instrument, on the one hand, and general international law on the other. An international organization was, however, governed first and foremost by its internal rules, and only afterwards by general international law. Thus, all measures taken by the United Nations were measures under the Charter of the United Nations.

58. In his view, the question whether the Security Council was the guardian of international law was a philosophical one. Mr. Pellet believed it was not. However, if, according to the Charter of the United Nations, the Security Council was the principal organ entrusted with the maintenance of international peace and security, it was also the guardian of international law in very many situations.

The meeting rose at 1 p.m.

2964th MEETING

Friday, 16 May 2008, at 10.05 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Al-Marri, Mr. Brownlie, Mr. Caflich, 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.

Organization of the work of the session (*continued*)*

[Agenda item 1]

1. The CHAIRPERSON drew attention to the programme of work for the remainder of the first part of the sixtieth session, in which two days were allocated to the celebration of the sixtieth anniversary of the Commission. A great deal of effort had gone into the organization of the celebrations, and he urged members to participate in them fully. A Solemn Meeting would take place on the morning

of 19 May 2008 in the Council Chamber of the Palais des Nations, and would be followed by one and a half days of seminars involving Legal Advisers of Member States.

2. The programme of work also indicated that a Drafting Committee on the topic of the responsibility of international organizations would be formed. Any members wishing to participate should contact the Chairperson of the Drafting Committee, Mr. Comissário Afonso. The Working Group on effects of armed conflicts on treaties was to be reconvened. Members wishing to participate should contact its Chairperson, Mr. Caflich.

3. Mr. HASSOUNA, supported by Mr. SABOIA, said that members were looking forward both to the Solemn Meeting and to the seminars to be held in Geneva as part of the celebration of the Commission's sixtieth anniversary.

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*)

4. Mr. HMOUD, referring to remarks made at the previous meeting by Mr. Kolodkin, said that the relationship between the system of sanctions under Chapter VII of the Charter of the United Nations and the system of countermeasures was an important issue, that had been discussed by the Commission in connection with the articles on responsibility of States for internationally wrongful acts,⁵² when a distinction had deliberately been drawn between matters covered by that text and those addressed under Chapter VII of the Charter of the United Nations. Paragraph (3) of the general commentary to chapter II of Part Three of the draft articles stated that “[q]uestions concerning the use of force in international relations and of the legality of belligerent reprisals are governed by the relevant primary rules”.⁵³ He did not believe, however, that the Special Rapporteur had intended that language to exclude measures under Article 41 of the Charter of the United Nations. Be that as it might, the point was that Chapter VII established a special regime, and the articles could not be said to be applicable to that regime. Obligations under the Charter of the United Nations took precedence over other treaty obligations. In the *Lockerbie* cases, however, the ICJ had stated—unfortunately—that decisions under Chapter VII of the Charter of the United Nations took precedence over other obligations of a State. In his opinion, however, such decisions were political in nature, not treaty obligations, and accordingly fell under the principle of legality. Fortunately, the Court had left the door open for a judicial review by itself of the legality of Security Council resolutions, and it was to be hoped that it would do so in the future.

5. Another issue was whether the punitive nature of measures under Article 41 of the Charter of the United Nations made it possible to distinguish them from

⁵² *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 et seq., paras. 76–77.

⁵³ *Ibid.*, p. 128.

* Resumed from the 2957th meeting.