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Summary record of the 2964th meeting

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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. Caflisch, 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. Caflisch.

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

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* Resumed from the 2957th meeting.

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

[53] *Ibid.*, p. 128.

countermeasures. The phenomenon of countermeasures originated with reprisals, which, by their very nature, were punitive, so there was no clear-cut difference between the two regimes. The regime of countermeasures under the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes incorporated the element of proportionality in order to ensure that a measure was lawful rather than punitive—fuel for the argument that countermeasures and measures under Chapter VII of the Charter of the United Nations should not be punitive.

6. On the other hand, both types of measure were intended to induce a State to cease an unlawful act, whether a threat to international peace and security under Chapter VII of the Charter of the United Nations or an act directed against other States. As to what happened if a Security Council resolution went beyond Article 41 of the Charter of the United Nations, some scholars argued that the principle of legality must apply; others claimed that the principles of the Charter of the United Nations, at the least, must be respected; and Professor Thomas Franck maintained that even if the act of the Security Council violated obligations *erga omnes*, it should nevertheless not fall within the purview of international law. He himself had in mind a case in which the Security Council had arguably induced a violation of normative rules under international law.[54] In such a case, should countermeasures be permitted, since the Security Council's action went beyond the special regime that constituted that body's authority, indeed beyond the principles of legality? Another issue was whether other States subjected to measures under Chapter VII of the Charter of the United Nations that went beyond the principle of legality could take countermeasures against the international organization or the State or States involved.

7. Ms. XUE said that the two issues of countermeasures and sanctions must not be confused. While both had counter-effects and both were responses to breaches of international obligations, they were totally different in nature and constituted different regimes under international law. The legal implications of lumping together sanctions and countermeasures would be that certain sanctions would become subject to the conditions envisaged for countermeasures, thereby greatly reducing the importance of the sanctions regime. Security Council sanctions were particularly powerful because they were designed to maintain international peace and security. They had a special role to play, hence the particular procedural rules applying to their use. Such measures were completely different from the countermeasures currently being addressed by the Commission in the context of rules on responsibility. The regime of countermeasures was a very narrow, exceptional one.

8. As to whether international organizations had obligations under customary international law, certainly they did, but since they were set up by States under constitutive instruments, their obligations are primarily derived from contractual relations. When their international obligations were breached, the means of redress were generally statutory. There was thus very little room for States or other international organizations to take countermeasures against international organizations.

9. Mr. HASSOUNA said that the main question was whether the Security Council was a guardian of law, or whether it simply bore the primary responsibility for the maintenance of international peace and security. In his view, the Security Council was a political body, but one that also performed functions pursuant to the obligation to respect international law; otherwise, its resolutions would be *ultra vires*. It had on occasion played not just a political but a quasi-judicial role: for example, when it had established a commission on delimitation of the boundary between Iraq and Kuwait,[55] through which the issue had been settled successfully, or in a similar dispute between Ethiopia and Eritrea,[56] when it had met with less success. The Security Council thus did not merely apply sanctions, but could also take legal steps that settled disputes, thereby enforcing international law.

10. Ms. JACOBSSON thanked the Special Rapporteur for an interesting sixth report, and for outlining his plans for the forthcoming seventh report. She wished to focus on the right to take countermeasures and had five points to make.

11. First, different rules were needed for States that were members of an organization and those that were not. States that are not members of an organization could resort to countermeasures, should the organization be in breach of an obligation. The extent to which member States could take countermeasures, against an organization was a much more complicated matter, and the two situations must be clearly identified in the draft articles and be subject to different legal rules.

12. Second, a conflict between a member of an organization and the organization must, as far as was possible, be resolved in accordance with the rules of the organization. That was a material consideration and was not the same as saying that the organization could divest itself of responsibility by reference to its internal law or implied powers.

13. Third, members of the organization should avail themselves of its internal procedures, a point that should be reflected in a separate provision in the draft articles. That was a procedural consideration. It was also the reason why an article was needed on admissibility of claims.

14. Fourth, countermeasures were the last resort—the last measure to take in order to induce the organization to comply with its obligations. It must be made clear how countermeasures differed from other types of measures, such as retortion, sanctions and decisions by the Security Council.

15. Fifth, the Commission needed to establish a working group on countermeasures.

[54] T. M. Franck, "The 'powers of appreciation': who is the ultimate guardian of UN legality?", *American Journal of International Law*, vol. 86, No. 3 (July 1992), pp. 519–523.

[55] See Security Council resolution 687 (1991) of 3 April 1991, paragraphs 2–4.

[56] See Security Council resolution 1312 (2000) of 31 July 2000, paragraph 6.

16. Turning to her arguments in support of those conclusions, she said she agreed entirely with the Special Rapporteur that, although practice was scarce with regard to the right to take countermeasures against an international organization, countermeasures were an important aspect of implementation of international responsibility which could not be ignored in the present draft (paragraph 41 of the report). His point on the scarcity of relevant practice was borne out by the fact that to date, only a few organizations had responded to the request for comments. Although on the whole those comments were positive, the lack of responses from a wider range of organizations might be a sign of the difficult nature of the legal issues involved. Many organizations were probably reluctant to reply simply because they did not have a firm view on the matter, or perhaps because they did not want to make their position known. She cautioned against giving too much weight to the relatively small number of responses received, and cited the comments by the European Commission as one example of the difficulties that might arise.

17. The European Union was not an international organization in the proper sense of the term—at least, not yet. If and when the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community entered into force, the legal status of the European Union would change, and it would be entrusted with competence to conclude international agreements. Whether it would become an international organization was a matter of debate. Until now, it had been a group of European countries that cooperated closely on certain economic and political questions. In some important areas, such as trade and fisheries, its member States had delegated some of the jurisdictional rights they enjoyed as sovereign States—above all, legislative competence and power to conclude certain types of international agreements—to certain institutions in the Union, the most important being the European Communities. However, it was still up to the individual States to implement and enforce the legislation both in relation to their own citizens and to other nationals. The European Union had not assumed the right or obligation to enforce the legislation or to execute the implementation of legal obligations under international treaties. Enforcement measures could include measures against illegal fishing in the exclusive economic zone, whether or not undertaken by a European Union member. Hence, it could not be said that member States had delegated their sovereignty to the European Union institutions: they retained their responsibility as States.

18. Technically, the European Communities were responsible for a violation of an international obligation if their legislation was in violation of, for example, the United Nations Convention on the Law of the Sea, but the individual States might well be responsible for taking enforcement measures. In some areas, competence was shared, and it was not always easy to ascertain where responsibility ultimately lay. International treaties concluded by European Union member States sometimes contained disconnection clauses, which set aside parts of the obligations in the treaty when a given area was already regulated by European Community law.

19. She had voiced a word of caution because references were frequently made to the European Union as if it were a proper international organization, and particularly since the responses in the documents were not technically from the European Union as an organization, but from the European Commission, i.e. one of its institutions. The European Commission's mandate was set out in the treaties adopted by the member States, and therefore its position reflected only one of the many institutions under the European Union umbrella.

20. As one of the guardians of European Community law, the European Commission was an important player, but it did not, for example, represent the European Union in foreign policy or security matters. That was, and would continue to be, the Council of Europe's remit. The view of the Council on matters relating to the International Law Commission's work was still not known and was not likely to be.

21. Thus, the Commission could not draw far-reaching general conclusions from the European Commission's response. Until the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community entered into force, it was the European Communities, not the European Union, that were party to international agreements such as the United Nations Convention on the Law of the Sea and WTO agreements. That was highly relevant to the topic under consideration, since it showed the difficulty of identifying the responsible organization. Until the responsible entity was determined, it would not be possible to establish whether a wrongful act was attributable to it and thus to take countermeasures. It might be even more difficult to pinpoint the entity that would be the proper target for countermeasures. There was a substantial risk that the organization or State that resorted to countermeasures might violate its own obligations by targeting the wrong entity.

22. Thus, the link between attribution, responsibility and the right to take countermeasures was crystal clear. What did that mean for the topic? First, it shed light on the comment made on more than one occasion by Mr. McRae, who argued that there was a need to differentiate between different types of organization. That might very well be true; but if the task proved too difficult, the draft articles must at least differentiate between the right of members and of non-members of an organization to take countermeasures.

23. Some organizations, such as WTO and the European Communities, had already established such procedures. It had been asserted that the European Communities had passed legislation that violated international law, for example in the *Ahmed Ali Yusuf and Al-Barakaat International Foundation* v. *Council of the European Union and Commission of the European Communities* case (now under appeal before the Court of Justice of the European Communities). In response to the increased power of the European Union, the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community would give European Union member States even wider possibilities to act.

24. Whereas there could be no doubt that an international organization was and must be accountable for its actions, including breaches of international obligations, it did not necessarily follow that the member States of the organization should be allowed a general and unduly broad right to take countermeasures against it; that might undermine inter-State cooperation and lead to a chaotic situation. She endorsed the comments in that regard by Mr. Nolte and Ms. Xue. If a State claimed that the organization of which it was a member was in breach of an obligation, and took countermeasures, and the organization then disputed the claim and announced that it would, in turn, take countermeasures against that member State, arguing that it had violated its obligations, the result would be not only a stalemate, but an unnecessary crisis, one that would probably run counter to the object and purpose of the organization.

25. The ultimate countermeasure was to withdraw from a treaty, which was clearly undesirable. That was not a purely theoretical situation, and was one of the reasons why an article was needed on admissibility of claims, as had been pointed out by Ms. Escarameia and a number of other members.

26. International law gave States and international organizations a number of ways of reacting to certain acts. States might resort to measures of retortion within the framework of international law. It was perfectly legal to take what were often referred to as "unfriendly" measures as an expression of displeasure with a certain behaviour. That was often done not only by individual States, but also by organizations or groups of States, such as the European Union.

27. The next step was countermeasures, and in order to take them, a number of criteria had to be met. Although there was no universal agreement on a definition, it was clear that countermeasures were measures which would otherwise be contrary to international obligations and were taken in response to an internationally wrongful act.

28. The term "sanction", for its part, was even more imprecise. A sanction might be imposed within the framework of a Security Council decision, for example as an enforcement measure under Chapter VII of the Charter of the United Nations, but the Security Council's mandate was much wider, being restricted only by the requirement that the measure be taken in order to maintain or restore international peace and security.

29. The question, then, was whether measures taken by the Security Council were countermeasures in the traditional sense of the term. She did not think they were, even though they might be adopted in reaction to a breach of an international obligation. It was in that context that the issue raised by José Álvarez in his article on the website of the American Society of International Law[57] was relevant. States had not established the United Nations in order to take countermeasures against it if it acted in breach of its obligations under international law. States assumed that the Organization would act within the parameters of international law. In fact, not even a decision by the Security Council was or was likely to be subject to a judicial review, whether the Commission liked it or not, and despite the door opened by the ICJ in the *Lockerbie* case.

30. Cases of a material breach of a treaty obligation were dealt with under applicable treaty law. Lastly, there was the situation in which a treaty, such as the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, provided for a regime of retaliation or contractual remedies, as convincingly described by Mr. McRae.

31. The discussion had shown that the Commission had not yet differentiated between the above-mentioned measures. It must decide what was and what should be included, and it must make it clear that measures taken by the Security Council fell outside the scope of the topic. It would also be useful to decide whether or not to deal with material breaches.

32. Mr. VASCIANNIE, referring first to the question of the invocation of responsibility by an injured State or international organization (draft article 46), said he accepted the premise that if a State was injured, it was immaterial, for the purposes of invoking responsibility, whether the injury was caused by a State or an international organization. He also accepted that an international organization could bring a claim on an international plane against another international organization.

33. As a matter of law, however, it was also true that an international organization could bring a claim against a State, regardless of whether the State was a member of the international organization. That was established in the 1949 advisory opinion of the ICJ on *Reparation for Injuries* and, with respect to non-member States, in the Court's famous *dictum* regarding the capacity of 50 States, representing the members of the international community, to give objective legal personality to an international organization. As had been emphasized by some members of the Commission, however, the Special Rapporteur had not included claims by an international organization against a State within the scope of draft article 46, thus creating a curious lacuna; the Special Rapporteur should explain that omission more fully.

34. In respect of the circumstances in which responsibility might be invoked, draft article 46 provided for three possibilities: when the obligation was owed to the State or international organization individually (paragraph (*a*)); when the obligation was owed to a group of parties, including the State or international organization, or the international community, and the State or international organization was specially affected (paragraph (*b*) (i)); and when the obligation was owed to a group of parties or the international community and it was of such a character that its breach radically changed the position of the parties with respect to the further performance of the obligation (paragraph (*b*) (ii)). Thus, the trigger in paragraph (*b*) (i) was that the State or international organization must be "specially affected", and in paragraph (*b*) (ii) it was that there was a "radical change" in obligations. Those triggers to draft article 46 were taken from article 42 of the draft

[57] J. E. Álvarez, "International organizations: accountability or responsibility?", *Canadian Council of International Law, 35th Annual Conference on Responsibility of Individuals, States and Organizations, Ottawa, 27 October 2006*.

articles on responsibility of States,[58] which in turn was based on the definition of "material breach" in the 1969 Vienna Convention. They were acceptable, but would necessarily require a case-by-case analysis of whether a State or international organization was specially affected or whether there had been a radical change of obligations. Under the circumstances, the commentary should provide examples for each category.

35. Draft article 46 would apply with respect to obligations both in treaties and in general international law. For that reason, he was not entirely certain that the word "parties" in draft article 46 (*b*) (ii), was appropriate, given that it tended to be used more for treaties than for customary international law.

36. On the issue of notice (draft article 47), he agreed that there should not be an indication as to the source of a claim from within an international organization. That was consistent with the approach taken in the articles on responsibility of States; the alternative might place too heavy a burden on the internal rules of an organization. The approach was also consistent with the case concerning *Certain Phosphate Lands in Nauru*, where a flexible approach had been taken by the ICJ on the bringing of a claim of State responsibility. One could probably argue that, in the interests of clarity, international organizations should be encouraged to give notice of their claims in writing.

37. The Special Rapporteur proposed the exclusion of rules concerning nationality of claims and the exhaustion of local remedies, or at any rate did not include them. On the nationality of claims, if a State claim against an international organization was meant, what was the argument for excluding the requirement of nationality of claims from the draft articles? The Special Rapporteur indicated that claims of that nature were rare, but not inconceivable, and then went on to say, in paragraph 16 of his sixth report, that "[s]hould a State exercise diplomatic protection against an international organization, nationality of the claim would be a first requirement". If nationality would be a first requirement, there was a case for including it in the current draft articles. The fact that a set of claims might be rare had not been used as an argument for excluding them from the general rules on invocation of responsibility elsewhere in the draft articles, and especially in draft article 46. Why, then, was rarity elevated to a guiding principle in the case of State claims against an international organization?

38. As to a claim by an international organization against another international organization, nationality would not be relevant, but if the claim was an indirect one, then perhaps by analogy the claimant international organization should be required to establish, as a precondition for admissibility, that the individual behind the claim was an agent of the international organization at the material time.

39. On the more difficult question of exhaustion of local remedies, the Special Rapporteur acknowledged the prevailing opinion that "the local remedies rule applies when adequate and effective remedies are provided within the organization concerned" (para. 16). That was consistent with the notion that local remedies must be exhausted where they existed, and it did not depart from the idea, set out in the *ELSI* case, that "for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success". Thus, where there were no remedies, there was no need to exhaust them. However, the draft articles should be prepared to say that if there was a remedy within the international organization, it should be exhausted. On that point, incidentally, he had no special fear of European structures, because it would be a question of fact in each case whether an appropriate remedy was available. It would be helpful if examples of that issue could be cited in the commentary.

40. With regard to draft articles 48 and 49, although he accepted the principles set out and the discussion of them in the commentary, their formulation was weakened by the use of the word "entities". The word "parties", as employed in draft article 46 (*b*) (ii), might not be appropriate either. It would be better to specify each of the possibilities, namely States and international organizations, given that the word "entities" could also include, for example, multinational corporations. In that connection, he was not in favour of extending the scope of the current chapter and the chapter on countermeasures to include the ICRC, a move that could have unpredictable consequences. What criteria would be used to justify including it, but not other NGOs?

41. He was in favour of incorporating a set of articles on countermeasures, more or less along the lines suggested by the Special Rapporteur. In principle, he believed that, as in the case of relations between States, countermeasures might play a role in relations between States and international organizations and, to some extent, in relations between two international organizations. As a matter of general observation, countermeasures could hardly be described as a weapon of the weak against the strong, but international law certainly allowed countermeasures in relations between States, subject to certain conditions, such as those set out in Omer Yousif Elagab's careful work on the subject.[59] He shared the view that the instances of countermeasures concerning international organizations cited by the Special Rapporteur largely reflected contractual relations within the European Union; those arrangements might have only a limited impact on the general state of the law, especially since other integration movements, such as the Caribbean Community (CARICOM), had so far avoided the degree of integration attained in Europe. That said, some of the State-to-State rules on countermeasures might be applied by analogy to the responsibility of international organizations. Thus, he supported draft article 52, including paragraphs 4 and 5, and draft articles 53 to 56.

42. Draft article 57, however, was problematic. First, its wording did not allow for easy interpretation. Secondly, the idea in its paragraph 2 that a State might require a

[58] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 117.

[59] O. Y. Elagab, *The Legality of Non-Forcible Counter-Measures in International Law*, Oxford, Clarendon Press, 1988.

regional economic integration organization to take countermeasures on its behalf might have the undesirable effect of causing a dispute to escalate by bringing in more States than those initially involved. Nor was any plausible explanation offered as to why an entity denominated a regional economic integration organization should be given special status. That was not consonant with current law, and it was difficult to see why draft article 57, paragraph 2, would constitute progressive development. He noted that neither the CARICOM regional economic organization nor its member States had canvassed the possibility recommended in that provision.

43. Mr. VÁZQUEZ-BERMÚDEZ congratulated the Special Rapporteur on his sixth report, which, notwithstanding difficulties associated with the scarcity of practice in the area, contained a useful in-depth analysis of matters relating to the invocation of responsibility of an international organization and of the question of countermeasures.

44. The Special Rapporteur suggested that before completing its consideration of the draft articles on first reading, the Commission should be given an opportunity to review the texts provisionally adopted in the light of subsequent comments by States, and of the fact that some of the articles had been examined in judicial practice. His own view was that the Commission should show flexibility in its working methods in that regard, since the goal was to achieve a better result, even if that result was only provisional. He endorsed the Special Rapporteur's suggestion, bearing in mind that the set of draft articles was virtually complete, which would enable the Commission to have an overall picture of them. Furthermore, if in his next report the Special Rapporteur intended to make concrete proposals for the revision of certain draft articles, it would be useful for the Commission to be able to analyse those proposals and, if appropriate, amend the draft articles concerned; that way, States and international organizations would see that their comments had been addressed and in some cases perhaps even incorporated before the second reading.

45. However, as to the suggestion that some articles might need to be amended in the light of recent judicial practice, he wished to sound a note of caution. The draft articles should be exhaustively analysed and formulated so as to constitute a widely acceptable and lasting contribution to the codification and progressive development of international law.

46. He welcomed the Special Rapporteur's stated intention of considering the question of special rules which might take into account the specific characteristics of certain organizations.

47. Draft article 46 (*b*) used the phrase "group of parties" to refer to a group of States and international organizations. The use of the term "parties" could, however, be misleading, since it generally referred to parties to an agreement, whereas under draft article 46 (*b*), the obligation breached could relate to, for example, regional custom, given that the draft article actually referred to any breach of an international obligation. Moreover, in later draft articles the Special Rapporteur used the term "entities" as a blanket term for States and international organizations. That term too was problematic, as some speakers had noted, and, in order to remain consistent with the rest of the draft articles, it would be preferable to refer explicitly to States and international organizations. More thought should be given to finding a suitable wording.

48. Draft article 46, which was closely modelled on article 42 of the articles on responsibility of States, set out the circumstances in which a State or international organization could consider itself an injured party entitled to invoke the responsibility of another international organization. If the obligation breached was owed to an international organization individually, there was no problem; but, in the absence of a precedent with regard to the conditions set out in paragraph (*b*), a more detailed analysis should be made of the importance of the functions and powers of the organization in question in applying those conditions to specific cases in which the international organization considered itself injured.

49. With regard to the admissibility of claims, he concurred with the view that the draft articles should include a provision on the nationality of claims and the exhaustion of local remedies, if adequate and effective remedies were provided under the organization's rules. As noted in the report, it was not inconceivable that a State might exercise diplomatic protection against an international organization, in particular an organization that administered a territory or used force; in such cases, nationality of the claim would be a first requirement.

50. With regard to draft article 51, the right of non-injured States to invoke the responsibility of an international organization presented no problems where the obligation breached was owed to the international community as a whole. The finding by the ICJ in the *Barcelona Traction* case was apposite in that context: had the Court found, with regard to obligations towards the international community as a whole, that "[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*" [para. 33 of the judgment]. In the case of international organizations, it was not simply a matter of their status as subjects of international law or members of the international community but also of the powers conferred on them by their rules, including implicit powers, in relation to the content of the obligation breached. It would therefore be wise to expand in some way the requirement contained in paragraph 3, under which an organization invoking responsibility had to have "been given the function to protect the interest of the international community underlying that obligation", since such a function was not necessarily spelled out in the organization's rules, even if the organization had powers expressly or implicitly linked with the nature of the obligation breached.

51. With regard to countermeasures, although the Special Rapporteur was right in saying that it would be hard to find a convincing reason for exempting international organizations from being possible targets of countermeasures, it was also the case that there was very little existing practice. For that reason, an exhaustive analysis should be undertaken of the implications of reproducing

the content of corresponding provisions of the articles on responsibility of States, and it should be ensured that sufficient safeguards existed to avoid abuses. Countermeasures should be used only in exceptional circumstances.

52. The report referred to the practice of WTO, with examples of countermeasures taken by certain States against the European Communities with the authorization of the Dispute Settlement Body. Paragraph (10) of the commentary to article 50 of the draft articles on responsibility of States for internationally wrongful acts pointed out, however, that the WTO system was deemed to be *lex specialis*.[60] Indeed, article 23 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes required that when members sought "the redress of a violation of obligations or other nullification or impairment of benefits" under WTO agreements, they should abide by the rules and procedures on dispute settlement and should not make a determination that a violation had occurred or suspend concessions, except in accordance with the rules and procedures of the Understanding.

53. It would be useful for the topic of countermeasures to be discussed by a working group. It would also be helpful if, as Mr. Pellet had suggested, a joint meeting could be held with the Legal Advisers of international organizations, so that the Commission's consideration of the topic could be made less abstract.

54. Mr. GAJA (Special Rapporteur) said that, by raising questions and doubts, expressing criticisms and dissecting his report, the members of the Commission had highlighted all the issues confronting it with regard to the question of the responsibility of international organizations. Further discussion was clearly necessary on some issues on which the Commission remained divided.

55. He would first address a couple of radical proposals that no doubt reflected deep conviction on the part of their authors, but might not be considered timely and, in any case, were unrealistic. Once the scope of international obligations set out in Part Two had been limited in draft article 36 to those "owed to one or more other organizations, to one or more States, or to the international community as a whole", it would follow that the invocation of responsibility by other entities or persons could not be included in Part Three. His proposal to draft a "without prejudice" provision, which had not attracted many comments in the Commission, remained an option, even though no corresponding provision was to be found in the articles on responsibility of States.

56. The second radical proposal, put forward by Mr. Pellet and taken up by others, was that the implementation of responsibility of a State that was in breach of its obligation towards an international organization should be included in the draft articles, since otherwise there would be a lacuna in the law of responsibility of States. The omission was not, however, the result of a recent decision, but was consistent with the approach adopted by the Commission from the outset. Had it been otherwise, the Commission would have systematically amended a number of the draft articles on responsibility of States. To give just one example, certain provisions concerning circumstances precluding wrongfulness—draft articles 20, 22 and 25—considered only relations between States. In order to complete the text, the Commission would have needed to add provisions concerning valid consent by an international organization to the commission of a given act by a State (art. 20); countermeasures taken by a State against an international organization (art. 22); and the invocation of necessity where an obligation existed towards an international organization (art. 25). He believed that the Commission had been wise not to tamper with the 2001 draft articles on responsibility of States, instead leaving it to the interpreter to work out the rules that applied to the relations between a responsible State and an injured international organization when that State breached an obligation existing towards that organization. It might well be that, in 10 or 15 years' time, a different approach might be appropriate and an international conference would agree on a single text covering both States and international organizations. For the time being, however, the Commission would be wise to leave the articles on responsibility of States unchanged and to regulate only matters relating to the responsibility of international organizations and those considered in draft article 51.

57. Some members of the Commission had viewed the wording of draft article 46 as implying that international organizations were regarded, under that article, as generally entitled to invoke responsibility, regardless of their capacity or size. He conceded that the terminology "invocation of responsibility", which came from the articles on responsibility of States, might be misleading. If a civil law approach had been adopted, as the Commission had done when considering those draft articles on first reading, the position correlative to "obligations" would have been termed "rights". One would first have established when an international organization would acquire such a right, and only then would the question of implementation be addressed. The articles on responsibility of States as adopted on second reading refrained from using the term "rights", but certainly implied that the international organization concerned had a special status in relation to the breach of an obligation, either because the obligation was individually owed to the organization or because of the more complicated circumstances set out in draft article 46 (*b*). The question of an organization's entitlement did not suddenly arise at the implementation stage. The organization concerned first had to acquire a right correlative to an obligation. What draft article 46 appeared to say, in substance, was that, should an international organization conclude an agreement with another international organization, and acquire a right under that agreement, it could invoke the responsibility of that organization, should the right be infringed. That was the simplest scenario, but also the most likely. There was no intention of extending invocation of responsibility beyond what would arise in the case of States. The draft article related to the case of an international organization specially affected by a given breach.

58. The rules of an international organization would play an essential role in defining whether it could acquire those rights for the infringement of which it would then invoke responsibility. The assumption that

[60] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 131.

an organization would act consistently with its own rules could be expressed in a provision to be included among the general principles. The statement of that assumption should not, however, imply that an international organization never acquired responsibility when it acted contrary to its rules. It might be responsible for the breach of an obligation *vis-à-vis* its members under its rules, but it might also be responsible for the breach of other obligations under general international law. Nor could it be said that the breach of its rules necessarily implied responsibility on the part of an international organization. A non-member State would hardly be entitled to demand that the organization should respect its rules. A non-member was not bound by those rules, unless it had consented to acquire obligations under them. Similarly, the organization did not have an obligation to act within its rules *vis-à-vis* a non-member, again unless the organization had consented to be so bound.

59. The qualification proposed in draft article 51, with regard to the invocation by an international organization of responsibility for the breach of an obligation towards the international community as a whole, reflected the views expressed by various States and international organizations. He noted, in that connection, that the Organization for the Prohibition of Chemical Weapons had made a general statement, and had not specifically considered its own entitlement. He concurred with the view expressed by Mr. Hmoud that, in paragraph 3 of the draft article, the definite article in the phrase "given the function" conveyed a misleading impression. That criterion had, however, received some support, and also some criticism, with some speakers seeking to restrict the qualification on the grounds that it gave an international organization too much scope to invoke responsibility, and others seeking to broaden the provision. On balance, however, the reaction had been favourable.

60. A number of drafting suggestions had been made with regard to draft articles 46 to 51, some of which touched on matters of substance, such as the implications of the concept of "subsidiary" responsibility in draft article 50. There had been no opposition to referring draft articles 46 to 51 to the Drafting Committee, which could address all those matters.

61. The Commission was divided on how the question of nationality of claims and exhaustion of local remedies should be approached and whether those matters should be addressed at all. A working group also convened for other purposes could be given the task of considering whether a provision could usefully be drafted on the admissibility of claims. As Mr. Kolodkin had pointed out, there were two separate cases: that of a claim by a State against an international organization, and that of a claim by one international organization against another. The former case should be fairly straightforward: article 44 of the articles on responsibility of States would serve as a model and the only point at issue was the extent to which the requirements of article 44 would apply with regard to international organizations. The Commission could leave article 44 unchanged in substance and provide examples in the commentary. Such examples might concern entities other than the European Union, since there were international organizations for which administrative tribunals might be competent with regard to claims that could later give rise to diplomatic protection.

62. With regard to a claim by an international organization against another organization, the requirement of the nationality of claims would not apply. As was pointed out in paragraph 19 of this report, the local remedies rule would be relevant only insofar as the claim by the organization also concerned damage caused to one of its agents as a private individual. Such cases, however, represented only a limited category of claims that could be preferred against an international organization. Having listened to the debate in the Commission, he was still inclined to favour omitting any article on the topic, but he had no strong views either way.

63. The question of countermeasures was the most difficult for the Commission but the easiest for him to sum up. The Commission was so divided as to whether there should be a chapter on countermeasures and, if so, to what extent international organizations should be considered entitled to adopt them, that the best course would be to form a working group, which could attempt to find a consensus. If the solution chosen was to be merely a "without prejudice" provision on countermeasures, as suggested by Mr. Fomba, there would be no opportunity to state, as the current wording of draft article 52, paragraphs 4 and 5, did, that as a general rule countermeasures had no place in the relations between an international organization and its members—an omission that he personally would regret. That general statement, the aim of which was to curb countermeasures, was nowhere explicitly spelled out in State practice or in the literature.

64. He wished also to draw attention to an error in the text of draft article 57, paragraph 1: the reference to "article 51, paragraph 1" should read "article 51, paragraphs 1 to 3".

65. In conclusion, he wished to propose that draft articles 46 to 51 be referred to the Drafting Committee and that a working group be convened to discuss both the question of an article corresponding to article 44 of the draft articles on responsibility of States and the question of countermeasures. He proposed that Mr. Candioti chair the working group.

66. The CHAIRPERSON said he took it that the Commission wished to refer draft articles 46 to 51 to the Drafting Committee and that a working group should be set up, chaired by Mr. Candioti, to consider countermeasures, and possibly other issues.

It was so decided.

67. Responding to a request for clarification by Mr. HMOUD, Mr. CANDIOTI said that the working group's mandate would cover both countermeasures and the question of the missing draft article on admissibility of claims.

The meeting rose at 11.45 a.m.