Document:-
**A/CN.4/3008**

# Summary record of the 3008th meeting

Topic:
**Responsibility of international organizations**

Extract from the Yearbook of the International Law Commission:-
**2009**, **vol. I**

## 3008th MEETING

*Wednesday, 20 May 2009, at 10 a.m.*

*Chairperson:* Mr. Ernest PETRIČ

*Present*: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue.

---

**Responsibility of international organizations (*continued*) (A/CN.4/606 and Add.1, sect. D, A/CN.4/609, A/CN.4/610, A/CN.4/L.743 and Add.1)**

[Agenda item 4]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the members of the Commission to continue their consideration of the seventh report on responsibility of international organizations (A/CN.4/610).

2. Mr. MELESCANU thanked the Special Rapporteur for his presentation of Part Two of the draft articles entitled "Content of the international responsibility of an international organization", which raised some important issues, and said that he would like to make a few comments on it. He noted that in paragraphs 95 to 100 of his report, the Special Rapporteur provided a very detailed account of the views expressed by States Members of the United Nations on draft article 43 (Ensuring the effective performance of the obligation of reparation). Unfortunately, the Commission's endeavours to find acceptable wording had not been crowned with success, despite agreement in principle that it was necessary to address the question of how to involve the member States of an international organization in the effective performance of the obligation of reparation by which the organization was bound. The Special Rapporteur had tried to find an acceptable solution by proposing the addition of a second paragraph, although admittedly that option had not enjoyed wide support from the members of the Commission; Mr. Pellet had been in favour of adding a "without prejudice" clause, while Mr. McRae had suggested that the proposed provisions should be placed in the commentary to draft article 43.

3. He was personally of the opinion that the right place for the additional paragraph proposed by the Special Rapporteur was in the draft articles themselves, since it was necessary to find a solution that made it clear that the member States of an international organization were not being burdened with subsidiary or joint obligation, but that the purpose of the draft articles was simply to create mechanisms securing the effective performance of the obligation of reparation. The Special Rapporteur was correct in stating that, since draft article 43 concerned the performance of the obligation of reparation, it should normally be placed in the chapter of the draft text referring to reparation. However, in view of the delicate nature of the problem, the European Commission's proposal[107] that draft article 43 should be moved to the part devoted to general principles should not be ignored. Draft article 43 could in any event be referred immediately to the Drafting Committee.

4. Turning to draft article 48 (Admissibility of claims), he said that it was unthinkable that draft articles on the responsibility of international organizations should contain no provisions on the functional protection of officials of international organizations, since they were in the front line in the field. For example, when Romanian policemen had taken part in an action to defend the Parliament during peacekeeping operations in Kosovo, in which one of them had been killed, Romania had found itself in an awkward position because it could not itself exercise protection on behalf of the police officers whom it had placed at the disposal of the United Nations. But the United Nations, as an international organization, could not exercise protection on their behalf either. Despite the obstacles which had to be overcome, and although some States Members of the United Nations, such as Slovenia,[108] were opposed to it, the Commission must find a way of providing for the functional protection of officials of international organizations. It should at least address that specific question and make sure that the future draft convention was more than just a general, theoretical framework.

5. As for draft article 55 on countermeasures, he drew attention to the fact that the Commission had already decided that it should deal with that matter,[109] so that all that remained was for it to ask itself how that should be done. In that connection, it was essential to distinguish clearly between countermeasures against States members of the international organization and countermeasures against non-members. It should be stipulated that countermeasures against member States could be adopted only after internal means of redress within the organization had been exhausted. That seemed to be a logical solution to the problems raised by that draft article.

6. With regard to draft article 61 (*Lex specialis*), he recalled that the Commission had proceeded on the assumption that, since international organizations, like States, were subjects of international law, it could base itself on the draft articles on responsibility of States for internationally wrongful acts[110] when formulating draft articles on responsibility of international organizations. It had likewise assumed that, notwithstanding the great variety of international organizations, they had a number of common features which might serve as a basis for working out general rules. The aim of the proposal relating to *lex specialis* was to cater for the huge differences between international organizations. Sir Michael had drawn up a

---

[107] *Official Records of the General Assembly, Sixty-second Session, Sixth Committee, 21st meeting* (A/C.6/62/SR.21), para. 115.

[108] *Ibid., Fifty-eighth session, 17th meeting* (A/C.6/58/SR.17), para. 9.

[109] *Yearbook ... 2008*, vol. II (Part Two), paras. 129–134, 141 and 148–153.

[110] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 26, para. 76, especially article 55 and the commentary thereto, pp. 140–141.

non-exhaustive list of those differences, to which could be added the system for adopting decisions. While the decision-making mechanisms of States were well known and all the consequences in terms of responsibility could be drawn therefrom when it came to international organizations, there were almost as many decision-making mechanisms as organizations. The application of the principle of *lex specialis* should therefore provide a general solution to the problem of the specificities of international organizations, a question that should be addressed in the chapter dealing with general principles. In that connection, support should be given to Sir Michael's proposal that the general principles should clearly state that the specific characteristics of international organizations should be taken into account. Perhaps it was time to urge the Special Rapporteur to accept a different approach. Hitherto the Commission had used the rules on State responsibility as its model and had adapted them to the specific features of international organizations, but the exercise seemed to be reaching its limits. The time had come for the Commission to think about dealing with the specific characteristics of international organizations in a first chapter setting out the general principles of the responsibility of international organizations.

7. He agreed that the other draft articles should be referred to the Drafting Committee.

8. Mr. PERERA noted that the only change proposed by the Special Rapporteur with regard to the content of the international responsibility of international organizations was the addition of a second paragraph to draft article 43 (Ensuring the effective performance of the obligation of reparation) relating to the duty of providing an international organization with the means for effectively fulfilling its obligations under the chapter on reparation for injury. One of the concerns expressed during the Commission's debate at the fifty-ninth session had been that the draft article might be interpreted as placing the member States of an international organization under a subsidiary obligation to provide reparation. A minority of Commission members had proposed an alternative text, evidence of the diversity of views that had emerged on the issue.[111] Against that backdrop, the introduction of a new paragraph into draft article 43 was a positive development insofar as it provided the requisite clarification, did not place a subsidiary obligation on the States members of an international organization and established the necessary balance. Nonetheless, any further proposal concerning the draft article that might be put forward during the current debate would be welcome, including the incorporation of a "without prejudice" clause, provided that it was made clear that no subsidiary obligation would devolve upon the States members of an international organization.

9. The Special Rapporteur had not proposed any changes in Part Three concerning the implementation of the international responsibility of an international organization. In paragraph 117 of his report, however, the Special Rapporteur noted that one State had expressed the view that "as a general rule, countermeasures had no place in the relations between an international organization and its members". The Special Rapporteur also referred to the doubts voiced as to whether that principle and the exceptions to it were adequately stated in draft article 55, and consequently he suggested that the Commission might wish to reconsider that provision. In that regard, it should be emphasized that the special nature of the relationship between an international organization and its members, which was governed by the constituent instrument and the rules of the organization, was a critical factor that needed to be taken into account when drawing up a set of draft articles on countermeasures. Caution was necessary. Concern had been expressed during the debate at the Commission's sixtieth session in 2008,[112] in the Sixth Committee at the sixty-third session of the General Assembly (A/CN.4/606, paras. 58–63) and at the meeting of legal liaison officers/advisers of the United Nations system held the previous week that countermeasures might affect an international organization's performance of its functions and might be abused by stronger member States to strangle an international organization, for example, by denying it funds. In that light, he agreed with Ms. Escarameia that the language of draft article 54, paragraph 4, referring to the effect of countermeasures on an international organization's exercise of its functions, was somewhat weak and required reworking. The principle could perhaps be reformulated in the negative so that the paragraph would state that "countermeasures shall not be taken in a manner that would affect the exercise by the responsible international organization of its functions".

10. Draft article 55, like draft article 19, paragraph 2, posed difficulties, especially with regard to the use of the phrase "some reasonable means for ensuring compliance". That overly vague language might give rise to difficulties of interpretation and application. He therefore tended to agree with the wording proposed at the previous meeting by Sir Michael Wood, namely: "unless, in the particular circumstances, no means to induce that international organization to comply with its international obligations are available". The Drafting Committee could look into that question, and once the language of draft article 55 was settled, draft article 19, paragraph 2, could be aligned with it.

11. He was in broad agreement with the chapter of the report on general provisions (paras. 120–134). He welcomed draft article 61 (*Lex specialis*) in which express reference was made to the "special rules of international law, such as the rules of the organization". As the Special Rapporteur had indicated, a general provision would obviate the need to repeat the proviso "subject to the special rules of the organization" in the draft articles where it would otherwise required. On the other hand, it might be useful, as suggested at the previous meeting, to refer in the commentary to the specific articles to which such a proviso would apply.

12. He approved of draft articles 62 (Questions of international responsibility not regulated by these articles), 63 (Individual responsibility) and 64 (Charter of the United Nations). Draft article 64 was particularly relevant to Security Council resolutions adopted under Chapter VII of the Charter of the United Nations and to possible limitations on countermeasures. He likewise endorsed the

[111] See footnote 106 above.

[112] *Yearbook ... 2008*, vol. II (Part Two), paras. 148–153.

suggestion made by several Commission members to add a draft article reflecting the diversity of international organizations and the specificity of each individual organization. In conclusion, he recommended that draft article 19, paragraph 2, as well as draft articles 55 and 61 to 64 should be referred to the Drafting Committee.

13. Mr. HMOUD, referring to the scope of the draft articles, agreed that the regime of international responsibility did not currently cover the question of the invocation of State responsibility by an international organization. The Special Rapporteur was, however, right in saying that that was an extraneous issue which should have been dealt with in the articles on State responsibility. There was a procedural matter involved, which could be settled by a decision of the General Assembly to supplement the articles on State responsibility for internationally wrongful acts with an article on that question.

14. As for the placement of the definition of the "rules of the organization" in the draft articles, it would be wise, as the Special Rapporteur suggested, to move it from draft article 4 to draft article 2 (Use of terms). Since the rules of the organization had been mentioned not only in relation to the attribution of conduct, but also in some other draft articles, their definition should apply generally to all relevant articles.

15. With regard to the attribution of conduct, it was important that the Special Rapporteur had accepted the premise that attribution of an act by an agent of an international organization to that organization should rest on a "factual test". If that point were made in the commentary, it should clearly indicate that attribution depended not only on how the organization's rules defined the notion of an agent performing the organization's functions, but also on whether the person in question had actually been instructed to carry out one of the functions of the organization. Draft article 4 referred to "other persons", for example, contractors, who carried out certain functions of the organization. If they committed a wrongful act, there was no reason why it should not be attributed to the organization, provided, of course, that the other conditions of attribution had been met.

16. The criterion of effective control exercised by an organization over the conduct of another entity which committed a wrongful act had recently received attention in the wake of the decision of the European Court of Human Rights in *Behrami and Saramati*. While the Court had not contradicted the test set forth in draft article 5, it had significantly lowered the threshold of control in finding that the delegation of operational command to an organ of another entity was sufficient for the wrongful act to be attributable to the delegating organization. Although that position had been criticized, it did raise a question of legal policy: was it preferable for the international organization which had given its authorization to another entity to be responsible for the wrongful act committed by that entity, or for the organ or the entity in question to be responsible under the criterion of attribution. Whatever position was taken, there was no reason at that point for the Commission to change the "effective control test", or to lower the threshold, since that criterion seemed to be that most generally recognized with respect not only to the responsibility of international organizations, but also to other forms of responsibility under international law. The effective control test had also been criticized on the grounds that it had been tailored for military operations and was not appropriate for other forms of cooperation between international organizations and other entities. The Special Rapporteur's reply was that, in doubtful cases, the test could lead to double attribution, which was allowed under international law. In his own opinion, it constituted a factual test, which introduced some flexibility when dealing with a variety of situations and which would produce the desired result with regard to attribution.

17. As for the Special Rapporteur's proposal to amend draft article 8, paragraph 2, on a breach of the rules of an organization constituting a breach of international law, the new wording might relieve the concerns of those who feared that paragraph 2, as it stood, might suggest that all the rules of an organization formed part of international law, which was not the case. The current wording of paragraph 2 did not support that interpretation, something that could have been made clear in the commentary. He could, however, accept the new formulation.

18. The Special Rapporteur's proposal that in draft article 15, paragraph 2 (*b*), the phrase "in reliance on" should be replaced with "as the result of" would bring out the link between the wrongful act committed by a member of an international organization and the authorization or recommendation of that organization. But he wondered whether the subject matter of the authorization or recommendation giving rise to the internationally wrongful act had to fall within the functions of an organization before the organization's responsibility could be incurred. For example, if an organization recommended that its members should adopt sanctions against a third party and those sanctions were unlawful under international law, should the organization be held responsible if it was not competent to impose sanctions? Conceivably, international organizations might issue recommendations of a political nature that did not necessarily fall within their functions. That point deserved further elucidation in paragraph 2 (*a*) or (*b*), or in a new subparagraph.

19. On circumstances precluding wrongfulness, he fully agreed with the Special Rapporteur that draft article 18 on self-defence should be deleted, because international law made no provision for the institution of self-defence in the case of an international organization and the creation of such a regime was not supported by any emerging *opinio juris*. Self-defence was directly related to State sovereignty, a notion that did not apply to an international organization. The same was not true of the regime of countermeasures, which international organizations, like States, could adopt. An international organization could be subject to countermeasures or take them itself. In the latter instance, for wrongfulness to be precluded, the measure must be lawful, in other words, it must, *inter alia*, be in accordance with the rules of the organization and in keeping with its functions as regulated by those rules. Draft article 19 would be clearer if that condition were expressly stated.

20. He welcomed the amendment made to draft article 28, paragraph 1, to the effect that the State must have acted intentionally, or in bad faith, when transferring its

competence in order for it to incur responsibility. But the new wording ("purports to") did not obviate the need to assess intent. The injured entity would still have to prove bad faith on the part of the State, just as it would have to prove the other elements of the breach. At all events, the burden of proof should not be shifted to the respondent State by the inclusion of a reference to "what may be reasonably assumed from the circumstances".

21. With regard to the proposal to add a second paragraph to draft article 43, he drew attention to the fact that that draft article had been the fruit of intensive negotiations within the Commission, which had finally adopted the principle that members should cooperate in fulfilling an organization's obligations to an injured party. It had, however, been understood that draft article 43 would not in any way entail a member's direct responsibility towards the injured party. The current version of draft article 43 did not convey the idea that a member was directly responsible for reparation or that the injured party could not rely on the organization's rules regulating legal relations within the organization and between the latter and its members. But if the Commission thought that the second paragraph made for greater clarity, it should be adopted; otherwise, the commentary would suffice.

22. He had already voiced his support for the inclusion of a countermeasures regime in the draft articles, not only because there was no reason to differentiate between States and international organizations with regard to the relevance of such a regime, but also because it would make it possible to regulate and limit the application of countermeasures to international organizations. Furthermore, the General Assembly was generally in favour of including such a regime in the draft articles. In paragraph 117 of his report, the Special Rapporteur said that the Commission might wish to reconsider the question of countermeasures in relations between an international organization and its members. That suggestion was based on comments that draft article 55 did not sufficiently limit the application of countermeasures between members and an organization. Nevertheless, the question had to be asked whether there were any other legal or policy reasons, apart from the scope of the rules of an organization, its nature and its ability to perform its functions, that would warrant extending the limitations that were already applicable under the general conditions governing the use of countermeasures.

23. As far as *lex specialis* was concerned, it was important to include a draft article stating that special rules on responsibility took precedence over the draft articles, which were general in nature. There were matters that the Special Rapporteur and the Commission had consistently stressed were hard to regulate owing to a lack of practice or theory in the matter. In view of the diverse nature and structure of international organizations, it was imperative to include in the draft articles a provision stating that *lex specialis* prevailed. Moreover, there were other matters that were not dealt with either by special rules or by the current draft articles. Hence the importance of draft article 62, which stated that they were regulated by the applicable rules of international law. Nor did the draft articles seem to deal with some other matters that were not regulated by either *lex specialis* or the other rules of international law. Although the system established in the draft articles should not be disturbed by making their application dependent upon the nature of the organization, if developments in the future warranted the formulation of specific rules applicable to a particular kind of organization, the Commission could tackle the issue when it considered the draft articles on second reading. In conclusion, he recommended that draft articles 19 and 61 to 64 be referred to the Drafting Committee.

*The meeting rose at 10.50 a.m.*

---

## 3009th MEETING

*Friday, 22 May 2009, at 10 a.m.*

*Chairperson:* Mr. Ernest PETRIČ

*Present*: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Nolte, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue.

---

**Responsibility of international organizations (*continued*) (A/CN.4/606 and Add.1, sect. D, A/CN.4/609, A/CN.4/610, A/CN.4/L.743 and Add.1**

[Agenda item 4]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. Mr. DUGARD said that he disagreed with the suggestion put forward in paragraph 97 of the seventh report on responsibility of international organizations (A/CN.4/610) that another paragraph might be added to draft article 43 in order to specify that States were not obliged to make reparation for wrongful acts of an international organization. In fact, it would be best to leave that question open.

2. Commenting on draft article 48, on admissibility of claims, he recalled that when the Commission had considered paragraph 1 of that article,[113] he had pointed out that when a State or an international organization brought a claim relating to an obligation owed to the international community as a whole, the situation addressed by draft article 52, it was obviously unnecessary to establish nationality of the claim. The omission of a clause to that effect had been an oversight in the draft articles on responsibility of States for internationally wrongful acts,[114] and the Commission had decided not to rectify it. He was surprised that States had not noticed that lacuna in either the draft articles on State responsibility or the draft articles currently under consideration, and he supposed that it was too late to remedy it.

---

[113] *Ibid.*, vol. I, 2962nd meeting, para. 26.

[114] See footnote 10 above.