

Document:-  
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**Summary record of the 2935th meeting**

Topic:  
**Responsibility of international organizations**

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26. The CHAIRPERSON, speaking in his capacity as a member of the Commission, said that he was not opposed to the draft articles being referred to the Drafting Committee. However, he shared the view of members who were uneasy about the way in which the Commission had approached the problem of responsibility of member States in the case of an organization that did not have the means to provide adequate reparation.

*The meeting rose at 11 a.m.*

## 2935th MEETING

*Thursday, 12 July 2007, at 10.10 a.m.*

*Chairperson:* Mr. Ian BROWNLIE

*Present:* Mr. Cafilisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

### **Responsibility of international organizations (*continued*) (A/CN.4/577 and Add.1–2, sect. B, A/CN.4/582, A/CN.4/583, A/CN.4/L.720)**

[Agenda item 3]

#### FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON reminded members that, at the 2932nd meeting, Mr. Pellet had urged the Commission to incorporate in the draft articles an additional provision dealing with the obligation of member States of an international organization to provide the organization with means of effectively carrying out its obligations that might arise as a result of its responsibility. That proposal had now been circulated to the Commission in written form. He suggested that the Commission should first conclude its plenary debate on the fifth report of the Special Rapporteur, who would then sum up the debate. Following the possible referral of all or some of draft articles 31 to 44 to the Drafting Committee, the Commission could then turn to the consideration of Mr. Pellet's proposal.

*It was so agreed.*

2. Mr. VASCIANNIE commended the Special Rapporteur on the analytical manner in which he had broached the topic of the responsibility of international organizations in his insightful fifth report and on his skill in extracting guidance for the Commission from very limited practice.

3. Notwithstanding the wide variety of international organizations, to which reference was made in paragraph 7 of the report, he could think of five reasons why

they should not be classified in different categories for the purpose of formulating rules on their international responsibility, and why the approach adopted by the Special Rapporteur deserved support.

4. First, the rules on responsibility were pitched at a level of generality that encompassed organizations of varying sizes and forms. Secondly, there was next to no practice in the area of responsibility suggesting that there should be one set of rules for one class of organization and a different set for others. Such a differential approach would amount to progressive development and would be in need of clear policy support. Thirdly, if such an approach were adopted, what criteria would be used for classification? Would the criterion be the number of States members of the organization; the power of the member States; the size of the organization's budget; its longevity; its objectives; whether it aspired to regional or universal membership; or the degree of risk it was likely to incur? Some of those criteria cut in differing directions and would probably make the classification unworkable in practice.

5. Fourthly, since a differential approach had not been adopted in the sphere of State responsibility, the onus was on the proponents of classification to show why the approach adopted with regard to responsibility of States was inappropriate in the case of international organizations. Lastly, there appeared to be no convincing reason of principle for introducing a classification of international organizations for purposes of responsibility. While it had been suggested that such a classification might be helpful in the context of reparation, he was uncomfortable with that idea. Why should a poor organization be able to act without incurring responsibility, by passing on responsibility to its member States, while rich organizations would not be allowed to do so?

6. As for the issue of recognition of an international organization's legal personality by an injured State, discussed in paragraph 8 of the fifth report, he was of the opinion that an international organization owed responsibility to all States and all other organizations and not just to member States, or States which had recognized it. His reasons for reaching that conclusion could again be listed.

7. First, in principle, an international organization should be responsible for all its wrongful acts, irrespective of the political inclination or opinions of the injured State or organization (recognition being a political act). Secondly, it was unclear to whom a State should turn if it was wronged by an international organization it had not recognized. Trying to obtain reparation from the member States might prove problematic if some of them had not been recognized by the victim State. Moreover, member States might refuse to pay reparation to the victim State on the grounds that it had not recognized their organization. Thirdly, in the advisory opinion on *Reparation for Injuries*, recognition had not been a factor in determining objective personality for the purposes of a claim brought by the United Nations. The converse would appear to be logically true, so that recognition should not be a factor in determining objective personality in respect of liability for claims.

8. Lastly, he was uncertain whether the European Commission's comments quoted in paragraph 9 of the report had the implication ascribed to them by the Special Rapporteur. While the European Commission distinguished between member States, third States that recognized the organization and third States that did not to do so, it did not spell out the consequences of that distinction. It might be going too far to interpret the European Commission's position as meaning that "responsibility of an international organization would arise only towards non-member States that recognize it".

9. What would happen if the international organization could not afford to pay compensation for its wrong? In that situation, should international law pierce the institutional veil? Those against such action argued that an organization had its own legal personality and must, by extension, be responsible for its own liabilities, however incurred. They also submitted that it was the organization, as distinct from its members, that had committed the wrongful act and might point to municipal law analogies and the *Barcelona Traction* case in support of their contention that member States were not liable for the wrongful act of the organization.

10. Too much reliance on that line of argument could, however, lead to the evasion of responsibility or, worse, result in the victim being left without recourse. He was therefore inclined to support Mr. Pellet's suggestion that a legal duty should be imposed on States to pay reparation in some circumstances. He had initially considered the possibility of inserting hortatory language encouraging States to facilitate payment when the organization was unable to pay, but had subsequently reached the conclusion that such an approach would be inappropriate, given that States' treasuries rarely responded to soft law. What was important was that the system of responsibility should not leave an international organization's wrongful act unremedied.

11. On the matter of reparation (draft articles 37 to 42), there was a case for offering a victim State a choice between restitution and compensation in some instances. A Government whose embassy had been destroyed in State X might not wish to rebuild it and might prefer compensation. That situation did not appear to be covered by draft article 38 (a) or (b).

12. Moreover, there might also be a case for requiring the victim to take reasonable steps to mitigate the damage. Draft article 42 would take into account the victim's contribution to the injury, but it should be borne in mind that victims sometimes contributed to the level of the damage. Such a position could be justified by analogy with municipal law. Nevertheless, he had reservations about the reference to "omission" in that draft article, because that word implied that the State or international organization had a duty to avoid placing itself in a position where a wrong could be done to it.

13. In draft article 40, a reference to the concept of "abuse of rights" might obviate the need for the express statement that "satisfaction ... may not take a form humiliating to the responsible international organization". The matter of making a formal apology was in the realm of

*lex ferenda* and, although the Commission might well be guided by the draft articles on responsibility of States for internationally wrongful acts,<sup>265</sup> great care would be needed because, almost by definition, if the proffering of a formal apology were to be made a legal requirement, that would not only be humiliating, but also a contradiction in terms, because it would diminish the apparent sincerity or value of the apology.

14. He also wondered whether, in draft article 44, it might be useful to include a provision to the effect that negotiations regarding a situation and the outcome of those negotiations did not constitute recognition of a situation created by a serious breach of an obligation under a peremptory norm of general international law, in order to facilitate solutions in situations where the law was only one of a number of factors to be considered. It might be helpful if the provision were also to indicate that provision of accommodation for individuals in unlawful situations did not necessarily imply that an organization was helping to maintain that situation. He had in mind the well-known case of the bantustan passports.<sup>266</sup> If the international organization took the position that since bantustans were illegal, no legal consequences should arise from their actions,<sup>267</sup> that placed individuals within the bantustans at a severe disadvantage. The rules on peremptory norms might therefore require some qualification in the context of the draft articles.

15. Mr. NIEHAUS said that the fifth report on responsibility of international organizations was an extremely clear and legally profound study of a topic of particular significance. Since it summarized work on the topic to date and drew attention to outstanding issues requiring further examination, it was also extremely helpful to new members at the beginning of the new quinquennium.

16. He was in agreement with the contents of the report. He, too, considered it vital not to succumb to the temptation of differentiating between various categories of organizations on the basis of whether they were universal, regional, political, technical and the like. The draft articles should maintain their general character in order to encompass all kinds of international organizations.

17. An international organization was emphatically responsible for the wrongful acts it committed and for the consequences of those acts. Draft article 34 was therefore particularly apposite. If an international organization was unable to make full reparation for the injury caused by an internationally wrongful act on its part, its member States or other member international organizations should be placed under an obligation to do so. Mr. Pellet's proposal in that regard therefore offered an appropriate solution which deserved the Commission's support. At some future date, it might also be advisable to consider whether international organizations which were members of other international organizations should be required to provide the latter with the means of meeting their obligations.

<sup>265</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 26, para. 76 (see footnote 116 above).

<sup>266</sup> See the advisory opinion of the ICJ in the *Namibia* case.

<sup>267</sup> See General Assembly resolutions 3411 (XXX) D of 28 November 1975 and 31/6A of 26 October 1976.

18. He supported all the draft articles contained in the fifth report, although he had some difficulty with draft article 35, which would allow an organization to rely on its own rules as justification for failure to comply with obligations deriving from its relations with its members. Since, as Ms. Escarameia had pointed out, that provision would enable an organization to do whatever it liked, it would obviously conflict with the remainder of the draft articles and with the spirit of the report and should therefore be amended.

19. Mr. Nolte's ideas about a broader regulation of an international organization's responsibility were most interesting.

20. In conclusion, he said that in his view draft articles 31 to 44 should be referred to the Drafting Committee.

21. Mr. HASSOUNA said that the fifth report on responsibility of international organizations was clear, precise, comprehensive and informative for new members. The Special Rapporteur's task had been made all the more difficult by the lack of practice and case law on the subject. International organizations had increased in number, jurisdiction and importance in recent years and, for that reason, their comments were of great relevance to the Commission's review of the articles provisionally adopted on first reading, although clearly they should be regarded as merely informative and should not bind the Commission or influence its conclusions in any way. Although a number of provisions relating to the responsibility of States were reproduced in the draft articles on the responsibility of international organizations, he totally agreed with the Special Rapporteur that it should not be assumed that solutions applying to States were generally applicable to international organizations, because of the inherent differences between the former and the latter. While States had general sovereignty and defined rights and obligations, organizations had limited jurisdiction and did not possess sovereign rights and obligations. Despite those differences, it might have been wise, however, for the Commission to deal with the two questions of the responsibility of States and of international organizations together as one subject, since they obviously complemented each other.

22. Uncertainty as to whether the current draft articles took account of the great variety of international organizations had been prompted by legitimate concerns arising from the fact that some of the hundreds of existing international organizations were limited in membership, scope or functions, while others had universal membership, wide scope and broad powers. At the regional level, some organizations were of a mere technical nature, while others were regional arrangements under Chapter VIII of the Charter of the United Nations, with specific powers in the field of preserving regional peace and security. While he agreed that it would be impossible to take full account of such a wide variety of international organizations in the draft articles, he believed that the general rules applicable to all organizations should be combined with clauses making exceptions for certain organizations, such as the United Nations, that had special responsibilities to redress unlawful situations and end serious breaches of an obligation arising under a peremptory norm of general international law, within the meaning of draft article 44.

23. Another important issue that was sometimes overlooked was the responsibility of an international organization as distinct from that of its member States. While an international organization had an independent legal personality and should therefore assume full responsibility for its wrongdoing, in practice the decision-making process raised more complex issues. International organizations' decisions were often subject to the approval or acquiescence of their member States. In the United Nations, for instance, the implementation of Secretariat decisions on a number of sensitive issues, including peacekeeping operations in Bosnia and Herzegovina and Rwanda and sanctions regimes, had been monitored by the Security Council, the organ with primary responsibility for international peace and security. In those circumstances, it might be possible to conclude that all the parties involved bore joint responsibility for an unlawful act, though the nature of that responsibility—legal, political or moral—would certainly remain open to debate.

24. If an international organization was unable to make reparation, in the form of compensation, for the injury caused by an internationally wrongful act it had committed, member States, even those not responsible for the act, might be willing to make voluntary contributions in order to preserve the credibility of their organization. It was, however, doubtful whether member States would be prepared to accept a legally binding obligation to pay compensation for an act for which they were not responsible.

25. In concluding, he recommended that the draft articles contained in the fifth report be referred to the Drafting Committee.

26. Mr. MELESCANU said that the task of drawing up rules on the responsibility of international organizations was an extremely exacting one that would require much effort, notwithstanding the enormous body of work already accomplished on the draft articles on State responsibility for internationally wrongful acts. Although, at first sight, the existence of that text might appear to be an advantage, the Special Rapporteur had had to make a detailed analysis of each provision on responsibility of States in order to ascertain whether the provision in question was also applicable to the responsibility of international organizations. Even if the Special Rapporteur ultimately decided that a given provision should be replicated (and that did not mean simply transposing it), that would entail much more work than might at first sight be supposed. Criticism levelled at the Special Rapporteur on that score was therefore unjust.

27. The second difficulty stemmed from the specific nature of the subject matter of the draft articles. In his view, the responsibility of international organizations was a subject derived from public international law, a sort of halfway house situated midway between the responsibility of sovereign, independent States, which was based on well-established rules of customary law recently codified by the Commission, and the criminal responsibility of individuals. The special nature of the responsibility of international organizations called for specific solutions. That difficulty had been highlighted by Mr. Pellet in his statement and the new proposal he was shortly

to introduce. The fact of the matter was that international organizations had no assets other than those provided by their member States.

28. The third difficulty was that the notion of an international organization encompassed an enormous variety of organizations ranging from integration organizations such as the European Union to entities which amounted to no more than mechanisms for implementing certain international or other agreements. At the current stage of its deliberations, the Commission should concentrate on attempting to formulate general rules covering the responsibility of international organizations as a whole, rather than becoming bogged down in an examination of criteria for determining separate categories of organizations. However, he would not rule out such an approach at some point in the future, should attempts to establish a general regime fail.

29. The difficulties he had just outlined highlighted the importance of the Special Rapporteur's study, and he was in favour of referring the draft articles presented in the fifth report to the Drafting Committee.

30. One key question concerned reparation for injury occasioned by a wrongful act of an international organization. He fully agreed that member States could not be held responsible and that it was for the international organization itself to make reparation for any injury it caused. On the other hand, it had to be acknowledged that an international organization had no assets other than those provided by the contributions assessed from its member States. Even where it did have other sources of income—as in the case of wealthy bodies such as the International Telecommunication Union, or the World Intellectual Property Organization, which gained much revenue from fees for patent registration—the approval of member States through adoption of the budget was necessary in order to determine how financial resources were to be spent. It was all very well to lay down a rule that the international organization, not its member States, bore responsibility, but in practice it might turn out to be a dead letter; the right to reparation would be impossible to implement simply because international organizations had no real means of making reparation unless member States played a role. As usual, Mr. Pellet had put his finger on a truly crucial question. Indeed, it was probably the most important question of all, and the Commission must resolve it. In all other respects, the draft articles appeared to be progressing at a satisfactory pace.

31. One way forward was through Mr. Pellet's proposal. While it was better than nothing, it was not entirely satisfactory; for a start, what would happen if a State voted against an international organization's decision to make reparation? Surely it could not be obliged to contribute? Another possibility would be to recommend that all international organizations should create mechanisms acceptable to member States, providing for reparation for injury, but that was not an entirely satisfactory solution either. It would be difficult—if not impossible—for the United Nations to adopt amendments to the Charter of the United Nations on reparation for injury, and many other organizations would have enormous difficulty in creating such systems.

32. A third option would be to expand the relevant portion of the draft articles on two levels, perhaps with the addition of new provisions: first, provisions on the responsibility of international organizations for injury caused by wrongful acts; and second, on the basis of the Commission's work on international liability for injurious consequences arising out of acts not prohibited by international law, provisions to create an obligation for member States to compensate victims of wrongful acts of international organizations. Unless a generally acceptable scheme for reparation for injury was found, the draft articles would remain a highly stimulating intellectual exercise but one devoid of any practical impact in real life.

33. Mr. PETRIČ congratulated the Special Rapporteur on an excellent report and supported the referral of all the draft articles to the Drafting Committee. He welcomed the fact that the Special Rapporteur had based his conclusions and proposals on an analysis of the materials while keeping carefully in mind the parallel between the responsibility of States and that of international organizations. That had enabled him to strike an excellent balance and to highlight the truly essential differences between States and international organizations in the context of responsibility.

34. Both States and international organizations acted via their agents—physical persons or organs whose wrongful acts might give rise to claims of responsibility. That essential factor had been duly taken into account in the Special Rapporteur's report. He strongly supported the view expressed therein that special rules were needed for the responsibility of international organizations only in those areas where differences really existed; in other matters, the rules on responsibility of States were perfectly adequate.

35. While he fully supported the excellent and well-balanced draft articles on reparation, restitution, compensation and satisfaction, he thought that moral satisfaction should also be covered. There was no persuasive reason whatsoever why international organizations should not be bound, where necessary, to provide moral satisfaction to injured parties.

36. On the capability of international organizations to provide financial compensation for damage, he supported the view that member States should not automatically be liable for the financial obligations resulting from a wrongful act of an international organization. International organizations and member States were entirely different legal personalities and financial entities. Member States were bound by the rules of an international organization or its constituent instrument to secure the financial means necessary for all the activities of the organization. Thus, they were required to provide resources for unexpected expenses, and that would include compensation. Compensation should be treated like any other financial obligation of an international organization that arose unexpectedly and was not foreseen in the regular budget.

37. By way of example, he noted that the IAEA, of which he chaired the Board of Governors, had recently resumed its activities in the Democratic People's Republic of Korea. Inspectors had arrived and begun their work.

That new activity had been totally unforeseen, and the means to carry out those inspections, which had not been provided for in the regular budget, had had to be secured. Various possibilities had been explored—additional funding, reserve funding, and so forth—and ultimately the resources had been found. Paying compensation could constitute a similar challenge for which an organization would have to find the means. To provide for automatic responsibility on the part of member States for finding such financial means would, however, be going too far.

38. He supported the Special Rapporteur's view, set out in paragraph 4 of the report, that decisions on the topics the Special Rapporteur mentioned in paragraph 3 should be postponed. He would even suggest that they should be reconsidered, rather than postponed *ad kalendas grecas*. True, international organizations were varied and numerous, but they should be dealt with as a single category. General rules rather than different rules covering the differing responsibility of the various categories of international organizations should be formulated.

39. Ms. XUE commended the Special Rapporteur's fifth report which, as usual, was comprehensive, clear and enlightening, and reflected his painstaking efforts to collect useful materials and examples of the practice of international organizations. In principle, she endorsed the draft articles as submitted and supported their referral to the Drafting Committee.

40. International organizations, like sovereign States, should be held accountable for breaches of their international obligations, and the draft articles, especially those on the content of international obligations, dealt well with such situations. Yet when they were actually put into practice, difficulties might arise owing to the differences between sovereign States and international organizations.

41. The rule on non-repetition, for example, seemed quite reasonable and clear: if an international organization breached an international obligation, it should give assurances that the act would not be repeated in future. In actual practice, however, things were not so simple. The head of an organization might make such assurances on its behalf but was often not in a position to carry them through because everything was contingent on the organization's decision-making process. That might well be a primary rather than a secondary rule. When a State made assurances of non-repetition of a wrongful act, the way it would prevent such an act from recurring or what domestic measures would be taken were not a matter of international law. In the case of international organizations, though, it was the decision-making process, powers and rules of the organization itself that guaranteed that such an act would not be repeated in the future, and in most cases that was indeed a matter of international law. To take an extreme case, there had been heated debate about whether the United Nations should be held responsible for the genocide in Rwanda. Even if the Secretary-General had made assurances that such serious violations of international law would not be repeated, it was really up to Member States to make good on those assurances, in which political or moral as well as legal considerations might come into play, hence the importance of organizations' institutional decision-making processes.

42. Secondly, as with responsibility of States, consideration of the responsibility of international organizations started with the principles in the *Chorzów Factory* jurisprudence, namely, that full compensation must be provided for the injured party and the situation re-established which would have existed had the act not been committed [p. 47 of the judgment]. That rule was reasonable and should apply to international organizations as well, but the question then arose as to where international organizations were to find the necessary means to comply with it. Paragraphs 27 and 28 of the report indicated that most States did not accept the idea that additional funding should be made available to international organizations by their members to enable them to fulfil their obligation to compensate injured parties. It had since been suggested that States simply lacked the necessary political will. A more likely reason, however, was the complicated institutional decision-making processes that might be involved.

43. In 2003, when Ms. Xue had been accredited to the Organization for the Prohibition of Chemical Weapons (OPCW), she had learned of the recent termination of the appointment of the previous Director-General of the OPCW, Mr. Bustani. The injured party had appealed to the ILO Administrative Tribunal, seeking moral as well as financial damages, and had won his case. He had announced that if he was awarded moral damages, he would donate them to an OPCW technical aid fund, which he had duly done. Consequently, the organization had not had to provide compensation from its own budget and the problem of lack of funding had not had to be addressed.

44. An informal debate had subsequently arisen among member States as to whether those that voted against such a decision or abstained during the voting should have to help pay for the decision to be implemented. It had been argued that since the decision had been adopted by the organization, all members were bound by it, irrespective of their individual positions. In a domestic setting, if a State adopted a certain foreign policy, financial resources had to be mandated to ensure that the policy was carried out. However, it was not clear whether, in the context of an international organization, the member State had to alter its foreign policy position if that position was overruled. More consideration should be given to the differences between the obligations of sovereign States and of member States of international organizations in terms of the decision-making process.

45. In the context of satisfaction, the Special Rapporteur had given a number of examples of specific ways in which an organization could seek to make amends for a wrongful act. A representative of the organization could, for instance, express regret or apologize to the injured party. Very often, however, satisfaction was not sufficient, and compensation or restitution should follow. If the organization did not have the means to fulfil such an obligation, the same practical problem arose, and analogies with sovereign States were not very helpful.

46. In the *Bustani v. Organization for the Prohibition of Chemical Weapons* case she had mentioned earlier, there had been no relevant internal rules, or at least they had not been clear enough to help resolve the problem.

Paragraph 29 of the fifth report of the Special Rapporteur indicated that “the existence of an obligation for member States would entirely depend on the rules of the organization; when the obligation existed, it would benefit the injured party only indirectly”. In theory, that was a very sound and coherent analysis, but in practice, it was difficult to place so much emphasis on the importance of internal rules. Very often no such rules existed. Moreover, the distinction between direct and indirect responsibility of member States was unclear and unhelpful. For instance, paragraph 52 of the report referred to the apology made by the German Chancellor after the NATO bombing of the Chinese Embassy in Belgrade, but it was not clear on whose behalf he had apologized. When the United States had provided compensation for that bombing, it was hardly likely that it had done so pursuant to internal rules of NATO or on behalf of NATO. Rather, it had done so because United States military forces had been directly responsible for the act. That was the sort of problem that arose when the rules were tested by being put into practice.

47. With regard to draft article 36, she agreed in principle that the scope of obligations should be confined to certain categories of subjects of international law. The rules governing the responsibility of States were also very clear in that respect.

48. Ms. Escarameia had appeared to query the usefulness of the draft article. Its purpose was surely to draw a distinction between two types of cases: purely administrative matters, such as labour disputes; and genuine breaches of international obligations. Such a distinction was necessary if the rules governing the responsibility of international organizations were to be truly meaningful. However, it must be made clear in what circumstances such rules should apply. In that connection, paragraph 46 of the report provided a good example for the purposes of a case study.

49. Regarding draft article 40, she agreed that satisfaction should not take a form humiliating to the responsible international organization, but considered it unlikely that representatives of major international organizations such as NATO and the United Nations would ever be subjected to such treatments. She was more concerned about the situation of smaller international organizations. In the light of recent developments in human rights law and international law, clear legal guarantees must be provided to ensure respect for the responsible party which had committed a wrongful act.

50. Further reflection was required on draft articles 43 and 44, which covered the special category of responsibility for a serious breach of an obligation arising under a peremptory norm of general international law. While she was aware that in the area of State responsibility such a special category was an instance of progressive development endorsed by the academic world and States in general, she questioned the need for it in the context of intergovernmental organizations, where member States participated in the decision-making process. It should also be recalled that the United Nations had its own system of collective security as well as special guarantees for the protection of human rights.

51. In conclusion, she thanked the Special Rapporteur for his excellent report. The purpose of her remarks had been to offer a more practical perspective on the issues at stake.

52. Ms. ESCARAMEIA, clarifying her earlier remarks, said she had queried, not the usefulness of draft article 36, but, instead, the absence of a reference in its first paragraph to the obligations of the responsible organization owed to individuals. Several examples of cases of obligations owed to individuals were given in the report; in particular, reference was made to General Assembly resolution 52/247 of 26 June 1998, which dealt exclusively with compensation to individuals. Some mention of individuals should therefore be made in the draft article.

53. Ms. XUE said she understood Ms. Escarameia's concern. However, the draft article did not exclude the possibility of individual parties seeking redress, and thus the rule in question was appropriate.

54. Mr. DUGARD said he tended to agree with Ms. Xue: while there was no reason why major international organizations such as NATO and the United Nations should ever be required to make humiliating statements by way of apology, the situation was more difficult for smaller organizations. That raised the issue of whether the Commission should legislate for the lowest common denominator, namely smaller, less important international organizations, or whether it should be more concerned about the major ones.

55. Mr. PELLET said he failed to understand why it should be more hurtful for a small international organization to issue an apology than for a larger one. He was somewhat surprised that Ms. Xue, having quite rightly cautioned against treating sovereign States and international organizations in the same way, should then proceed to do exactly that. He was at a loss to understand why the issue had been raised in the first place: any international organization—large or small—that committed an internationally wrongful act must bear the consequences.

56. Ms. XUE said that the question at issue was satisfaction in a humiliating form, not an apology. She agreed with Mr. Pellet that small and large international organizations alike should give satisfaction. She was not concerned about the situation of major international organizations such as NATO and the United Nations, since no one would dare to treat them in a humiliating fashion, but about those in a weaker position. Even in the present civilized age, legal guarantees were still needed to protect them. She failed to see the logic of the argument that if there was no need to worry about the large international organizations, there was no need to worry about the smaller ones.

57. Mr. GAJA (Special Rapporteur), summing up the debate on his fifth report on responsibility of international organizations, thanked members of the Commission for their input. He understood how difficult, and sometimes frustrating, it had been for them to comment on the draft articles contained in Part Two only, without being able to touch on matters relating to those

contained in Part One, which had already been provisionally adopted. He hoped there would be an opportunity to discuss at least some of the key issues relating to Part One in the near future. Regrettably, such an opportunity would not be available with respect to the draft articles on responsibility of States, although some interesting suggestions made in the debate on responsibility of international organizations also seemed to be applicable to the responsibility of States. A case in point was Mr. Vasciannie's suggestion concerning mitigation of damage. However, he would be reluctant to take up such a suggestion with regard to the responsibility of international organizations only, while no decision on the ultimate fate of the draft articles on responsibility of States had yet been taken. While he appreciated the comments made relating to general issues, he would confine his remarks to those relevant to draft articles 31 to 44.

58. Mr. McRae had noted that practice relating to reparation by international organizations mainly concerned the treatment of individuals in respect of their employment or conduct during peacekeeping operations. By and large, something similar could be said of State practice relating to reparation. That did not mean, however, that reparation was not also due for other internationally wrongful acts. The purpose of stating the general principle of the *Chorzów Factory* case was to affirm that those who committed wrongful acts could not benefit from them, yet it did not necessarily follow that reparation would be sought or made whenever a wrongful act occurred: in international relations the main consideration was often not reparation, but the cessation of the wrongful act.

59. Mr. Ojo had referred to the possibility of waivers of claims, which was clearly implied and would be dealt with in Part Three, concerning implementation of responsibility.

60. Mr. Nolte had pointed out that the obligation to make reparation should reflect the extent of the international organization's involvement in the wrongful act when the responsibility arose in relation to the wrongful act of a member State. It was a difficult question in view of the number of different subjects that could be involved and their varying degrees of direct or indirect responsibility. The question had been left aside when the Commission had considered similar problems arising in relations between States. Perhaps there were more cases involving international organizations, but he found it difficult to imagine what kind of rules could be established on that issue. He nonetheless took the point that it would be useful to draw attention to the question in the commentary to Part Two and thereafter in Part Three.

61. While sympathizing with Ms. Escameia's view that the draft articles should cover reparation owed to subjects other than States and international organizations, he pointed out that the same argument could have been made for the draft articles on responsibility of States, which contained no such provision. Moreover, problems relating to the implementation of responsibility towards subjects other than States could not be considered separately from the responsibility of such subjects towards States and international organizations, and the time for an

overall consideration of matters relating to international responsibility was not yet ripe. The reason he had provided examples in the report of cases of reparation made to individuals was not only the absence of more directly relevant practice, but also the fact that, in many respects, it was likely that similar solutions would apply irrespective of whether the reparation was owed to a State or an individual.

62. There had been mixed reactions to Mr. Pellet's informal proposal for a new provision made orally at a previous meeting, the implication of which would be that it was an obligation under general international law for member States of international organizations to provide funds when the organizations did not have sufficient means to make reparation as required. There was no practice to support the existence of such an obligation. Furthermore, the overwhelming response of States to a similar question raised in chapter III of the Commission's report to the General Assembly on the work of its fifty-eighth session had been that there was "no basis for such an obligation"; he referred to paragraphs 27 and 28 of his report in that connection, and especially to footnote 24.

63. In his view, too much importance had been attached to the issue. As Mr. Hmoud had pointed out, an obligation to provide funds normally existed under the relevant rules of the organization concerned, although as Ms. Xue had quite rightly added, such an obligation was perhaps not always explicitly stated. There was a general obligation of cooperation and, when necessary, the funds must be found, as was borne out by the example of IAEA activities in the Democratic People's Republic of Korea referred to by Mr. Petrič. Cases in which it was impossible to make reparation were as likely to arise with international organizations as with States.

64. His preference would be to include a recommendation in the commentary to the effect that member States of international organizations should make appropriate arrangements according to their rules, along the lines suggested by Mr. Melescanu. If, however, the Commission decided that a general statement should be made regarding the obligation for member States to provide funds, he would of course follow the majority view, although he was not in favour of that solution. Such a concern might be expressed as a general proposition, although probably not in Part Two, as Mr. Pellet had suggested, because, as Mr. Petrič had pointed out, the situation did not only concern reparation when a breach occurred, but referred more generally to the obligations of organizations. There was no need to wait for a breach to occur before making provision for the funds. Thus, there were alternatives to Mr. Pellet's proposal that warranted consideration.

65. He disagreed with those members who had suggested that the proviso in draft article 35 implied the unlimited power of an international organization to flout its obligation to provide reparation. It was merely a reference to the relevant rules based on the constituent instruments of the organizations concerned. That interpretation should dispel all doubts expressed regarding the supposedly large loophole that the proviso might

open up. Whether or not explicitly stated in draft article 35, the possibility remained that the rules governing reparation could be modified in relations between an international organization and its member States; obligations *vis-à-vis* States which were not members and the international community would clearly not be affected. The difficulties in the decision-making process referred to by Ms. Xue could not be used as justification for failing to provide reparation to non-member States or the international community as a whole. When a breach occurred, there was an obligation to provide reparation which must be fulfilled.

66. While he agreed with Mr. Dugard that it was unlikely that satisfaction taking a form humiliating to the responsible international organization would ever be sought, he did not consider to be a sufficiently valid reason to justify the deletion of text in draft article 40, paragraph 3, particularly since there was a parallel reference in the draft articles on responsibility of States. Moreover, the deletion might lead to the *a contrario* argument that satisfaction in a humiliating form was permissible in the case of international organizations.

67. Contrary to Mr. Ojo's opinion, draft article 44 did not replicate draft article 41 on responsibility of States, which referred to breaches by States only. It should be noted that the Commission had been encouraged by the Sixth Committee to draft a provision on such types of breaches by international organizations. Under draft article 44, paragraph 1, international organizations had a duty to cooperate to bring to an end any serious breach, but as Mr. Hassouna had pointed out, that did not exclude the possibility that a specific international organization, such as the United Nations, might be required to do more under its relevant rules. The matter could be taken up in the commentary to the draft article, thereby perhaps allaying some of the doubts expressed by Mr. Dugard. It should also be noted that draft article 44 went further than the advisory opinion of the ICJ on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, which merely said that "the United Nations ... should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime" [p. 200, para. 160 of the advisory opinion].

68. That concluded his summing up of the debate. He hoped there would be no objection to draft articles 31 to 44 being referred to the Drafting Committee, on the understanding that a new proposal by Mr. Pellet for an additional provision would be discussed separately.

69. The CHAIRPERSON said he took it that the Commission wished to refer draft articles 31 to 44 to the Drafting Committee.

*It was so decided.*

70. The CHAIRPERSON invited members to consider the text of a new provision proposed by Mr. Pellet, which read: "The member States of the responsible international organization shall provide the organization with the means to effectively carry out its obligations arising under the present Part."

71. Mr. PELLET, introducing his proposal, suggested that, if adopted, the new provision should be inserted either after draft article 42 or after draft article 44. He had already explained the reasons for his proposal at some length at the 2932nd meeting and, encouraged by expressions of support, had resolved to persevere with it. His main concern, shared by several other members, was based on various doctrinal and practical considerations.

72. In theory there was no doubt that, except as provided in draft article 29, international organizations alone bore responsibility for their acts or omissions. They had a legal personality, and it was not possible to "pierce the institutional veil", to use Mr. Vasciannie's words, which acted as a screen between their international responsibility and member States. The main consequence of such responsibility was the obligation to make reparation, and since the organization bore sole responsibility, it was the organization that must make reparation.

73. Nevertheless, those principles could, concretely, lead to an absurd situation: international organizations would have to provide reparation for internationally wrongful acts imputable to them, yet, when the injury in question exceeded the threshold of "normal" damages, for instance following the dismissal of a high-ranking official, they might not have the funds in their ordinary budget to fulfil that obligation. He stressed that, irrespective of whether the member States approved of the internationally wrongful act committed, his proposal was in no way intended to shift the obligation of reparation from the international organization to its member States.

74. The Special Rapporteur was opposed to the proposed draft article, largely on the basis of responses by States to the question put to them in paragraph 28 (a) of the Commission's report on its fifty-eighth session.<sup>268</sup> The negative reaction by States was, however, entirely understandable, given the way in which the question was worded, namely: "Do members of an international organization that are not responsible for an internationally wrongful act of that organization have an obligation to provide compensation to the injured party, should the organization not be in a position to do so?" He agreed entirely: clearly, States were not bound to provide compensation to the injured party; their obligation—quite a different one—was to contribute to the budget of the international organization concerned. His proposed draft article did not seek to impose any such obligation on States. Far from being revolutionary, as several speakers had suggested, his proposal was in conformity with both *lex lata* and common sense—the law was not, after all, necessarily incompatible with common sense. All it aimed to do was to underline the fact that member States were obliged, by contributing to its budget, to provide an international organization with the means to discharge its obligations. In freely choosing to join the organization, a State accepted the risks and the advantages of participation and joint action.

75. Some speakers had suggested that his proposal ignored the decision-making process and thereby

<sup>268</sup> *Yearbook ... 2006*, vol. II (Part Two), chap. III, p. 21.

undermined the concept of State sovereignty, but, just as national parliaments were obliged to provide the budgetary resources for the country's national obligations to be discharged, so they were bound by the obligations of an international organization of which they were members.

76. Listening to some speakers, he had had the impression of stepping back sixty years into the era of McCarthyism, when the United States had attempted to prevent the General Assembly and the International Labour Conference from honouring the awards of compensation made by the United Nations and ILO Administrative Tribunals to staff members who had been deemed sympathetic to communism. He drew the Commission's attention to three extracts from the advisory opinion by the ICJ, of 13 July 1954, on the *Effect of awards of compensation made by the United Nations Administrative Tribunal*. The Court had stated:

As this final judgment has binding force on the United Nations Organization as the juridical person responsible for the proper observance of the contract of service, that Organization becomes legally bound to carry out the judgment and to pay the compensation awarded to the staff member. It follows that the General Assembly, as an organ of the United Nations, must likewise be bound by the judgment. [p. 53]

Again:

The Court therefore considers that the assignment of the budgetary function to the General Assembly cannot be regarded as conferring upon it the right to refuse to give effect to the obligation arising out of an award of the Administrative Tribunal. [p. 59]

The Court had concluded that:

the General Assembly has not the right on any grounds to refuse to give effect to an award of compensation made by the Administrative Tribunal of the United Nations in favour of a staff member of the United Nations whose contract of service has been terminated without his assent. [p. 62]

It followed that international organizations were legally obliged to discharge their financial obligations arising in the context of reparation and that member States had no choice but to enable them to do so. That is what would have happened in the *Bustani v. Organization for the Prohibition of Chemical Weapons* case, to which Ms. Xue had referred, but for Mr. Bustani's gracious gesture in returning the compensation he had been awarded to the OPCW. State sovereignty was not infringed in any way: nobody forced States to go through the formal procedure of joining an international organization. To paraphrase the judgment by the PCIJ in the case of the *S.S. "Wimbledon"*, State sovereignty was not encroached upon, but exercised.

77. Contrary to the Special Rapporteur's repeated assertion that there was no practice to support that position, he believed that a solution was always found in such cases. International organizations almost invariably retained funds to cover payment of compensation. He was, however, inclined to concur with the objection by Mr. Niehaus that the proposed draft article was badly worded, inasmuch as it referred to the member States of the organization concerned, whereas, in fact, the onus lay on all its members. He therefore suggested that the word "States" should be deleted.

78. The additional draft article that he had proposed was not the only way of dealing with the issue; there was no reason why there should not also be specific arrangements to provide for compensation. However, in a set of draft articles such as the one with which the Commission was concerned, there needed to be a provision pitched at a sufficient level of generality. That said, if the Commission failed to adopt some provision dealing with the absolutely central problem of reconciling the responsibility of international organizations with the obligation to make reparation, the whole codification exercise would amount to nothing and the Commission would make a laughing stock of itself. He urged members to support his proposal by referring it to the Drafting Committee.

79. The CHAIRPERSON, speaking in his capacity as a member of the Commission, recalled that he had expressed similar views during the discussion on draft article 29, although at that time his position had found little support.

80. Mr. CANDIOTI supported the inclusion of the additional draft article, as orally amended by Mr. Pellet on the basis of a suggestion by Mr. Niehaus. The obligation to provide an international organization with the means to carry out its obligations must indeed lie with all members, not just with States.

81. Mr. HMOUD said that the proposed additional draft article had no place in the body of law that the Commission was trying to codify. The issue of reparation was a matter for international organizations to resolve through their internal rules. Indeed, systems already existed whereby organizations set aside sufficient funds for the payment of compensation. Organizations such as the United Nations levied an assessment on each country, part of which was earmarked for such unexpected payments. It was therefore hard to understand why an additional obligation needed to be imposed on States. As Mr. Pellet had said, States were aware of their obligations when joining an organization, including obligations arising out of a wrongful act of that organization. If the additional draft article was adopted, it would send the message that, ultimately, an international organization's responsibility was mitigated, because member States could be relied on to bail them out. Mr. Pellet's proposal nevertheless warranted further consideration.

82. Ms. ESCARAMEIA said that Mr. Pellet's arguments, persuasive though they were, had not entirely won her over. The phrase "shall provide the organization with the means to effectively carry out" could, as it stood, cover a multitude of different situations. If it referred only to the obligation on States to pay their assessed contributions, thus providing sufficient resources to meet unexpected expenses, no problem arose. The proposed draft article, however, aimed at dealing with situations in which States might have to pay additional sums, and that was where problems might arise, both at the legal level—because the organization's internal rules or constituent instrument might not allow such a procedure—and at the political level, in that a member of a small organization, or of a large organization in which a restricted organ had the power to make decisions, might find itself obliged to pay for the consequences of a wrongful act which it had voted

against or opposed. She was, however, sympathetic to the gist of the proposed text, which would be improved if the onus were placed on the organization rather than its members. A text should be drafted calling upon international organizations to make provision in their budgets for such contingencies, which could then be met without recourse to additional contributions from members.

83. Mr. GALICKI said he was strongly in favour of the proposed additional draft article. Failure to adopt such a provision would make the Commission's text less effective. Draft article 39, for example, would lose all its force if compensation for the damage exceeded an organization's budget or other financial resources. An organization's status as a subject of international law was not original, but derived from the status of its member States as subjects of international law. It followed that its international responsibility also derived from the responsibility of States, and a proper balance should be struck between the two. States establishing an international organization should provide for the organization's ability to be not only fully but also effectively responsible, financially and otherwise. Moreover, some special regimes contained provisions similar to the proposed additional draft article. The 1972 Convention on the international liability for damage caused by space objects contained provisions on joint and several liability for damage caused by an international organization's space activities, liability which was to be shared with member States. A general regime such as that envisaged in the draft articles should not prevent claimants from receiving satisfaction purely owing to the organization's inability to pay compensation. The proposed draft article seemed to meet the basic requirements of common sense and justice. It was also sufficiently general as to give States some leeway in fulfilling their obligations.

84. Mr. PETRIČ, after welcoming Mr. Pellet's assurance that he did not advocate the direct obligation of States to provide compensation, said that, nonetheless, he could not support the proposed additional draft article, on the grounds that it would set the dangerous precedent of relieving international organizations of their legal responsibility, in the belief that States would always act as a safety net. Many different factors were involved in the discharge of liability, and an international organization should not necessarily feel that it could turn to its members for extra funds. As one who in his diplomatic role often had to deal with large budgets, he knew that a political process was involved in an organization's efforts to find ways and means of meeting its financial obligations. How it did so was up to the individual organization. He was absolutely opposed to the establishment of an obligation on member States to make special, separate provision for the possible consequences of an organization's wrongful acts. At the same time, the subsidiary organs and the agents of an organization had to be aware that they themselves bore responsibility. While he did not dismiss the proposed draft article out of hand, he had serious reservations about the current text and urged the Commission to give it further consideration so that a common position could be adopted.

*The meeting rose at 1 p.m.*

## 2936th MEETING

*Friday, 13 July 2007, at 10.05 a.m.*

*Chairperson:* Mr. Ian BROWNLIE

*Present:* Mr. Al-Marri, Mr. Cafilisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

### Reservations to treaties (*continued*)\* (A/CN.4/577 and Add.1–2, sect. C, A/CN.4/584, A/CN.4/586, A/CN.4/L.705)

[Agenda item 4]

#### TWELFTH REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRPERSON invited the Special Rapporteur to introduce his twelfth report on reservations to treaties (A/CN.4/584).
2. Mr. PELLET (Special Rapporteur) said that his twelfth report dealt with the procedure for acceptances of treaties, which was the subject of 13 draft guidelines. He drew attention to the footnote on page 1, which indicated that the twelfth report in fact constituted the second part of his eleventh report,<sup>269</sup> from which it carried on. In producing it, he had proceeded on the basis of a number of provisions of the 1969 and 1986 Vienna Conventions of relevance to the formulation of objections and had analysed their scope, attempted to fill their lacunae and discussed their implications.
3. Logically, the point of departure of the current study was article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions, which draft guideline 2.8 (Formulation of acceptances of reservations) did not reproduce word for word, for the sake of coherence, although it reflected the paragraph's main idea. Draft guideline 2.8 introduced the principle—probably the most important one of the report—that “[t]he acceptance of a reservation arises from the absence of objections to the reservation formulated by a State or international organization on the part of the contracting State or contracting international organization”. That was the principle of the tacit acceptance of reservations. The second paragraph of the draft guideline set out the conditions in which the absence of objections was established, either because the contracting State or international organization had made an express statement in that respect, or because the State or international organization had kept silent.

\* Resumed from the 2930th meeting.

<sup>269</sup> Reproduced in *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574.