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Summary record of the 2932nd meeting

Topic:
Responsibility of international organizations

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SUMMARY RECORDS OF THE SECOND PART OF THE FIFTY-NINTH SESSION

Held at Geneva from 9 July to 10 August 2007

2932nd MEETING

Monday, 9 July 2007, at 3 p.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Caffisch, Mr. Candioti, Mr. Comisário 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. Ojo, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Responsibility of international organizations²¹⁴ (A/CN.4/577 and Add.1–2, sect. B, A/CN.4/582,²¹⁵ A/CN.4/583,²¹⁶ A/CN.4/L.720²¹⁷)

[Agenda item 3]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRPERSON declared open the second part of the fifty-ninth session of the International Law Commission and invited members to begin their consideration of the fifth report on responsibility of international organizations (A/CN.4/583).

2. Mr. GAJA (Special Rapporteur), introducing his fifth report, said that the report examined the content of the international responsibility of international organizations and that it corresponded to Part Two of the draft articles on responsibility of States for internationally wrongful acts.²¹⁸ The general model of those draft articles would also be followed in the third and fourth parts of the draft, which would be entitled “Implementation of international responsibility of an international organization” and “General provisions”, respectively.

²¹⁴ For the text of the 30 draft articles provisionally adopted by the Commission and the commentary thereto, see *Yearbook ... 2006*, vol. II (Part Two), chapter VII, section C, paras. 90–91.

²¹⁵ Reproduced in *Yearbook ... 2007*, vol. II (Part One).

²¹⁶ *Idem*.

²¹⁷ Mimeographed; available on the Commission’s website.

²¹⁸ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 26, para. 76.

3. During the previous quinquennium, the Commission had provisionally adopted 30 draft articles, constituting Part One of the study, entitled “The internationally wrongful act of an international organization”. A few questions relating to that part, mentioned in paragraph 3 of the report, had been left outstanding and a discussion on them should, in his view, be postponed. The need for such postponement was obvious when it came to draft article 19, on countermeasures, which had been left blank until the issue could be considered in the context of the implementation of international responsibility. Other questions could be settled immediately, but it seemed preferable not to consider them until the Commission undertook its final review of the draft articles adopted on first reading. According to the Commission’s practice, that review would take place on second reading, but since the Commission had in fact provisionally adopted all the draft articles on the topic at the same session that they had been proposed, there had been no opportunity for it to respond to the comments made by States and international organizations (see A/CN.4/582). Those comments had been duly noted, but given that they referred to questions already dealt with, having been submitted after the provisional adoption of the texts to which they referred, it seemed reasonable not to wait until the second reading before considering certain key questions.

4. The review of the draft articles should also be based on the practice that had developed since their adoption. After the submission of the fifth report, draft articles 3 and 5 and the related commentary had been quoted *in extenso* by the Grand Chamber of the European Court of Human Rights in the *Behrami and Behrami v. France and Saramati v. France, Norway and Germany* cases. The Commission could acknowledge with satisfaction that an international judicial body had paid close attention to its work, though one should also add that the Court’s conclusion—that the conduct of forces authorized by the United Nations Security Council, such as the NATO-led International Security Force in Kosovo (KFOR), was attributable to the United Nations and not to the States that had sent contingents—was not based on an accurate analysis of the Commission’s views. It had happened that the Commission’s work was sometimes misunderstood, as was illustrated by certain of the impressive series of references to the draft articles on State responsibility collected in the compilation of decisions of international courts, tribunals and other bodies²¹⁹ and the comments and information

²¹⁹ A/62/62 and Add.1.

received from Governments,²²⁰ submitted to the General Assembly at its sixty-second session. Nevertheless, the Commission might welcome the considerable global attention given to the draft articles.

5. Returning to the report itself, he said that he had included some comments often made about the draft articles so that he could provide an appropriate response. For example, with regard to the idea that he had not taken sufficient account of the great variety of international organizations, he noted that the draft articles were worded in terms so general that they could apply to most if not all such organizations. The fact that some articles were only marginally relevant for a number of international organizations did not necessarily mean that the draft articles should not contain a general provision applying to all international organizations. In addition, the final version would certainly contain a provision such as draft article 55 of the draft articles on responsibility of States, to the effect that the “articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State [or, in the current instance, an international organization] are governed by special rules of international law”.²²¹

6. Another criticism mentioned in the report was that the draft articles were insufficiently based on practice. In his view, that criticism rang hollow when it came from States or international organizations that had failed to provide information on their practice, notwithstanding the request made to them by the Codification Division of the United Nations Office of Legal Affairs on behalf of the Commission. The solution lay with the authors of the criticism, or at least with those who had information but did not communicate it, and it was not right for the Commission to refrain from continuing its examination of the topic until such time as further information on practice became available. The Commission’s study would, in any case, provide States and international organizations with a general framework, albeit based on insufficient practice, that would probably assist them in focusing on the main legal issues and disclosing factors in practice that had thus far been unobtainable.

7. A further criticism, the consideration of which could serve as an introduction to the draft articles proposed for Part Two, was that the draft articles mainly reproduced the draft articles on responsibility of States with only minor adaptations. J. E. Álvarez claimed that the Commission’s six years of work on the topic had consisted of replacing the word “State” in the draft articles on responsibility of States with the words “international organization”.²²² In fact, the reports on responsibility of international organizations spoke for themselves; it was clear that all avail-

able practice, whether covered by the draft articles on responsibility of States or not, had been analysed from the point of view of international organizations. It was not surprising that, given the general nature of the provisions, the principles stated in the draft articles on responsibility of States applied equally, in many cases, to international organizations. In those circumstances, it seemed reasonable for the Commission to use the same language as that used in the draft articles on responsibility of States. That had been done with many of the draft articles in the second part of the report, which dealt with the general principles relating to the content of the international responsibility of international organizations.

8. According to Christian Dominicé, draft articles 28 to 39 of the draft articles on responsibility of States should undoubtedly apply to matters relating to the international responsibility of international organizations, including the United Nations²²³ (see paragraph 22 of the report). There seemed little alternative to reproducing the relevant articles relating to State responsibility in drafting articles 31 (Legal consequences of an internationally wrongful act), 32 (Continued duty of performance) and 33 (Cessation and non-repetition). Practice of international organizations with regard to reparation was both limited and not always clear. In that case, the replacement exercise seemed a bit more problematic, even though a few instances of practice could be found that favoured the application to international organizations of most of the rules contained in the draft articles on responsibility of States. Thus the report gave several examples of satisfaction provided by international organizations in practice, in the form of an apology, when they had committed an internationally wrongful act.

9. Two issues specific to international organizations were given special consideration in the report (see paragraphs 27–35). The first, to which the Commission had drawn the General Assembly’s attention in its report on the work of its fifty-eighth session, was whether members of an international organization that were not responsible for an internationally wrongful act of that organization had an obligation to provide compensation to the injured party, should the organization not be in a position to do so.²²⁴ A clear majority of States had expressed the view that the Commission should not state such an obligation, since it did not exist. Why should States that were not held responsible for an internationally wrongful act be held responsible for a subsidiary obligation with regard to the injured party, and on what basis? It had been noted that the question of whether members were required by the rules of the organization concerned to provide it with adequate means to make reparation was a different problem. Even though the existence of such an obligation in the internal rules of most international organizations could be established, there was still no justification for setting out a general rule in the draft articles, since the obligation on members to provide the organization with funds did not mean that they were

²²⁰ A/62/63 and Add.1.

²²¹ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 30 and 140.

²²² J. E. Álvarez, “International organizations: accountability or responsibility?”, *Responsibility of Individuals, States and Organizations: Proceedings of the 35th Annual Conference of the Canadian Council on International Law, Ottawa, October 26–28, 2006*, Ottawa, Canadian Council on International Law, 2007, pp. 121–134. Available at: www.asil.org.

²²³ C. Dominicé, “The international responsibility of the United Nations for injuries resulting from non-military enforcement measures”, in M. Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter*, Leiden, Martinus Nijhoff, 2005, pp. 363–370.

²²⁴ *Yearbook ... 2006*, vol. II (Part Two), p. 21, para. 28 (a).

required to compensate the injured party. In his view, the question should be discussed in the commentary; it should not give rise to a draft article setting forth an obligation the implementation of which the injured party might well be unable to secure.

10. The second specific issue addressed in the part of the report relating to compensation for damage was taken up in paragraphs 32 to 35. Article 32 of the draft articles on responsibility of States for internationally wrongful acts provided that “[t]he responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part”.²²⁵ That wording could not simply be transposed to the draft articles on responsibility of international organizations for it might well be that, where relations between an international organization and its members were concerned, the international organization was entitled to rely on the provisions of its internal rules as justification for not giving compensation to its members. If one accepted that point of view, two options were possible: either it should be mentioned in draft article 35 or the Commission could decide that it was not necessary to take it into account, owing to the principle of *lex specialis*, to which express reference would be made in a final provision. In his view, draft article 35 should, for the sake of clarity, contain a proviso that drew attention to the distinction that might exist between rules applicable to relations between an international organization and its members, and those applying to relations with non-members.

11. With regard to the final chapter of Part Two, he recalled that, in chapter III of the 2006 report to the General Assembly, the Commission had also drawn the General Assembly’s attention to the consequences of serious breaches under peremptory norms of international law that might be committed by international organizations. Specifically, the question had been whether in such cases States and other international organizations were under an obligation to cooperate to bring the breach to an end.²²⁶ The idea that international organizations, like States, had such an obligation had enjoyed strong support in the Sixth Committee. However, that should not be taken to imply that an international organization taking such action should act beyond its powers under its constitutive instrument or any other relevant rule. What had been said about the obligation to cooperate in paragraph 1 of article 41 of the draft articles on responsibility of States should apply also to the obligations set out in paragraph 2 of the same article, namely that no State should recognize as lawful a situation created by a serious breach of a peremptory norm nor render aid or assistance when maintaining that breach.²²⁷ In paragraph 64 of his report he referred in that connection to United Nations Security Council resolution 662 (1990) of 9 August 1990, which stated the duty for all international organizations not to recognize the annexation of Kuwait by Iraq. He should perhaps have drawn

²²⁵ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 28 and 94.

²²⁶ *Yearbook ... 2006*, vol. II (Part Two), p. 21, para. 28 (b).

²²⁷ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 29 and 113–114. See also paragraphs (2)–(12) of the commentary, *ibid.*, pp. 113–115.

attention in the report also to paragraph 160 of the advisory opinion of the ICJ on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, according to which “the United Nations, and especially the General Assembly and the Security Council, 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, taking due account of the present Advisory Opinion”. The advisory opinion, and other examples given in the report, concerned serious breaches committed by States, not by international organizations. Article 41 of the draft articles on responsibility of States ought perhaps to have mentioned the fact that international organizations were, like States, under an obligation to bring a breach to an end, not to recognize as lawful the situation created by a serious breach and not to render aid or assistance in maintaining that situation. Nonetheless, it seemed feasible to mention that both international organizations and States had such an obligation when article 44 of the draft articles on responsibility of international organizations considered the consequences of a serious breach of a peremptory norm of international law.

12. Ms. ESCARAMEIA drew attention to the introduction to the report, particularly the comments appearing in paragraph 7, and said that the difficulty created by the great variety of international organizations could not be settled with a provision along the lines of article 55 of the draft articles on responsibility of States for internationally wrongful acts because the question at issue was not “special rules” but “special international organizations”, which had their own internal rules. The matter ought to be thought through more thoroughly. As for the concept of “objective” personality mentioned in paragraph 8, she wondered why recognition was always limited to injured States and did not include injured international organizations and other entities under international law. The problem was in fact a far more general one, having to do with the scope of international obligations and those to whom they were due. In that regard, the Commission’s last Special Rapporteur on State responsibility, James Crawford, had, in his third report,²²⁸ made a distinction that she still did not understand between Part One of the draft articles on responsibility of States, which related to all wrongful acts, and Part Two, which was restricted to obligations owed to one or more States or to the international community as a whole.

13. Of the proposed provisions, draft articles 31 to 34 and 37 to 43 did not give rise to any problems. Draft article 35, on the other hand, allowed an international organization too much power when it came to determining failure to comply with obligations owed to the international community as a whole or even breaches of *ius cogens*. Ms. Escarameia also questioned the need for the word “pertinent” in the draft article.

14. In draft article 36, the Special Rapporteur had based the provision on the corresponding provision of the draft articles on responsibility of States and thereby excluded any injured parties that were not States, international

²²⁸ *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/507 and Add.1–4.

organizations or the international community as a whole. The examples that he gave, however, including those in paragraphs 44, 45 and 46 of the report, concerned reparations made by international organizations to individuals and not to States. She therefore wondered why other subjects of international law could not be covered.

15. With regard to draft article 44, she found it difficult to understand the doubts expressed in paragraph 61 of the report as to whether an international organization, like a State, had the obligation to cooperate to bring to an end breaches of *jus cogens*. International organizations had the same obligations in that regard as States, and not to recognize that obligation was tantamount to treating them as minor subjects of international law. Their internal rules had no bearing on the matter.

16. Mr. GAJA (Special Rapporteur), referring to Ms. Escameia's last point, said that under draft article 44 international organizations were under an obligation, in exactly the same way as States, to cooperate to put an end to a serious breach by an international organization of an obligation arising out of *jus cogens*.

17. Mr. PELLET said that if it had only been a matter of commenting on the draft articles proposed by the Special Rapporteur, his statement would have been extremely brief, since, apart from a translation problem with the French text of draft article 35, he was in agreement with all the proposed draft articles and, for the most part, with the explanations given by the Special Rapporteur. He disagreed with the Special Rapporteur very strongly, however, with regard to what the latter had omitted. Moreover, he was only partially convinced by the methodological proposals made at the beginning of the report.

18. Taking up the last point first, he noted that in paragraphs 3 to 6 of the report the Special Rapporteur described how he intended to continue his consideration of the topic, and despite the rather anodyne description that he gave of them, his methodological intentions could have significant consequences for the way the Commission worked and, indeed, its very nature. Although not categorically opposed to what the Special Rapporteur was suggesting, he wanted to be sure that before it encouraged the Special Rapporteur to go ahead, the Commission fully understood the profoundly innovative nature of the Special Rapporteur's proposals. On the face of it, the Special Rapporteur's proposals bore all the hallmarks of common sense: the Commission could reconsider certain issues already "provisionally" adopted, "in the light of the comments made by States and international organizations". The justification for such a reconsideration seemed to be that, in contrast with what had happened with most of the other topics that it had considered, the Commission had thus far provisionally adopted all the draft articles on the topic at the same session at which the Special Rapporteur had presented them. Moreover, in submitting his report, the Special Rapporteur had added that the Commission had been criticized for not taking sufficient account of outside opinion. In his view, however, the words "most other topics" could only really mean the topic of reservations to treaties. In all other

cases, except on the odd occasion, special rapporteurs submitted their reports more or less on time, and that was how the Commission worked when it decided to refer draft articles to the Drafting Committee: the Drafting Committee considered them the same year and the Commission adopted them immediately upon receiving the report of the Chairperson of the Drafting Committee. That long-standing practice had the obvious drawback that comments by States fell a bit flat and had no real impact on the elaboration of draft articles adopted on first reading, given that the record of the comments by delegations in the Sixth Committee, should they be required, did not become available until the second reading. The only way of avoiding that drawback was to submit reports late so that they could only be considered the following year. Such a delaying strategy might have certain advantages, but it should not be held up as a model. The other option, the one proposed by the Special Rapporteur, was to wait until States had expressed their views before reconsidering draft articles that had already been adopted. That, however, had wide-ranging consequences, two of which should give the Commission pause for thought. First, it amounted to introducing a one "1 bis" reading of the draft articles, between the first and second readings. The Commission would adopt draft articles in year A and then readjust them in the light of comments by States in year A + 1 or A + 2, but in either case, it would still be a first reading, with a subsequent second reading still to come. Thus the Commission would move imperceptibly from two readings to three. The process by which the Commission codified international law was already terribly cumbersome, and if the Special Rapporteur's suggestion was followed it would become even more so. Another result would be a change in the role, or even the very nature, of the Commission, which was in danger of becoming, if not a rubber stamp, then at least a sounding board for the opinions of States, and he was strongly opposed to such an outcome. The Commission should, obviously, be sensitive to what the representatives of States said, because one of the Commission's main assets was the dialogue that developed over time between the political decision makers, i.e. States, and the independent experts making up the Commission. The Commission's task, however, was to set out the ideas of independent experts that made logical and scientific sense rather than political sense. The second reading was the stage at which the Commission took account of the political concerns of States, although even then it was not obliged to submit to those concerns. In any case, since States had the last word, it would be absurd for the Commission to submit texts that were not generally acceptable. The system proposed by the Special Rapporteur, however, was in danger of leading the Commission off in a disturbing direction. He feared that if the Commission followed the Special Rapporteur in that direction, it would ultimately focus more on giving States—or rather, the small number of States that had expressed views—what they wanted rather than on bringing its professional expertise to bear on its texts to ensure their coherence. For that reason he would prefer to adhere as closely as possible to the Commission's traditional practice. The articles adopted on first reading would thus, in principle, have been adopted definitively rather than provisionally and could not be reconsidered until the second reading.

There could, of course, be reasonable exceptions to, or even violations of, any principle, and if on reflection a provision that had been adopted seemed illogical or too obviously out of line with the rest of the text, the Commission should not feel that it was trapped by a principle that had been interpreted too rigidly. The principle itself, however, should be maintained.

19. As far as substance was concerned, he had no real objection to the draft articles being referred in their entirety to the Drafting Committee. In fact he believed that they should be adopted as they stood, since it was hard to see what improvements the Drafting Committee might make. Apart from a very small number of cases, only one of which, in draft article 35, seemed justified, and for which the Special Rapporteur had given an excellent explanation when introducing his report, the Special Rapporteur's proposal was simply to transpose the 2001 draft articles on responsibility of States for internationally wrongful acts to responsibility of international organizations. In his view, that was fully justified and he was totally persuaded by the arguments presented by the Special Rapporteur both in his introduction and in paragraph 2 of the report: there was no reason to depart from the 2001 articles if neither practice nor logic warranted it. He also agreed with the Special Rapporteur's view—not shared by Ms. Escameia—that there was no need to enter into greater detail to adapt the provisions to particular categories of organization. The principles contained in the draft articles were generally applicable and even if, as the Special Rapporteur had noted, some of them, such as self-defence, were of no practical use in the case of some international organizations, that was of no importance.

20. On the other hand, he was not at all convinced by what the Special Rapporteur had chosen not to propose. Paragraph 13 of the report stated that “the current draft is intended to follow the same general pattern as that of the articles on State responsibility”. Again, he had no objection to the principle itself, which seemed quite right to him. The draft articles on responsibility of States had been discussed with great care and at great length on the basis of reports that had been the subject of both political and academic debate, and it would be better not to depart from them any further than was strictly necessary. That did not mean that no additions should be made where such additions were necessary. However, it was absolutely essential, in his view, to add one or several provisions on the role that could or ought to be played by States in the reparation owed by an international organization that was liable for an internationally wrongful act. Of course, there was no question of saying that States were responsible for an act of an international organization, but the fact remained that such organizations were inextricably linked with their member States, and that was bound to have consequences where reparation was concerned.

21. He endorsed the statement in paragraph 22—the most important point made in the report, along with the position of Dominicé cited in footnote 17 of the report—that international organizations were responsible for their acts and their omissions, that they should respond

to any failure to comply with international law for which they were liable and that, except in a few rare cases, States were not and should not be responsible for the actions of international organizations.²²⁹ He had devoted much time in the past to arguing that the legal personality of international organizations was opaque, acting as a screen between them and their member States, and he wrongly suspected the Special Rapporteur of coming down in favour of the transparency of their legal personality.

22. One of the consequences of the principle of the responsibility of international organizations was that they had to make reparation for any injury their unlawful behaviour might have caused to third parties. However, the Commission could not and must not stop there, for, as Álvarez, who was cited in footnote 17, had written, “When it comes to [international organizations], some of which are purposely kept by their members at the edge of bankruptcy, the concept of responsibility-cum-liability seems something only a law professor (or the writer of a Jessup Moot problem) would love”.²³⁰

23. In most major cases, international organizations were unable to discharge their obligation to make reparation because they lacked the resources to do so. That was a basic fact that the Commission could not overlook. In that connection, he was not convinced by the pretext that the Special Rapporteur used in paragraph 30 of the report to sidestep that issue: “Obligations existing for member States or organizations under the rules of the responsible organization need not be recalled here.” In the first place, the problem did not have to do with the “rules of the responsible organization”—it had to do with general international law: if an organization was responsible, did general international law require that its member States provide the organization with the means of discharging its obligations arising from its responsibility? In his view, the answer to that question could only be yes. Moreover, that affirmative response must surely be included in the actual text of the draft articles and not in the commentary. If not, there was no point in undertaking the project; a single article would suffice, which might read: “The provisions of the articles on responsibility of States for internationally wrongful acts shall apply *mutatis mutandis* to responsibility of international organizations for internationally wrongful acts.”

24. In his view, that point lay at the heart of the topic before the Commission. It was imperative that the principle of the exclusive responsibility of international organizations for their internationally wrongful acts should be preserved. At the same time, it was equally imperative that realistic compromises be found that, without calling that fundamental principle into question, would guarantee victims a reasonable likelihood of reparation for the injury they had suffered.

25. Under the leadership of the Special Rapporteur, the Commission should find a way of striking a balance

²²⁹ Dominicé, *loc. cit.* (footnote 223 above), at p. 368.

²³⁰ Álvarez, *loc. cit.* (footnote 222 above), at p. 128.

between the exclusive responsibility of the organization and the means of effectively implementing that responsibility in respect of the victims. The road to take was clear: the Commission must establish principles according to which the organization's member States must allow the organization to discharge its obligation to make reparation, as the Russian Federation had indicated in a statement delivered in the Sixth Committee,²³¹ cited in paragraph 29 of the report.

26. The basis of that obligation was, first of all, practical, as it was the only realistic way that reasonable guarantees of reparation could be given, but it also had to be pragmatic and realistic. In his view, that basis ought to have its underpinnings in jurisprudence as well as in precedents and elements of practice indicating that States realized that if the organization was unable to pay, they must nevertheless allow it to discharge its indisputable obligation to make reparation. He firmly believed that it was not incongruous from a legal standpoint to state that in joining an international organization a State accepted the obligations that resulted from membership, including the obligation to make reparation, which was an inescapable consequence of responsibility. To that end, it was imperative that the Special Rapporteur focus on that key problem in his next report and formulate one or more draft articles that reflected that necessity.

27. He wished to draw the Commission's attention to the unacceptable translation into French of paragraph 35, which meant absolutely nothing at all. The frequency of translation errors in the Commission's texts was, to his way of thinking, becoming quite a problem. The correct translation of the phrase "the relations between an international organization and its member States and organizations" was "*les relations entre une organisation internationale et les États et organisations internationales qui en sont membres*", and not the one given in the report.

28. He wished to make several detailed observations, not on the draft articles themselves, but on some of the justifications for them advanced by the Special Rapporteur. In paragraph 29, for example, the Special Rapporteur's interpretation of the statement of Belgium to the Sixth Committee seemed to him inaccurate. Belgium had said that if member States were required to make contributions in accordance with the rules of the organization, that did not mean that they themselves were required to compensate the party injured by an internationally wrongful act, nor did it mean that the injured party could bring legal action against them.²³² He shared that view, but he disagreed with the interpretation given by the Special Rapporteur when he said: "In other words, 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" (para. 29). In fact, what the Special Rapporteur was saying was different from what Belgium had said, for the two reasons mentioned earlier. First, the problem was not a problem of the rules of the

organization but one of general international law; furthermore, the Special Rapporteur did not draw the right conclusions from those observations.

29. In paragraph 41, the position of the IAEA as formulated by its Director-General was based on a terminological misunderstanding. In the passage quoted, the IAEA drew a distinction between what it called "reparation properly so called" on the one hand and satisfaction on the other hand, whereas satisfaction was not one of the three possible options for reparation.

30. In paragraph 52, the Special Rapporteur wrote concerning the NATO bombing of the Chinese embassy in Belgrade: "A further apology was addressed ... by the German Chancellor Gerhard Schroeder on behalf of Germany, NATO and NATO Secretary-General ...". That statement left him extremely perplexed; he wished to know whether those apologies had been made by Germany on its own behalf or also on behalf of NATO.

31. The draft articles proposed by the Special Rapporteur, particularly subparagraph (b) of draft article 33, elicited the same criticisms as the provisions of the 2001 draft articles on State responsibility for internationally wrongful acts on which they were based. Moreover, the *chapeau* of article 38 was highly questionable, as it called for the re-establishment of the situation that had existed before there was knowledge of the wrongful act, whereas in order for restitution to be complete, it ought to have called for the re-establishment of the situation that would have existed had the internationally wrongful act never been committed. Lastly, draft articles 39 and 41 were too general. That being said, the 2001 articles on State responsibility did exist, they had been adopted after meticulous and occasionally difficult drafting, and on the whole they were a great success. There was thus no reason to depart from them. Accordingly, he did not think that the criticisms that Ms. Escarameia had made with regard to the Special Rapporteur's draft should lead to its modification. While they were obviously not unfounded from a substantive standpoint, it was too late to go back over the 2001 draft. Observations could perhaps be made in the commentary, but not in the draft article itself.

32. In conclusion, he was in favour of sending the draft articles proposed by the Special Rapporteur to the Drafting Committee. That body's work should be largely formal, since it should not lead the Drafting Committee or the Commission to modify text that was directly, and rightly, modelled on the 2001 provisions. However, the Commission could not—and he wished to stress the point—stop there; the Special Rapporteur and the entire Commission must give serious thought to the obligations incumbent on member States *vis-à-vis* the organization to which they belonged deriving from the organization's responsibility.

The meeting rose at 4.40 p.m.

²³¹ *Official Records of the General Assembly, Sixth Committee, Sixty-first session, 18th meeting (A/C.6/61/SR.18)*, para. 68.

²³² *Ibid.*, 14th meeting (A/C.6/61/SR.14), para. 42.