

Document:-
A/CN.4/2934

Summary record of the 2934th meeting

Topic:
Responsibility of international organizations

Extract from the Yearbook of the International Law Commission:-
2007, vol. I

*Downloaded from the web site of the International Law Commission
(<http://legal.un.org/ilc/>)*

2934th MEETING

Wednesday, 11 July 2007, at 10 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Cafilisch, 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. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vascianie, 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 invited the Commission to continue its consideration of the fifth report of the Special Rapporteur on responsibility of international organizations (A/CN.4/583).

2. Mr. DUGARD said that he had two brief comments on the draft articles proposed by the Special Rapporteur in his fifth report. The first concerned draft article 40, paragraph 3, on satisfaction, which provided that satisfaction “may not take a form humiliating to the responsible international organization”. That wording, which had not appeared in the provision on satisfaction initially proposed by the Special Rapporteur during the elaboration of the draft articles on responsibility of States, had been introduced at the request of many Commission members who had argued that small States in particular might be compelled to apologize in the most humiliating manner and that this would infringe on their sovereignty.²⁶⁰ It might be asked whether the same considerations were valid for international organizations. In his view, an international organization that acted wrongfully should be required to apologize, even if doing so was humiliating for it. It was in that context that one ought to view the apologies made by the former Secretary-General, Mr. Kofi Annan, in respect of the failure of the United Nations to act in Srebrenica²⁶¹ and Rwanda.²⁶² There was no need for article 40, paragraph 3, but if the Commission decided to retain it, the final proposition should be deleted. In the case of the United Nations, apologies, if they were made, should probably come from the Security

²⁶⁰ See *Yearbook ... 2000*, vol. II (Part Two), pp. 35–36, paras. 154–160. See draft article 37 and the commentary thereto, as adopted on second reading by the Commission, see *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 105–107.

²⁶¹ See the Report of the Secretary-General pursuant to General Assembly resolution 53/35: the fall of Srebrenica (A/54/549).

²⁶² See the Letter dated 15 December 1999 from the Secretary-General addressed to the President of the Security Council (S/1999/1257), transmitting the report of the Independent Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda.

Council, the highest executive body of the Organization. In any case, that situation illustrated the need to distinguish between various organizations.

3. Secondly, with regard to draft article 44, paragraph 2, he said that international organizations should be bound by a positive obligation, namely to declare a situation to be unlawful and to call upon States not to recognize it or render aid or assistance in maintaining that situation. That had been United Nations practice on numerous occasions, whether in Katanga in 1960, in Rhodesia in 1965 or with regard to the bantustans of South Africa, the invasion of Cyprus by Turkey, the annexation of Jerusalem by Israel and the invasion of Kuwait by Iraq. It should therefore be indicated that international organizations were under an obligation to declare such a situation unlawful. Silence might be interpreted as approval. Article 44, paragraph 2, must therefore be reconsidered.

4. The CHAIRPERSON, speaking in his capacity as member of the Commission, said that he had reservations about the idea that the Security Council might make apologies or give some form of satisfaction. It was conceivable that, as part of its responsibilities under Chapter VII of the Charter of the United Nations, the Security Council might take positions on the validity of the acts of States, but it would be troubling to see it in a sense applying remedies, because it was not a court of law.

5. Ms. XUE, responding to a comment made by Mr. Dugard regarding article 40, paragraph 3, said that it had been the Chinese member of the International Law Commission who, during the elaboration of the draft articles on responsibility of States, had proposed the insertion, in the provision presented by the Special Rapporteur, of wording stipulating that satisfaction could not take a humiliating form.²⁶³ At the close of the nineteenth century, the representative of China, which had been defeated in a war, had been ordered by representatives of the victorious State to kneel down before that State’s flag. The Chinese people had never forgotten that humiliating episode, yet it could not be said that China was a “small State”. It was inconceivable that someone might wish to impose such a humiliation on the representative of an international organization, and that should not be permitted. Thus article 40, paragraph 3, was not without merit in the context of international organizations.

6. Mr. DUGARD thanked Ms. Xue for her comments, but said that he found it difficult to imagine that a Secretary-General of the United Nations or a high official of the European Union could be compelled to kneel before the flag of any State. A distinction between States and international organizations seemed justified in that regard. As to the comment by the Chairperson, he observed that the Security Council could very well formulate apologies in a situation arising under Chapter VII of the Charter of the United Nations. In any case, the whole question needed to be given further consideration.

7. Mr. PELLET said that if article 44 was changed in line with Mr. Dugard’s wishes to indicate that international

²⁶³ *Yearbook ... 1984*, vol. I, 1865th meeting, statement by Mr. Ni, p. 306, para. 20.

organizations should, when they could, take positive action to put an end to a serious breach stemming from a peremptory norm of international law, it seemed to suggest *a contrario* that article 44, paragraph 1, was being interpreted as meaning that the cooperation required of States pursuant to article 41 of the draft articles on responsibility of States for internationally wrongful acts²⁶⁴ might only be passive. He was therefore opposed to the proposed change, but thought that it should be stressed in the commentary that in such situations international organizations must, like States, take all measures at their disposal to put an end to the breach.

8. Mr. DUGARD said that he fully concurred with Mr. Pellet, but it was precisely because international organizations should be under a positive obligation that article 44, paragraph 2, ought to be reconsidered; in its current form, it implied that international organizations could simply do nothing.

9. Mr. FOMBA said that the Special Rapporteur's methodological approach did not appear to raise any deontological problems, but if it did, it was important to be cautious and realistic. He endorsed paragraph 7 of the report, in which it was noted that "most, if not all, articles that the Commission has so far adopted on international responsibility, whether of States or of international organizations, have a level of generality that does not make them appropriate only for a certain category of entities". As to the definition of an international organization (paras. 8–9 of the report), and in particular its central constituent element in the context of responsibility, namely international legal personality, the Special Rapporteur was perhaps right in his reluctance to embark upon a theoretical or in-depth analysis of the link that existed or might exist between recognition of the international organization, its legal personality and its international responsibility. Thus, the proposal "that the draft articles should consider recognition of an international organization on the part of the injured States as a prerequisite of its legal personality and hence of its international responsibility" (para. 9) was open to criticism and should not be approved. It was enough to recall that such a subordination of the legal personality of an international organization was contrary to the idea that every international organization was endowed with an international legal personality from the moment it came into being, in accordance with the definition proposed during the work on the codification of the law of treaties. The ICJ had upheld that fundamental proposition in its 1949 advisory opinion on *Reparation for Injuries*, and he referred in that connection to the dissenting opinion of Judge Krylov, according to whom "[i]t is true that the non-member States cannot fail to recognize the existence of the United Nations as an objective fact" (p. 48 of that opinion).

10. The question raised in paragraph 27 as to whether States should be required to assist the international organization in providing compensation for damages which the latter caused was not theoretical either. It arose, for example, when the reparation claimed included compensation

exceeding the organization's financial means. The desire to have an effective and functional reparation mechanism was a good justification for such a solution, but no clear-cut policy had been established in that regard. Accordingly, either the Commission should forgo consideration of the question or, conversely, it should take it up but should do so *de lege ferenda*. Such an approach would run counter to the Special Rapporteur's conclusion in paragraph 30 that "no additional obligation should be envisaged for member States". A number of proposals had been made in that connection. Mr. Pellet had suggested a specific approach, namely the obligation of member States to give the international organization the means to meet its obligations in respect of responsibility. Mr. McRae had proposed a case-by-case approach based on a clearly established classification of international organizations. Such an approach was not necessarily easy or useful. Nevertheless, the Commission should consider closely all proposals that might prove relevant.

11. In the note dated 24 June 1970 from the Director General of the IAEA, referred to in paragraph 41 of the fifth report, the distinction made between "satisfaction" and "reparation properly so called" was erroneous, because the former was merely a form of the latter.

12. He shared the Special Rapporteur's view, expressed in paragraph 37 of the report, that it would be unwise and impractical to widen the scope of obligations considered to include obligations towards subjects of international law other than States or international organizations.

13. The draft articles did not pose any particular difficulty. To the extent that they were modelled on the articles on responsibility of States, it would be pointless to look for differences where they did not exist. That would probably facilitate the Drafting Committee's work, which would be limited to a purely formal exercise.

14. A number of questions should be addressed in greater depth, in particular the financial independence of international organizations, which was an important way of ensuring the effectiveness of their legal personality. Specific cases in which international organizations could not meet their financial obligation to make reparation for damages should also be identified. In addition, it was important to consider cases in which the international organization was handicapped by the non-payment or delayed payment of member States' contributions and to look into the legal basis of a possible obligation on the part of member States in such cases. The relationship between a possible differentiated approach to the extent of the international organization's responsibility based on the legal nature of the action that was the origin of the wrongful act and the question of a possible additional responsibility of member States should also be examined.

15. He was in favour of referring all the draft articles to the Drafting Committee.

16. Mr. HMOUD commended the Special Rapporteur on the quality of his fifth report, in which the approach that had been taken to responsibility of States was applied to international organizations. Given the opinions of States and organizations, together with the jurisprudence

²⁶⁴ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 29 and 113–114.

on the question, there seemed to be no reason to follow a different approach and create separate general rules on the consequences of a wrongful act by an international organization. An international organization which committed a wrongful act was responsible for repairing its consequences in the same manner as a State.

17. The question, then, was what happened when an organization was unable to provide reparation to the injured party. Were the member States under a direct obligation to repair the injury on behalf of the organization or to provide sufficient support for it to repair the damage caused? As the organization had a legal personality, it should, as a general rule, be the responsible party, without the responsibility of member States being incurred. Likewise, the organization should not be able to rely on its internal rules to avoid the consequences of its internationally wrongful acts. On the other hand, the injured party should have the chance to cite the rules of the organization that were part of international law if such rules provided that the member States were under an obligation to make reparations. The Commission should look into the possibility of elaborating a draft article to that effect.

18. The proposal that member States should be required to provide sufficient financial support to the international organization to enable it to assume the consequences of its internationally wrongful act would constitute unnecessary interference in the internal affairs of the organization and its relations with member States. The language of draft article 34 made it sufficiently clear that the organization was under an obligation to make reparations in accordance with international law. The organization and its members must find the means to allow the organization to meet its obligations to make reparations; otherwise, the organization's existence and functioning would be jeopardized. On the question of how an organization could meet its financial obligations if it was dissolved, he thought that the same rules should be applied as were applicable when the organization had an obligation *vis-à-vis* any third party.

19. On the subject of serious breaches by international organizations of obligations stemming from peremptory norms of international law, the view appeared to be emerging in the international community that those organizations should be treated as States insofar as the obligation to cooperate to end the breach was concerned. In that connection, paragraph 63 of the report should be taken into account in the commentary to the draft articles. An international organization should not be required to cooperate to bring a serious breach to an end unless such cooperation was in keeping with its mandate and rules.

20. Mr. CAFLISCH endorsed the content of the fifth report and its draft articles. He agreed in particular with the idea that distinctions should not be made between types of international organizations, for example "ordinary" and "supranational" organizations, or between political and technical or universal and regional organizations. He fully concurred with the explanations concerning draft article 34 provided in paragraphs 19 to 31 of the report, and supported in particular draft articles 43 and 44, on serious breaches of international law by international organizations and their consequences. Draft articles 31 to 44 could be referred to the Drafting Committee.

21. He would convey a number of editorial suggestions on draft articles 31 and 35 directly to the Special Rapporteur and also wished to correct the French version of paragraph 25 of the report, which stated the exact opposite of what was meant. The phrase in question should read: "*La pratique des organisations internationales est abondante en matière de réparation des conséquences dommageables d'un fait illicite, encore que cette réparation soit souvent accordée ex gratia ...*".

22. He agreed with Mr. Nolte on the need to resolve the question of responsibility of international organizations in respect not only of their acts and decisions, but also of their recommendations and authorizations. Like Mr. Pellet, he thought that it would be useful to stipulate in one way or another that the States members of an international organization should give the organization the means to bear the consequences of its wrongful behaviour.

23. Mr. SABOIA thanked the Special Rapporteur for his fifth report. He doubted whether it was appropriate to extend the concept of countermeasures to international organizations, a question that had been raised in paragraph 3 of the report. In certain cases expressly foreseen in their rules, international organizations could legally take measures against a State or another organization which was in breach of an international obligation, but such measures would constitute sanctions rather than countermeasures.

24. He took a positive view of the suggestion to reconsider a number of questions during the first reading of the draft articles, since the Commission could benefit from further observations and comments of States, international organizations and other sources; as an independent body of experts, the Commission would not, of course, be bound by such observations and comments.

25. He was in general agreement with the draft articles proposed by the Special Rapporteur and was in favour of their being referred to the Drafting Committee. He agreed with Ms. Escameia and Mr. Ojo that the phrase "Unless the rules of the organization otherwise provide" at the beginning of draft article 35 should be reviewed, because this wording made it too easy for the organization to use its rules as justification for failure to comply. Whereas in a strictly legal sense the responsibility of international organizations was separate from that of their member States, from a broader, more political point of view, member States were usually responsible for most of the policies and decisions that might in some cases lead an international organization to breach an international obligation or even a norm of international law. Mr. McRae and Mr. Pellet had addressed that question in their statements. Mr. McRae had argued that smaller and weaker institutions might find it difficult to comply with rules of responsibility and that in some cases member States should be made directly responsible. He personally thought that it would be very difficult to establish such a typology of international organizations, and he preferred Mr. Pellet's suggestion that a new article should be drafted to reflect the obligation of member States to provide the international organization with the means to compensate the injured party for its internationally wrongful act.

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.